THE ENFORCEMENT OF EU COMPETITION LAW IN CARTEL CASES:
SEEKING EFFECTIVENESS IN DIVERGENCE

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INTRODUCTORY CHAPTER. The enforcement of EU competition law in cartel cases as a subject

1. The path to ‘the more proactive enforcement approach’

During the first half of the twentieth century, the desire of business groups to gain control over the market by engaging in collective agreements enjoyed a deep respect in Europe. Throughout these decades, cartels were conceived as instruments designed to protect the general interest of the industry by controlling the instability created by cutthroat competition and price warfare. This benevolent vision, coupled with the fact that freedom of contracting was one of the principles governing commercial relations, implied not only that cartel agreements were allowed to operate without any interference from public authorities, but also that, in certain occasions, they were enforceable in courts.¹ The perceptions of cartel conduct, varying from acceptance, scepticism to absolute intolerance, have of course differed from State to State over time. Nonetheless, after 1945 the idea that cartelisation can hinder economic progress began to gain strength, and ultimately led to the creation of the first domestic competition regimes in Europe.²

More than fifty years ago, cartels were identified by the Treaty of Rome as the primary target of the European competition policy order. The original Article 85 EEC (now article 101 TFEU) prohibited all agreements ‘which may affect trade between Member States and which have as their object, the prevention, restriction or distortion of competition within the common market’.³ Today, there is a widespread consensus that cartel behaviour constitutes one of the most damaging and serious violations of competition law and, during the last decade, it has become one of the clear priorities of competition authorities all around the world, including the EU Commission.⁴ Although, at present, the overall condemnation and subsequent prioritisation of cartels seem to be indisputable, the following discussion will show that such recognition has not been obtained in a linear fashion. The EU competition system, with the EU Commission at its forefront, required time to form and grow. Throughout this evolution path, the Commission had to overcome several hurdles before its enforcement mechanisms and priorities could develop into the “anti-cartel” regime, as it exists today.

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² The first anti-cartel regimes were introduced in the United Kingdom in 1948 and later in West Germany in 1957. M. Motta, Competition 11. (See also infra Chapter 1, section 2.2.3).

³ Under 101(3) TFEU certain agreements are entitled to exemptions if they contribute to improving the production or distribution of goods, promote technical and economic progress while ensuring that consumers also obtain benefit from such advantages. See infra Chapter 4.

To date, the Commission has been the principal enforcer of the competition rules (a task envisaged by Article 103 TFEU - ex Article 83 EC) via the Directorate General for Competition (formerly DG IV). Although the DG Competition was created in 1960, it only acquired the first instruments to act against cartels two years later, under the regime set by Regulation 17. This Regulation provided novel powers of investigation into suspected violations of the competition provisions and the possibility to impose fines on infringing firms. Despite the essential value of such instruments, during the first years of application of the system, the Commission had the inclination to deviate from what today is considered as its imperative objective.

One of the main reasons that can help to understand the limited cartel focus is the fact that the EU competition system was originally designed to reinforce the working of the internal market. Its main purpose was, thus, to avoid that public barriers to trade in the form of customs duties and quantitative restrictions, which were removed under the EEC Treaty, would reemerge in the form of private barriers, such as export bans or market sharing-agreements between businesses. The importance of the market integration goal, logically increased the Commission’s concern with vertical agreements, explaining therefore that during most of the 1960s the Commission centered an important part of its resources on vertical restrains, such as distribution and licensing agreements. This situation was further complicated by the inefficiencies deriving from the notification system under Regulation 17. In order to obtain an exemption, companies were required to notify their agreement to the Commission, which was (at that time) the only competent body to grant exemptions. Agreements could also be notified with a view to obtaining some clarity on whether their conduct was caught under the prohibition of (now) Article 101 (or 102) TFEU. When the system was implemented in 1962, the Commission received over 35,000 notifications requesting exemptions or negative clearances. Although this system reinforced the central role of the Commission as enforcement authority, as well as the value of the cartel prohibition, the extremely large number of notifications received added to the limited enforcement resources, explain why practically all the efforts of the Commission were centered on solving the notification burden and, thus, no cartel decisions at all were adopted during these first years.

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6 Regulation No 17, Articles 11 and 14.
7 Ibid, Article 15. It is important to highlight that fines had (and still have) an upper threshold of 10% of the company’s annual turnover.
9 Regulation No 17, Article 2.
10 According to the White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty COM (1999) 101 (hereafter: ‘White Paper on Modernization’), in more than 35 years of application of Regulation 17 there were only 9 decisions in which a notified agreement was prohibited without a complaint being lodged against it (White Paper on Modernization, para 77). This means that the European Commission was mostly focusing on (notified) agreements that could be considered less relevant because, in contrast to cartels, they were rarely considered anticompetitive.
11 Council Regulation No 19/65 of 2 March 1965 on the application of (ex) Art. 81(3) to certain categories of agreements and concerted practices, [1965] OJ 36/1, as subsequently amended by Council Regulation 1215/1999 of 10 June 1999, [1999] OJ L148/1. DG Competition adopted block exemption regulations in respect of distribution and other vertical agreements. Although the block exemptions certainly contributed to ease the case-load, the adoption of this instrument did not suffice to completely eliminate the notification burden. See e.g. A. RILEY, “Consequences” 15.
It was not until the end of the 1960s that the Commission took its initial steps against cartels by adopting its first decisions imposing fines in the *Quinine*\(^\text{12}\) and *Aniline Dyes* \(^\text{13}\) cases.\(^\text{14}\) Both decisions are of crucial importance not only because they exemplify the early concerns about the undesirable nature of cartels practices, but also because they provided strong precedents and reinforced the Commission’s confidence to take future enforcement initiatives.\(^\text{15}\)

In the years following these first cases, the Commission showed a slightly more active attitude against cartels, by prosecuting some collusive agreements. Notwithstanding that there was some progress, from the mid 1970s to the mid 1980s, a period of economic decline evidenced the unique nature of the EU competition system, as instrument designed to generally advance in the European integration project.\(^\text{16}\) By taking into account divers objectives, such as the maintenance of employment in situations of economic crisis, or the interest of the industry, the Commission showed its flexibility to set the pure “competition goals” aside and allow the so-called “crisis cartels”. This type of agreements could offer companies a joint solution for difficult economic times by enabling them to reduce overcapacity and output. This may, in turn, stimulate recovery and enhance technological development.\(^\text{17}\) Although the desirability of this special treatment can be arguable, it cannot be denied that this situation created considerable ambiguity as to the degree of acceptance of cartels in general. By adopting this attitude the DG Competition showed that it was still very far from ‘applying zero tolerance to those who operate anticompetitive cartels’.\(^\text{18}\)

The general evolution of the EU integration project has also somewhat modeled the Commission’s priorities. When the completion of the internal market was only a few steps away, considerations on the benefits of economic efficiency deriving from the competitive process and the importance of European competitiveness enhanced the already significant role of competition policy in maintaining and strengthening the internal market.\(^\text{19}\) While this logically placed the enforcement of competition law at the center of the Commission’s strategy, the further development of the internal market also encouraged new objectives and challenges, which – although desirable – would again

\(^{12}\) Commission Decision of 16 July 1969 (IV/26.623 - *Entente internationale de la quinine*) [1969] OJ L 192/5. In the international quinine cartel a series of gentlemen’s agreements among Dutch, German, French and British producers prohibited the French and British parties from manufacturing quinidine without the approval of the other parties, in exchange for territorial protection of their respective home markets. The Commission found that (now) Article 101(1) TFEU had been violated and rejected the parties’ argument that the French and British companies were in any event unable to manufacture quinidine because of their lack of technical experience. (This decision was confirmed on appeal).


\(^{14}\) In the early 1960s, the Commission also investigated some cartel cases but no fines were imposed. Most of these cases were dealt with following a notification from companies (that mistakenly thought that they qualified for an exemption) and others arose from complaints, showing that the Commission’s powers of investigation had little value in cartel detection. In stark contrast with the transparent sanctioning procedure followed at present, these cases were handled through negotiations. Only in the *Dutch Cement* case (Commission Decision of 30 November 1994 (Cases IV/33.126 and 33.322 - *Cement*) [1994] OJ L 343/1) the first contentious procedure was initiated.

\(^{15}\) It is interesting to mention that the growing cartel awareness was also reflected in the first annual competition policy report of 1972, which further stressed the need proceed with special vigor against practices jeopardizing the unity of the Common Market; namely sharing market agreements, practices allocating customers and collective exclusive dealing arrangements. Commission, “First Report on Competition Policy”, Brussels-Luxemburg 1973, at 15.

\(^{16}\) See also infra Chapter 3.


\(^{19}\) See in particular the Commission’s White Paper on Completing the Internal Market, COM (1985) 310 final, paras 157-158.
cause a flood in the agenda of the DG Competition. The adoption of the Merger Control Regulation in 1989 and the growing focus on trade liberalization understandably became the center of the Commission’s scarce resources, while cartel-busting once more moved to a second place.  

After some twenty-five years of application of the competition rules, the Commission acknowledged that while it is important to indicate, by way of regulations and individual exemption decisions, to what extent cooperation between firms can be supported, it is equally relevant that solid initiatives are taken to combat the classic violations of competition law, such as price-fixing, market-sharing and quota-fixing cartels. Following this reasoning, in the late 1980s the Commission took an essential step to strengthen cartel enforcement, by finally recognizing the need to make an appropriate use of sanctions aimed at deterring future violations. Effective deterrence can only be achieved if fines are capable of, first, eliminating the illegal profits from the cartel and, second, imposing a significant punishment on the undertakings. However, it seems that the Commission’s cautious fining approach in its early practice was not completely appropriate to achieve these goals. The Polypolypropylene and PVC cases dating from the mid 1980s, in which fines were imposed of EUR 58 million and EUR 23.1 million respectively, illustrate the beginning of the trend to impose more effective fines, while reflecting the Commission’s resolve to tackle cartels.

As it was to be expected, the more active enforcement began to influence the conduct of companies involved in cartel agreements. Colluding firms became increasingly concerned with the risks of being fined, which led them to invest greater efforts in order to cover their tracks and keep their agreements secret. This created important difficulties not only as regards cartel detection; finding sufficient evidence that could prove their existence became as well more and more problematic. The difficulties to detect cartels drove the Commission to consider the introduction of sharper enforcement strategies. The adoption of the EU’s first Leniency Notice in 1996 constitutes the ultimate proof of the Commission’s determination to match the growing sophistication of cartels with an equally refined response. Leniency programmes are specifically designed to destabilize cartels and facilitate their detection. In order to achieve this goal, the system allows for substantially reduced fines and even the granting of total immunity in exchange for cooperation with the competition enforcement authorities. This system has turned out to be an extremely effective

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25 See also L. McGOWAN, “At the Commission’s Discretion: Fining Infringements under the EU’s Restrictive Practices Policy”, 2002 (78-3) Public Administration, 639-656.

26 This was, for instance, illustrated in Wood Pulp II. In this case the Commission intended to prove the existence of a cartel based on concerted announcement of prices for wood pulp. The ECJ found that, as a matter of law, a system of quarterly price announcements in itself did not infringe (now) Article 101(1) TFEU. The Court did accept that the evidence provided by the Commission was ‘a firm, precise and consistent body of evidence of prior concertation’. See Judgment of 31 March 1993, C-89/85 et seq. A. Ahlström Osakeyhtiö and others v. Commission [1993] ECR I–1307, para 71.


28 The cooperation with the Commission can be seen in this sense as betrayal to the rest of the members of the cartel, which will eventually be fined.
device, capable of facilitating the Commission’s challenging task of prosecuting cartelists and proving that they are involved in such practices.\textsuperscript{29} The adoption of the Leniency Notice undoubtedly constitutes a milestone for effective cartel enforcement.

Over the course of the last decades the Commission drastically enhanced its anti-cartel policy up to the point that the numerous ground-breaking developments, strategies and (re)adjustments have been qualified as ‘the cartel revolution’.\textsuperscript{30} Undoubtedly, the most significant changes came with the reforms envisaged in Regulation 1/2003\textsuperscript{31} (replacing Regulation 17) which came into force on 1 May 2004. Regulation 1/2003 forms the basic pillar of the modernized ‘process’ and reflects the results of the Commission’s efforts to simplify and improve the effectiveness administrative enforcement system. These improvements were achieved by abolishing the notification system and redesigning the rules that applied to the handling of the cartel prohibition. A chief modification is that Regulation 1/2003 rendered Article 101(3) TFEU a directly applicable exception and established the basic framework for the Commission, the national competition authorities (NCAs) and the national courts to cooperate in a decentralized enforcement system. As it was expected, these reforms had a tremendous impact on cartel enforcement. With the abolishment of the system of notifications, undertakings were practically encouraged to enforce Article 101 TFEU among themselves. As a result of this modification, DG Competition was finally able to invest more time and resources in the most serious anti-competitive practices, namely cartels.\textsuperscript{32} Furthermore, since NCAs and courts were empowered to apply Article 101 TFEU (as a whole) to any agreement affecting trade among Member States following decentralisation, they became, together with the Commission, the three mayor players of the new enforcement regime. The concern of how competition authorities on two different enforcement levels would cooperate in practice was addressed by the creation of the innovative European Competition Network, formed by the Commission and the NCAs. Additionally, the new Regulation incorporates improved tools to deal with the issue of cartel detection in a more direct manner. In effect, experience has shown that the increasing complexity of detecting cartels and gathering evidence to prove the conduct. To effectively tackle this situation, the Regulation 1/2003 granted the Commission more extensive powers.\textsuperscript{33} It can interview individuals or representatives from an undertaking,\textsuperscript{34} and not only search business premises where serious violations are suspected,\textsuperscript{35} but also domestic premises.\textsuperscript{36} Also, complaints from third parties and sector enquiries have proven to be efficient methods of detection and have produced valuable results.

\begin{itemize}
\item \textsuperscript{29} The Commission granted a form of leniency in 16 cases during the 1996-2002 period. See also M. MoiTTA, “Cartels in the European Union: Economics, Law and practice”, paper presented at the conference on \textquote{Fifty Years of the Treaty: Assessment and Perspectives of Competition Policy in Europe”}, 19-20 November 2007, Barcelona, at 18. See further Chapter 8.
\item \textsuperscript{30} A. Macculloch, \textquote{Cartel revolution and evolution}, 2008 (5-1) Competition Law Review, 1-14, at 1.
\item \textsuperscript{32} See also Commission, \textquote{White Paper on modernization}, at 72 in fine.
\item \textsuperscript{33} For a discussion of the relationship between powers investigation and procedural rights see e.g. W. Wils, “Powers of investigation and procedural rights and guarantees in EU Antitrust enforcement”; 2006 (29-1) World Competition, 3-24.
\item \textsuperscript{34} Regulation 1/2003, Article 19.
\item \textsuperscript{35} \textit{Ibid}, Article 20.
\item \textsuperscript{36} \textit{Ibid}, Article 21.
\end{itemize}
The trend to impose higher fines that started in the 1980s culminated in June 2006 with the adoption of the revised Guidelines for setting fines.\textsuperscript{37} The sophisticated method of calculation of fines set by this new instrument reflects more appropriately the economic harm resulting from cartel infringements and the weight of each company in the agreement. The Commission is obviously bound by the principles set out in the Guidelines, however, it still enjoys a wide margin of discretion in setting fines. Making use of this discretion, the Commission emphasises in its Guidelines that horizontal price-fixing, market-sharing and output-limitation agreements, which are by their very nature among the most harmful restrictions of competition, will be as a matter of policy heavily fined.\textsuperscript{38} As a whole, the 2006 method is certainly an important development that further contributes to hammer the message down: cartels inflict serious damage on the economy and enforcers are there to ensure that their actions have the necessary deterrent effect.

The last few years clearly reflect the Commission’s endeavour to obtain results by developing new enforcement instruments that are complementary to the traditional sanctioning and investigation methods. These efforts include different innovations, such as initiatives to foster greater international cooperation,\textsuperscript{39} the introduction of efficient decision making mechanisms, such as direct settlements\textsuperscript{40} and the encouragement of private enforcement.\textsuperscript{41} These more recent strategies do not only represent important complementary measures for a definitive and coherent anti-cartel regime. Seen as a whole, they give evidence of the Commission’s ability to seek deterrence, to introduce additional and more effective cartel enforcement tools and, ultimately, to keep on evolving.

Looking at the entire evolution of the system, it appears as if everything had to make way for “the fight against cartels” to start. However, the existing prohibition has long been, and still is, deliberately disregarded and breached by many. The relatively low probabilities of getting caught\textsuperscript{42} motivates such forbidden conduct, as does the knowledge that – even in case of detection – the benefits obtained may probably compensate the repercussions of the violation. Today, the rule is clear and only one interpretation can be given to the imperative that ‘hardcore cartels are prohibited’. But how can one find a way for a norm not to be bended? The answer is effective enforcement.

\textsuperscript{38} Fining Guidelines 2006, para 23.
\textsuperscript{39} A. ITALIANER, SPEECH/2010/4 “Priorities for Competition Policy”, speech delivered at St. Gallen International Competition Law Forum, March 2010, St. Gallen, Switzerland.
\textsuperscript{40} Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C 167; 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 [2008] OJ L 171. The settlement procedure enables the Commission to settle cartel cases through a more simplified procedure. The system is suitable for companies who are convinced of the strength of the Commission's case in view of the evidence gathered during the investigation and are, as a consequence, willing to acknowledge their involvement in an infringement and accept their liability. In return they have the advantage of an expeditious procedure and receive a 10% fine reduction. See further infra Chapter 9.
2. Problem definition

Only 15 years ago, the specific topic of (European) cartel enforcement received little attention - in the sense of distinct treatment - in the legal literature on competition matters. This can be relatively easily explained. Amongst all anticompetitive practices that allow for exemptions and were therefore ‘disputable’ from a substantive point of view, hardcore cartels infringements were and are non-controversial. From an economic perspective, cartels cause harm by definition, with only very rarely exceptions. This rule is commonly translated into the law by using the per se standard, under which there is no need to undertake a deep investigation about their possible pro-competitive and/or anti-competitive effects. However, the 21st century fight against cartels, as discussed above, has made clear that in the absence of effective enforcement mechanisms, this rule is and will be easily circumvented.

The need for effective enforcement mechanisms for every single legal rule is, indeed, unanimously recognised. Thurman Arnold, one of the great antitrust thinkers in the United States, was fond of an interesting metaphor illustrating this aspect: ‘[t]he competitive struggle without effective antitrust enforcement’, he observed, ‘is like a fight without a referee’. This way of putting it highlights two aspects that can be considered essential for effective antitrust enforcement. In order to achieve compliance with the competition rules it is firstly important to secure the existence of an appropriate enforcement system, equipped with effective “weapons”, as well as sufficient capacity and resources. Said differently, without a capable referee, the rules of the match will probably not be complied with. Secondly, being equipped with the right tools does obviously not suffice to achieve effective enforcement. If the system is to be credible, the tools need to be used constantly. In other words, the “referee” needs to be capable of permanently monitoring and imposing its authority by means of sanctions when necessary.

In the European Union, the evolution of the competition law regime and its changes to improve these two enforcement aspects in the context of the cartel prohibition have been plentiful in the last decades. Despite this proactive approach and the efforts that have been undertaken, cartels are still a frequent feature of the European industry. It appears, therefore, that the legal contours of the enforcement system were not as effective as they were and are supposed to be, and they will have to further evolve in order to overcome the remaining obstacles.

The effectiveness of any cartel enforcement system will primarily depend on its ability to overcome the difficulties stemming from the special nature of cartel practices. Basically, cartels arise when a number of independent companies from a similar sphere of economic activity engage in an agreement exclusively designed to reduce or eliminate competition among them. By mitigating competition, cartel companies are capable of obtaining much higher (and illegitimate) profits than they would have in the face of open competition. Almost by definition, due to their common fear of

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43 According to a study undertaken by the OECD, the price rises ranged from 3% to 65% of the affected commerce. OECD Reports, “Fighting Hard Core Cartels: harm, effective sanctions and leniency programmes” (2002), p 75.
44 Thurman Arnold was Assistant Attorney General in charge of the Antitrust Division in Franklin Delano Roosevelt’s Department of Justice from 1938 to 1943, and was best known for his strong antitrust campaign.
detection these practices are secret. Very often this type of agreements consists in highly organised schemes operating at an international level.\textsuperscript{46}

This brief description suffices to identify the main ingredients for any (public) enforcement systems.\textsuperscript{47} To act against cartel agreements a given enforcement system requires:

- (i) a clear and firm cartel prohibition,
- (ii) detection and evidence gathering methods capable of uncovering and proving the existence of secret cartels, and
- (iii) sanctions that are appropriate to punish such deliberate violations and to discourage firms from forming cartels in the future.

The importance of these three elements highlights that in the current European enforcement system (including the Commission’s as well as the Member States’ regimes) some aspects can be called into question. One of the crucial questions is whether administrative fines for undertakings are sufficient to effectively combat cartels, or whether individual penalties should be incorporated, as some Member States have recently been done. Furthermore, since the decentralisation reforms did not go so far as to involve any harmonisation of the procedures or fining policies, it also remains to be seen whether the measures adopted are sufficient or whether further guidance and/or harmonisation of the Commission’s and the domestic rules will be required to enforce the law effectively. This question is also closely linked to the issue of cooperation within the ECN. Since cartels often operate at an international or European level, it is essential to take into account that enforcement systems will frequently need to interact with each other. Whether the current framework is capable of guaranteeing the necessary degree of coordination is also open to debate.

3. Research questions and structure

This work explores the public enforcement of the European anti-cartel provisions, especially in the context of decentralisation. The primary objective is to determine within this framework whether the instruments available under the EU competition system – at the EU and Member State level – are appropriate to secure effective enforcement, taking into account the special features of cartels. To this end, this study is divided into three main parts, which are dedicated to: (I) the special nature of cartels, (II) exploring the EU anti-cartel system and (III) its enforcement by the European Commission and the National Competition Authorities (the “NCAs”).

The special nature of cartels

Analysing the cartel enforcement system can be a fairly unproductive task if no attention is given to the essence of the conduct as such. The first phase of the research is entirely intended to understand the real nature of cartel behaviour in the context of EU competition law. This initial stage will not only clarify whether there are good reasons to consider cartels among the most serious violations of EU competition law. Additionally, it will highlight the main defining features of cartel activity, which should be necessarily taken into account in the analysis and – subsequent – (re)design of the

\textsuperscript{46} See also infra Chapter 2.

enforcement regime. For this purpose, the traditional (and benign) perception of cartels and the history of cartel regulation in Europe will first be discussed. Next, the reasons underlying the more recent focus on cartels and the shift in the perception of collusive activity will be analysed. This analysis will give special attention to the harm flowing from cartels (including overcharges), the reasons to conclude such agreements and their (un)stable nature.

**Exploring the EU anti-cartel system**

After having looked into the essence of cartels, the second phase of the study invites to an inquiry of the EU anti-cartel system. In particular, it is essential to identify the goals of the European competition law system in order to be able to assess whether cartels really go against the spirit of the competition system. Cartel agreements will be subsequently analysed under the substantive EU competition law provisions contained in Article 101 TFEU. This examination will enlighten whether the classic forms of cartel agreements, as described and analysed in PART I, are as a general rule prohibited under Article 101 TFEU. In other words, this assessment seeks to establish whether a European cartel prohibition exists.

Next, before seeking to enhance the effectiveness of the current European anti-cartel enforcement system, it is important to know where we are and where we come from. The enforcement regime created by Regulation 1/2003, and the system of full parallel competences established between the Commission, the NCAs (and the national courts), has resulted in a joint enforcement mission. This decentralised model, combined with shared parallel competences, make necessary that all the new ‘players’ collaborate and coordinate their actions in order to achieve a consistent and effective application of the anti-cartel provisions. Consequently, Regulation 1/2003 provides the necessary cooperation mechanisms, with the creation of the ECN at the heart of the reform. In this context, the practical functioning of the network and questions regarding coordination, allocation, information exchange and confidentiality, do unavoidably have an important impact on anti-cartel enforcement. In this second part of the study the modernisation reforms as a means to enhance effectiveness, especially in context of anti-cartel enforcement will also be discussed.

**Ensuring effective enforcement (enforcement by the Commission and the NCAs)**

In a third phase of the research, the different enforcement instruments available to the Commission and the NCAs will be evaluated. The nature, content and repercussions of the different enforcement mechanisms will be critically assessed, more precisely in light of their effectiveness (in the sense of detection and evidence gathering and deterrent punishment). In the course of this investigation, particular consideration will be given to current tendencies that can be identified in the Member States, especially as regards introduction of sanctions for natural persons who commit cartel infringements. In order to judge the efficiency of detection and sanctioning mechanisms, additional emphasis will be placed on the application of Article 101 TFEU and its national equivalents in practice and on the special characteristics of each case. This study will (only) focus on public enforcement by the Commission and the NCAs.

Having looked at where we have been and where we are now, it will then be time to look at the future. The analysis of the evolution effectiveness of the current enforcement trends will help us to assess whether we are on the right path to enforce the European anti-cartel rules in an effective manner. The findings of the previous analysis will be brought together to provide a number of concluding reflections on effective enforcement of the Commission’s enforcement of the European
anti-cartel rules and the national mechanisms that can provide additional deterrence and, thereby, enhance effectiveness.

4. Methodology

Public enforcement of the EU cartel provision takes places on two different levels: on the EU level, where the Commission operates, and on the national level, where 28 NCAs do their part of the job. On the one hand, the substantive EU competition provisions to be enforced by the different authorities are obviously the same. On the other hand, the degree of convergence of national cartel detection tools and respective sanctioning systems is more limited given the lack of harmonization in this field and, therefore, offers a challenging scenario for a comparative analysis.48

Since the Commission has preserved the most dominant enforcement role within the ECN and its particular approach to cartels seems to be capable of influencing the national enforcement models, the Commission’s enforcement model will be the reference point for the comparative analysis. The Commission’s anti-cartel enforcement tools will be scrutinized with a view to determine whether this system should be seen as a blueprint for Member States which seek to enhance the effectiveness of their enforcement regimes. Given the special importance of economic theory to understand the essence, (formation and sustainability) of cartel agreements, this analysis will lean on economic principles. To the extent that the Commission’s enforcement tools contain caveats or major shortcoming, the study of the NCAs anti-cartels regime will be explored. More precisely, this assessment aims at identifying differences or divergent enforcement approaches between the selected Member States and the Commission. In this comparative exercise, particular attention will be given to national instruments capable of enhancing the effectiveness of the Commission’s anti-cartel enforcement system which is currently seen as a driver for convergence. At the same time, it is not excluded that the existence of divergent enforcement approaches on the level of the Member States can constitute a significant obstacle for effective enforcement that needs to be properly addressed. In this regard, it is essential to pay some attention to the question whether effective anti-cartel enforcement can be achieved without adopting further harmonisation measures.

Regarding the divergent enforcement approaches towards cartel behaviour in the Member States, the study does not seek to cover all specific anti-cartel enforcement mechanisms in Europe. Since a complete analysis of the 28 Member States is not feasible, the research will focus on three Member States, namely: Germany, the UK and Belgium. Germany and the UK have a strong but quite different anti-cartel enforcement traditions. While Germany’s system is basically administrative in the sense that no imprisonment is provided, the UK is well known for having adopted criminal sanctions (i.e. prison sentences) for cartel infringements. Finding divergent enforcement trends in these jurisdictions is thus more likely. Belgium, in contrast, can be seen as a young jurisdiction in terms of anti-cartel enforcement and is thus more likely to find enforcement inspiration in the Commission’s regime. Nevertheless, if the anti-cartel enforcement instruments available in this jurisdiction are also the result of national convergence, innovative enforcement tools available in Belgium may lead a whole divergent enforcement trend that serves as effective enforcement model for other Member States.

5. Relevance of the research

The research subject is of practical significance for the European Union competition law and policy system in general, but also for the Member States’ regimes in particular. The identification of alternative or complementary but (still) highly effective enforcement methods in the area of anti-cartel enforcement is seen by all regulators and legislators alike as a necessary way to reduce the most serious forms of anti-competitive behaviour. Moreover, the recent (national) developments and innovative trends will also shed some light on the question whether or not effective enforcement can be attained (only) by means of soft convergence.

Arguably, the topic of enforcing the cartel prohibition is frequently at the centre of the debate. Yet, the ongoing discussions often only pertain to concrete aspects of EU competition law enforcement. The recent developments in this field indicate that it is the right timing to conduct this research. Not only has the decentralised enforcement regime been in force since a number of years – allowing to evaluate its functioning – but the Commission continues taking innovative initiatives and adopting new enforcement tools against consistent anti-cartel enforcement. While the Member States are generally inclined to follow the Commission’s steps, there is no doubt that national divergent trends can play an important role as enforcement model.

The study seeks to make a substantive contribution to the resolution of the legal and practical problems that have been encountered as the system evolved, while simultaneously it aims at generating awareness and understanding of these issues. Solving these difficulties in a more permanent and comprehensive manner is critical to the successful operation of the enforcement regime. By suggesting solutions for specific problems, this study will hopefully also contribute to enhance the general effectiveness of the system.
PART I. THE SPECIAL NATURE OF CARTELS

CHAPTER 1. Background of European anti-cartel law

1. The protection of competition and cartels

The concept of competition occupies an important place within society. Not only is it present in business relationships, but also in fields like politics, sports, arts, education and sciences, people tend to compete against each other in order to maintain and improve their own welfare. The special nature of competition can even be found back in Darwin’s theory of evolution. Competition law, on the other hand, refers to the economic meaning of the term competition and is only applicable in the business context. Any competition law system is designed to protect competition in a free market economy. States which embrace a market economy do so because, in accordance with neoliberal economic principles, they consider it to be the form of economic organization that brings the greatest benefits to society. Forceful competition between firms constitutes the pillar of a free market because such competition is believed to deliver economic efficiency, lower prices, a wider range of products and innovation. Accordingly, the general rule is that competition should be protected and encouraged, while restrictions on competition must only be allowed as an exception.

Competition can be described as a dynamic process by which firms independently strive for the patronage of customers in order to achieve a particular business objective which may concern inter alia profits, sales or market shares. In this sense, competition is often associated with rivalry. Competitive rivalry between firms occurs when there are two or more companies in a given sector and it may take place in terms of price, quality, service or combinations of these and other aspects.

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49 C. DARWIN, On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life (1859). Darwin introduced the scientific theory that populations evolve over the course of generations through a process of natural selection. The main tenets first proposed by Darwin have been summarized by biologist E. MAYR in “The Growth of Biological Thought”, which consists of a series of facts and inferences. An excerpt from this series follows: ‘Resources such as food are limited and are relatively stable over time (fact). A struggle for survival ensues (inference). Individuals in a population vary significantly from one another (fact). Much of this variation is inheritable (fact). Individuals less suited to the environment are less likely to survive and less likely to reproduce; individuals more suited to the environment are more likely to survive and more likely to reproduce and leave their inheritable traits to future generations, which produces the process of natural selection (inference). This slowly effected process results in populations changing to adapt to their environments, and ultimately, these variations accumulate over time to form new species (inference)’. In this context, resource limitation leading to competition is implicit in Darwin’s ideas on struggle for existence and survival of the fittest.


51 Free market economy is an economic system in which the allocation of resources is determined solely by supply and demand in free markets and is not directed by government regulation. The concept of free market economy is opposed to a state-controlled economy.

52 A. JONES AND B. SUFRIN, EC Competition 2. However, the fact that a competition system seeks to promote effective competition in the market does not mean that, in a free market economy, all industries must be completely exposed to unrestricted competition. Each State may have a specific vision about whether and if so to which extent how the free market should be tempered by social goals. In this line, certain fields such as health services may, for example, be subject to governmental regulation. In the European Union for instance, agriculture is controlled by the so-called common agricultural policy. (Still, since a couple of decades ago, the system of intervention (commonly based on subsidies) has been gradually reformed in line with a more market-oriented policy which supports farmers (rather than goods) when they meet certain standards concerning aspects such as food safety, animal welfare, and care of the environment. See Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products [2006] OJ L 214/7.)
which are valued by customers.\textsuperscript{53} Vigorous competition is the best way to assure that the desired range and quantity of goods and services which respond in the best possible way to consumer needs are produced at the lowest possible cost to society.\textsuperscript{54} This is possible because competition in markets entails a risk for businesses of losing customers in favor to rival companies. This threat represents an important incentive for firms which feel motivated to provide the best ‘value for money’ to the consumer, to work efficiently and to perform at their best. Within a competitive environment companies are not in a position to simply raise prices and reap undeserved profits. On the contrary, they are under pressure to achieve the lowest level of costs and prices, create new and improved products or services and develop specific skills in order to meet customer needs more efficiently and effectively than other competitors. At the same time, the competitive pressure to improve encourage firms to innovate and to pursue technological change.\textsuperscript{55} Increased efficiency entails additional benefits. An efficient firm, capable of improving the quality of its goods, realizing technological or organizational progress and introducing new products, will logically be in a better position than its competitors. Companies which fall behind will be pushed to leave the market. Therefore, competition promotes the reallocation of capital from less to more productive firms. Ultimately, competition not only leads to increased consumer welfare through lower prices and a wider range of improved products; businesses and the whole economy also benefit from the competitive process. Dynamic competition in a supportive business environment has a positive impact on the economy and society as a whole, and should be seen as a key driver of productivity growth and competitiveness.\textsuperscript{56, 57}


\textsuperscript{55} The benefits of enhanced competition between firms are often identified as greater allocative, productive and dynamic efficiency. Allocative efficiency is attained when resources are directed to the production of an optimal output combination of goods and services. An optimal output combination occurs when resources are allocated to production in such a way that the optimal level of output is produced. As a result of allocative efficiency, the functioning of markets matches consumer’s preferences. Productive efficiency occurs when the largest quantity of goods or services is produced from a given amount of inputs. In other words, products are made at the lowest possible cost. If a firm does not produce at minimum cost, it may will lose its customers, make losses, and possibly leave the market. Dynamic efficiency involves the development and introduction of new technology to diminish expenses over time. For example a Ford factory in 1920 would be very efficient for the time period, but by comparison would now be inefficient. J. R. BALDWIN AND R. E. CAVES, “International Competition and Industrial Performance: Allocative Efficiency, Productive Efficiency, and Turbulence”, Statistics Canada Research Paper 1997 No. 108, available at http://ssrn.com/abstract=54942.

\textsuperscript{56} Competitiveness can be defined as a ‘measure of an economy’s ability to create valuable goods and services productively in a globalizing world so as to raise the standard of living and secure the employment’. Communication from the Commission - A pro-active Competition Policy for a Competitive Europe, COM (2004) 293 final.

\textsuperscript{57} Although this discussion seems to depart from the premise that the sole objective of competition law is to achieve economic efficiency and to preserve the competitive structure of markets, there are (more) complex reasons behind the existence of competition law systems (A. JONES AND B. SUFRIN, EC Competition 3). In Europe, for instance, there is (or used to be) much disagreement about the goals that the competition system should pursue. While some authors argue that the economic goals should be a priority or even the sole objective, others underline the desirability of pursuing a
The core notion that effective competition between companies should be protected and promoted has, nevertheless, not always been imperative. Throughout history, most countries had their ups and downs as regards their perception of competition and business rivalry. Periods in which a given State actively favored the competitive process were often followed by periods of official restraint on competition under a state-controlled economy. Practically every developed country is familiar with campaigns supporting that the preservation of competition was at best simply pointless or, at worst, devastating for the economy. The proliferation and emergence of cartels is a phenomenon typically characteristic of the periods in which competition was seen as a threat rather than as a process worth of protection.58

Cartels belong to one of the several types of commercial agreements whose direct object is to replace individual competition by collusion or cooperation among firms. Obviously, their existence goes against the very notion of independent business behavior. These practices exist because not all businesses can resist the challenges and pressure of uninhibited competition, which is then regarded as a risk for profitability and even for business survival. In these cases, instead of competing against each other in order to increase their own market shares and profits, businesses seek an alternative approach and attempt to calibrate the market.59

The concept of cartel is generally used to describe an agreement or other form of cooperation between two or more actual or potential competing companies.60 Such agreement is specifically designed to limit or eliminate competition between the cartel participants, with the final objective of artificially raising the price of a product or service. Apart from straight agreements on the prices to be charged to customers, cartels usually involve collusion in respect of the commercial terms to be applied to transactions, output levels, the allocation of market shares, specific customers or geographic areas, or other bid rigging arrangements.61 All these practices are considered most harmful for effective competition between market operators which, as observed, constitutes the only environment that can ensure an optimal allocation of resources and economic progress. On the other side of the picture, cartel parties will obtain substantial (unearned) benefits. By participating in a cartel, individual firms are sheltered from the whole effect of the market forces. This not only ensures financial safety but also high profits which are reaped from a stable competitive situation. At the same time, this lack of pressure to compete is translated into a whole negative impact on the economy, including higher prices, misallocated resources and reduced innovation.62

wider range of goals. The concrete elements and goals of competition law systems will logically vary depending on the country. In this context, the historic and economic background of the State in question are factors that typically affect the shaping of competition law and policy systems. The objectives of the EU competition law system are discussed in Chapter 3. 58 However, as it will be seen, the general recognition of the positive value of competition does not mean that cartels ceased to exist. The presence of cartels, unfortunately, is also a common feature of current commercial relations.

59 See P. C. CARSTENSEN, “While Antitrust Was Out to Lunch: Lessons from the 1980s for the Next Century of Enforcement”, 1995 (48) SMU L. Rev, 1881-1916, at 1912. This author rightly commented that ‘[s]elf-conscious economic actors have strong incentives to seek out ways to organize markets and market relationships that will increase the potential for such cooperation’. As it will be examined, in some markets cartelization has been traditionally seen as more than a simple attempt to maximize profits. In fact, in periods when the industry was seriously decreasing cartels were considered as necessary practices for business survival. See also infra section 2.2.2.

58 For discussion of the etymology of the term, see C. HARDING AND J. JOSHUA, Regulating 11-16.

59 See further Chapter 2, section 5.3. See also Commission, “Glossary of Terms”.

60 See C. R. LESLIE, “Cartels, Agency Costs, and Finding Virtue in Faithless Agents”, 2008 (49) William & Mary Law Review, 1621-1699, at 1629. This author comments that ‘[s]uccessful cartels have been able to impose markups of 400
Cartel agreements have been an established, significant and wellknown feature of commercial life in industrialized countries for decades and, logically, they have been the object of widely differing opinions. While cartels have been praised by some as the pillars of economic cooperation, others have condemned them as economic evil which must be eliminated. The differing attitudes of legal systems as to the acceptability of cartels are inevitably linked to the (positive or negative) value conferred to the competitive process. The general acceptance of the competition principle took place when the debate about the merits of a market-based economy versus a state-controlled economy that existed for decades in several countries, widely settled in favour of the former. At that moment, countries across the globe began to adopt systems of competition law and policy specifically designed to protect and promote the competitive process.\(^63\) In this context, law provisions dealing with cartel behaviour emerged as central elements of competition law regimes around the world.

2. Brief history of cartel regulation in Europe

2.1. The political and economic context in Europe

In Europe, the recognition of the core view that competition is worth preserving along with the development of competition law systems emanates from a unique legal and historic background. The European cartel law provisions have to be necessarily understood and interpreted in the light of the particular context in which they emerged. The appearance of economic liberalism rooted in the French Revolution led to a radical change in the political and economic panorama in the 19th century. Liberalists pioneered the concept of free market trade and defended this model by claiming that competition between firms was the best motivation to perform effectively and, accordingly, the most beneficial means to promote the State’s economy. Yet, during the last years of this century, many European countries and the world in general began to call in question the positive view of competition. This trend, although more discrete at first, became clear in 1914 with the outbreak of World War I.\(^64\) One of the main manifestations percent above competitive prices. Recent cartels have overcharged consumers billions of dollars. Because cartels reduce market output, they generally create significant allocative inefficiencies. In some markets, cartel pricing may also protect high-cost firms, which would be driven from the market if lower, competitive prices prevailed. By insulating less efficient firms from competitive pressures, cartels sometimes facilitate productive inefficiency as well. See also in general, M. C. LEVENSTEIN AND V. Y. SUSLOW, “What Determines Cartel Success?”, 2006 (44-1) Journal of Economic Literature, 43-95 (hereafter: ‘M. C. LEVENSTEIN AND V. Y. SUSLOW, “What Determines Cartel Success”’); J. M. CONNOR AND H. R. LANDE, “How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines”, 2005 (80) Tulane Law Review (hereafter: ‘J. M. CONNOR AND H. R. LANDE, “How High Do Cartels Raise”’), 513-570, at 559-60; N. E. CLARK, “Antitrust Comes Full Circle: The Return to the Cartelization Standard”, 1985 (38) Vanderbilt Law Review, 1125-1198, at 1135 (describing the effects of cartelization as, among others, the concentration of economic power, reduction of output, increased price, and reduced allocative efficiency). See also infra Chapter 2, section 2.

\(^{63}\) The terms competition policy and competition law are frequently used as synonyms but they can and should be distinguished. The concept of policy is broader as it describes the governments’ approach to promote the competitive market structures. This implies that competition policy will therefore include a system of competition law. The competition law provisions are meant regulate the competitive market behavior of undertakings and, thereby, to implement competition policy. A. JONES AND B. SUFRIN, EC Competition 2. In this context, competition policy and law are complementary notions. They create an environment where it is expected that by continually adjusting and controlling the competitors’ behavior a better result will be achieved. However, the concrete impact of the system on competitiveness will depend on the firm’s individual ability to compete (see J. STEENBERGEN, “De nationale rechter” 321). As it will be seen, the adoption of competition laws has sometimes pre-dated the adoption of a discernible policy.

\(^{64}\) W. WELLS, Antitrust and the Formation 4.
of this new tendency was the emergence and consecutive expansion of cartels, which played an ever-growing role in domestic and international trade. As a consequence of the sudden fall in prices for almost all goods throughout the world, firms in many countries started to engage in cartels to avoid market exit. Initially, cartels were typically formed at a national level, but soon the same reasoning that drove regional rivals to collude started being followed by international firms. Before 1914, cartels were a common reality and operated successfully in multiple sectors.

The three decades following the beginning of World War I were marked by an open rejection of the ideas of economic liberalism and a negative perception of the competitive process. Logically, the cartelization trend was a well-established feature of this period. The climate of restriction and regulation fostered by wartime mobilization efforts did not vanish with the end of World War I. While in the early 1920s the most industrialized regions experienced the sore consequences of high inflation and severe economic recession, the 1930s were profoundly stigmatized by the Great Depression, which turned down the world economy. Unsurprisingly, the expansion of cartels reached a logical “climax” during World War II. Throughout the interwar period, most governments encouraged cartels which were then viewed as positive attributes of the economy. In Germany, where these practices had traditionally enjoyed support, cartel agreements proliferated almost in an unlimited manner. In addition, the fact that Nazis and fascists subsidized the corporate state led to a situation in which almost each sector of the economy was governed by cartels. Nonetheless, Germany was not the only State with a positive vision of cartels. In countries like Britain or France, the optimistic attitude towards cartel agreements was completely contradictory with their supporting view of free competition. During this period, business executives used this technique to impose some order on their industries and to shield firms from the dangers of operating in a chaotic environment. They discussed the need to stabilize markets and to rationalize industries

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65 For a detailed and interesting historic overview of growth of cartels and the consecutive development of antitrust see W. WELLS, Antitrust and the Formation.
68 W. WELLS, Antitrust and the Formation 4.
70 W. WELLS, Antitrust and the Formation 11.
72 W. WELLS, Antitrust and the Formation 11.

73 In the 1920s, R. LIEFMANN, a German economist, wrote that international cartels ‘are expected to help to bridge over the enmities created or inflamed by the War or at least to mitigate their disastrous influence upon the economy of the different nations and on the world economic order’. See R. LIEFMANN, Cartels, Concerns and Trusts, London Methuen & Co. 1932, 379 p. at 153; French premier Édouard Herriot argued that ‘the [international] cartel is a sign of progress, uniting national economies which were previously hostile’. See E. HERRIOT, The United States of Europe, New York, Viking Press 1930, 293 p., at 169–70.
and agreed on the benefits of avoiding the unnecessary wastes of competition. Free business activity was, back then, a manifestation of the ambition of the business community to prevent any governmental control over the economy. The interest in cartels was, as observed, not only reflected in the desire of private firms to protect themselves in hard times. Many academics and government representatives believed that cartels were the supreme form of economic organization and that aggressive competition should be replaced by business cooperation. While at present cartels are considered devastating for the economy, the interwar Europe welcomed them as ultimately facilitating the “expropriation of the expropriators.” The strength of this sentiment could only but increased in the light of the conditions facilitating economic planning that dominated the industry between world wars.

The end of World War II meant a breakthrough for the common prewar notion that competition was essentially destructive for the economy. This momentum for political and economic reconstruction was also ideal to draw lessons from the wartime experience. The landscape of international and European business policies was at that time fundamentally altered. The general reaction against the scarcities of the war years added to a parallel interest in welfare and higher living standards resulted in a novel trend of economic liberalism. This common response slowly evolved into respect for private initiative and recognition for the fact that competition is not destructive or wasteful but may, in fact, be a dynamic source to promote greater economic growth and productivity. The European policies encouraging competition rather than restraints thereof had their origin in this context. The potential for political abuse of concentrated and collusive power and the desire to promote economic progress led the Allies to impose antitrust laws on Germany (and Japan) were cartels, syndicates and trust were finally forbidden by the occupation authorities. A tremendous increase of interest in the development of the antitrust principles emerged, particularly among the countries of Western Europe. This new interest led in particular to the widespread enactment of competition legislation relating to cartels in a number of national legal orders and, most significantly, to the origin of the first supranational anti-cartel regime in Europe.

74 B. THORELLI, “Antitrust in Europe 222.
75 W. WELLS, Antitrust and the Formation 9. Government representatives expected that cartels would coordinate the modernization of chaotic and often antiquated industries. STANLEY BALDWIN, the prime minister of Great Britain, commented soon after his country’s none-too-efficient steel makers joined the international steel cartel in 1935, ‘I make bold to say that in four or five years the [British] steel industry will be second to no steel industry in the whole world’. Quoted in E. HEXNER, The International Steel 243. In a speech before the House of Lords in 1944, Lord Harry McGowan, the chairman of Imperial Chemical Industries (ICI) of Britain, stated that ‘such agreements [cartels] can lead to a more ordered organization of production and can check wasteful and excessive competition. They can help to stabilize prices at a reasonable level. They can lead to a rapid improvement in techniques and a reduction in cost, which in turn, with enlightened administration of industry, can provide a basis of lower prices to consumers. They can spread the benefits of inventions from one country to another by exchanging research results, by the cross-licensing of patents, and by the provision of important ‘know-how’ in the working of these patents’. Quoted in W. J. READER, Imperial Chemical Industries 425.
76 See H. B. THORELLI, “Antitrust in Europe” 222.
77 W. WELLS, Antitrust and the Formation 11.
78 Ibid.
79 For an overview of the decartelization process in occupied Germany see K. LOEWENSTEIN, “Law and the Legislative process in occupied Germany”, 1948 (57-6) The Yale Law Journal, 994-1022. However, MOTTA argues that the de-concentration program was soon put to an end since the US and British governments now perceived the threat of the Soviet Union and decided that Germany represented a useful force that could help to counterbalance the strength of the Soviet Union. See M. MOTTA, Competition 10. See also C. HARDING AND J. JOSHUA, Regulating 89-90.
2.2. The national legal background

2.2.1. The general situation in Europe

The political and economic context favoring the existence and expansion of cartel practices had important influence on the European legal tradition, which has been qualified – for good reasons – as ‘a culture of toleration’. Under the European national systems cartels had a legal status similar to that of contracts and other commercial arrangements. Prior to World War I, legislation actually capable of preventing such restrictive agreements was very uncommon in most European countries. In the few systems which contained legal provisions to guarantee freedom of trade and to deal with cartels, these rules were very broadly formulated. As a result, as it is examined below, from 1914 coinciding with the beginning of the war, the mild interpretation of such rules by judges barely had an impact on cartelization. Governmental tools capable of limiting the intense cartel trend were completely inexistent in Europe before the 1920’s. Furthermore, during the 19th century freedom of association and freedom of contract were guaranteed by legislation in several European countries.

On the one hand, freedom of association provided effective protection for the right of businessmen to organize their activities and operate collectively. To some extent – which varied depending on the country and the timing – business associations even had the right to compel its members to agree to collective decisions. Freedom of contract, on the other hand, generally implied that cartel agreements were permitted and could be usually enforceable in courts.

2.2.2. The judicial doctrine of “good cartels”

The legislature of Revolutionary France, where the economic system favored free competition, was the first to introduce the principle of free trade as soon as 1791. Later, the Criminal Code of 1810 decreed imprisonment for anyone who (individually or in cooperation with others) negotiated transactions in order to obtain profit not resulting from ‘a free and natural balance of competition’. The Legislative Law of June 14, 1791 (‘Loi Chapelier’). Le Chapelier Law declared illegal any combination of persons of the same occupation or trade for the purpose of refusing to sell or charging a certain price for services. For a detailed examination of the legislative situation in France before 1914 see C. E. Freedeman, “Cartels and the Law in France before 1914”, 1988 (15-3) French Historical Studies, 462-478; see also H. Kronstein, “Cartel Control: A Record of Failure”, The Yale Law Journal, (55) 1945-1946, 297-335 at 300.

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81 C. HARDING AND J. JOSHUA, Regulating 56.
83 Ibid.
84 E. D. CORWIN, “Cartelization in Western” 254. According to this author, freedom of contract implied more precisely that ‘(a) a restrictive agreement could be enforced in court against a recalcitrant party to it; (b) legal remedies were available to the parties against outsiders who induced or contributed to the violation of such an agreement; and (c) parties to a restrictive agreement were not generally liable for damage that their agreement inflicted upon outsiders, any more than a competitor is responsible for the damage done to others by his competition. These rights and immunities were not absolute: Agreements contrary to public policy were void, and participants in such agreements were responsible for damage to others done by their participation. This rule curbed agreements to engage in what were recognized as unfair methods of competition. Agreements maliciously intended to injure others were vulnerable in suits brought by persons damaged. But since there was no duty to compete or to refrain from commercial collaboration that served the interests of the parties, these curbs upon permissible agreements had only peripheral effect upon restrictive contracts. Enterprises could restrict themselves as they chose; they could restrict others as their own interests made appropriate, within wide limits set by public policy’.
86 Code Penal (1810) art. 419. ‘This provision remained in force until September 3, 1926. However, as soon as August 29, 1833, the criminal division of the Court of Paris declared valid, subject to certain conditions, a plan of price-fixing sponsored by a group of manufacturers. The Court found that in periods of depression the protection of industry was of
However, the provision of the French Penal Code was often construed in a way that had little impact on cartelization. In 1891, the civil division of the Court of Paris first interpreted the Criminal Code as accepting the possibility to differentiate “good” from “bad” cartels.\(^\text{87}\) In this context, it was not possible to offer any kind of opposition to the agreement as long as its goal was ‘the defense of the common interests of the people engaged in an industry’.\(^\text{88}\) The doctrine admitting such remarkable distinction gained acceptance rapidly\(^\text{89}\) and as soon as 1911 the Court de Cassation had embraced it, with slight nuances.\(^\text{90}\) In 1926, this development was definitely endorsed by the legislature and, from this moment, cartels became a conventional attribute of the French industry.\(^\text{91}\)

In Britain, the Statute of Monopolies of 1623 constituted until the end of World War II the only mechanism available under the British legal system to act against restrictive business practices.\(^\text{92}\) In accordance with these rules, private contracts restricting trade were unenforceable, and governmental grants of monopoly rights were prohibited as they violated the common law doctrines. Furthermore, those injured by such practices were awarded treble damages.\(^\text{93}\) Before 1914, British courts generally refused to enforce cartels. Instead, they permitted firms to sign this type of agreements and, consequently, to break them at their convenience.\(^\text{94}\) From the 1920s, the courts began to accept cartel restrictions if they were reasonably necessary and in the interest of the participants, and not primarily motivated by malicious intent to harm competitors.\(^\text{95}\) In practice, judges found few agreements with unreasonable provisions.\(^\text{96}\) These decisions were frequently based on the fact that English law gradually started to embrace the sanctity of any contract not clearly criminal in nature, becoming closer to the German tradition.\(^\text{97}\) As a consequence, regulations against

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\(^{87}\) H. KRONSTEIN, “Cartel Control: A Record” 300.

\(^{88}\) See e.g. Cour de Grenoble, May 1, 1894, [1895] Recueil Périodique De Jurisprudence (Dalloz) II, 70-1, quoted in H. KRONSTEIN, “Cartel Control: A Record” 300.

\(^{89}\) Ibid.

\(^{90}\) Ibid. As it will be examined, this aspect is interesting as regards the difference between the current conception of the need to protect the competitive process and the past idea that the competition system should be used to protect competitors. See infra Chapter 3.

\(^{91}\) Ibid. As it will be examined, this aspect is interesting as regards the difference between the current conception of the need to protect the competitive process and the past idea that the competition system should be used to protect competitors. See infra Chapter 3.


\(^{93}\) Other countries such as Austria, the Check Republic, Holland, Hungary or Switzerland also followed the German vision.
unfair competition practices were directed to tackle other commercial activity, such as bribery and misleading advertising, rather than against cartels. 98

The (anti-)cartel experience in Central and Southeastern Europe was quite similar. In Austria, prior to World War I, (despite the general legislative prohibition against business agreements directed to raise prices to public disadvantage) 99 the courts of the several countries of southeastern Europe dominated by Austrian law were unable to prevent the expansion of cartel agreements. At the end of the 19th century there was a clear cultural preference for business cooperation and a distrust of unrestrained competition. This positive perception of cartels, as a moral manifestation collective will, was in stark contrast to the hostility towards wild competition and the general disapproval of destructive individual behavior. 100 Unsurprisingly, in 1916 an Austrian court declared that a price cartel ‘saved an important branch of the Austrian industry whose existence otherwise would have been threatened in a time of economic emergency. Nothing could be more advantageous to the public than the saving of an industry. Any individual disadvantage due to an increase in price would be offset by removing from the cartel any illegality which might result from a price increase or from any inconsistency with good ethics’. 101 Given this perception, it is understandable that cartels were a traditional feature of economic life in this nation. 102 Although under Austrian law, such arrangements were valid and enforceable contracts, this statute could be very easily circumvented and was thus of little value to combat cartels. 103

In Germany, the basic economic statute of 21 June 1869 (the Gewerbeordnung) provided that ‘all trade [was] open to everyone, unless this statute provide[d]s exceptions from or limitations upon this rule’. However, the Reichsgericht decision of 4 February 1897 in the (in)famous Woodpulp

98 H. B. THORELLI, “Antitrust in Europe” 222. However, it is important to highlight that before the 1920’s cartels were a minor subject of concern for Britain and France. In these two States, the cartelization trend seemed to be at least less pronounced, certainly compared to the great impact of cartels in other countries such as Germany or Austria. HARDING AND JOSHUA argue that ‘there were restrains of competition but they were more subtly embedded in social and cultural attitude, such as the French disapproval of price warfare as something which is almost morally suspect. For Britain and France, business combination was a less obvious phenomenon, and something less formal, and therefore not such an appropriate matter for legal control’, C. HARDING AND J. JOSHUA, Regulating 76.

99 The Austrian provision declaring the invalidity of cartel agreements was a reenactment of an 1803 statute designed to avoid that merchants would obtain any advantage from the scarcities caused by the Napoleonic wars, especially in the case of essential products such as food. The original provision qualified as a criminal offence the conclusion of any agreement among members of a particular trade or business to raise the price of a given good to the disadvantage of the public. In 1870, however, this provision was transferred from the criminal law and into a new statute (the Koalitionsgesetz of April 17, 1870, Reichsgesetzblatt 1870, Nr. 3 – the Koalitionsgesetz). The new statute was meant to allow associations of workers, but to limit the practices organized within the framework of such associations by rendering void agreements to strike. D. GERBER, “The Origins of European Competition Law in Fin-de-Siècle Austria”, 1992 (36) American Journal of Legal History, 405–440 (hereafter: ‘D. GERBER, “The Origins of European”’).

100 According to GERBER cartels represented a ‘means by which individual businesses could seek to counteract falling prices and excess capacity and thus avoid the effects of “too much” competition. They provided a cooperative mechanism for stabilizing economic conditions in an industry and increasing the profitability of its members, and they represented part of the sharp turn away from the market and toward organized capitalism’. (D. GERBER, “The Origins of European” 417); see also generally, D. LANDES, “The Structure of Enterprise in the Nineteenth Century” in D. LANDES (ed.) The Rise of Capitalism, New York, Macmillan 1966, 109-111.


102 According to KRONSTEIN, by 1902 over fifty cartels of national importance were already functioning actively in Austria (H. KRONSTEIN, “Cartel Control: A Record” 301).

103 The only mechanism to enforce the statute was through a civil claim by a cartel member, and such claims were rather infrequent. Moreover, civil claims could be avoided by inserting an arbitration clause into the cartel agreement. If this was the case, the Austrian courts (could) held that arbitrators were not required to apply the provision. In this sense, the Coalition Statute did not provide an effective means to deal with the cartel problem. See D. GERBER, “The Origins of European” 421.
case, completely deprived this declaration of its substance and further entrenched the doctrine of "good cartels". In the Reichsgericht's opinion if in any industrial field prices decreased to an extent that the existence of a profitable industry is endangered, public welfare itself could be jeopardized. Therefore, permitting owners of companies to combine to prevent decrease in prices resulting could not go against public interest. As could be expected, cartels proliferated enormously in the years around the turn of the century. Up to the time of World War I, Germany had become the pre-eminent industrial country of cartels.

2.2.3. The first legislative trend

Legislation under which national governments could effectively impede restrictive agreements appeared in Western Europe soon after World War I. The growing size and capacity of cartels made them appear increasingly threatening for society. As a result, they started to become a general concern which, in turn, stressed the need to reestablish control over cartels. The reaction of the German legislature came on November 1923, when it created the first of the several European administrative agencies, authorized to regulate through licensing, membership control and threat of dissolution, the commercial activities of cartels. For a period of approximately six years during the 1920’s, the Cartel Regulation was the most significant and effective form of competition regulation in the European context. However, from the beginning of the 1930’s the presence of a severe economic depression led to some adjustments of the system which diminished the importance of the role of the Cartel Court. Subsequently, the proclamation of the Nazi regime in 1933 and the adoption of a policy of compulsory cartelization fully modified the legal landscape. During the last phase of the Nazi regime, companies had generally lost their motivation to conspire or engage in private cartels, as the competitive process was no longer being protected.

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104 B. v. Saon Woodpulp Manufacturers Ass’n, (B. v. den Sichsischen Holzstoff-Fabrikanten-Verband, Reichsgericht, VI. Zivilsenat, Feb. 4, 1897, 38 R.G.Z. 155). In this case the cartel management representing a wood pulp producers' association, sought to impose the purposes of the organization on a member, which were ‘to prevent harmful competition among manufacturers and to obtain reasonable prices’. See also in general I. E. Schwartz, “Antitrust Legislation and Policy in Germany. A Comparative Study”, 1957 (105-5) University of Pennsylvania Law Review, 617-691.

105 By 1905 there were 385 cartels involving 12000 firms and the number increased steadily. By 1923 there were 500 cartels in Germany. M. Motta, Competition 9-10.

106 Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen, Nov. 2, 1923 (Kartell Verordnung) [1923] Reichsgesetzblatt I. 1067. The Kartell Verordnung was subsequently amended by the Decree of June 14, 1932, [1932] Reichsgesetzblatt I. 289, and by the statute relating to the change of the Cartel Decree, July 15, 1933 [1933] Reichsgesetzblatt I, 487. An official statement accompanying the decree 10 declared: ‘[t]here is a national interest in the re-establishment of freedom of the market, in opposing artificial restriction of production, excessive rates for alleged risks and excessive prices not justified by actual costs; there is a national interest in forcing producers and traders to rediscover their consciousness of duty toward the public’. The key aspects about this legislation concern its focus on the control of abusive exploitation of economic power by means of administrative supervision. Section 4 of the Regulation enabled the Minister of Economics to take action against cartels which were considered to harm the economy or welfare (as a result of the economic power of the cartel). The Minister had the power to require reporting of cartel agreements, authorize the withdrawal of cartel members, or ask the newly established Cartel Court to invalidate the agreement. An alternative mechanism to enable cartel members to withdraw from the agreement was provided in Section 8, according to which Cartel Court had the competence to decide whether there was a ‘good cause’ for such withdrawal. Section 9 prohibited the use of boycotts and similar devices directed at non-members of a cartel unless such measures were approved by the President of the Cartel Court. C. Harding and J. Joshua, Regulating 73.

107 However, it is argued that the German legislative trend in the field of cartels appeared predominantly 'pro-cartel' and that in practice the number of cartels increased during this period. In this respect, Gerber argued that (in contrast to formal compliance mechanism) the informal character of the system was more likely to only modify cartel conduct. This mechanism was in essence a discretionary tool of control, quite influenced by a positive view of business cartels as an institution. D. Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus, Oxford, Clarendon Press 1998, 472 p., at 130 (hereafter: ‘D. Gerber, Law and Competition’).
Inspired by the German system of 1923, central and northern European States began to enact legislation concerning anti-competitive practices during the decade of 1920. The Swedish legislative act of 1925 allowed the investigation of cartels by governmental bodies as regards the influence of such agreements on prices and other aspects of competition. However, given the strong intent of the industrial community to adjust the scope and purpose of the legislation, this instrument never became an effective tool to fight restrictive behavior. In contrast, the Norwegian law offered a much stricter and effective appraisal. This jurisdiction established a system of registration of restrictive practices with a Control Office. This organism, with a senior judge at its forefront, performed its task independently from government ministers. Its main function was to analyze commercial practices and identify those which could be considered objectionable. Consequently, it discussed an (informal) termination of the practices with the relevant parties. Cases could also be transferred to a Control Council, another independent body, which had the authority to make orders regarding prices and the termination of cartel agreements. The trend to regulate cartel practices continued during the 1930’s. Throughout this decade, a number of other European countries joined the list of states which had enacted legislation. The Dutch law of 1935, for instance, permitted the dissolution of cartels in accordance with an administrative procedure which was largely based upon the German system. The Danish law of 1937, on the other hand, borrowed from the Norwegian experience. Also Czechoslovakia (1933), Poland (1933) and Yugoslavia (1934) adopted legislation establishing registration systems for restrictive business practices and establishing cartel courts or commissions. Despite all progress, these developments were mostly lost as a consequence of the political adjustments adopted in many of those countries after World War II. The Italian law of 1932, deeply contrasts with these first anti-cartel trend, and can be seen as the perfect illustration of a State-controlled model of cartelization. Under this regime, the government even acquired the competence to establish compulsory cartels in every sector of the industry when this was considered necessary for the regulation of production. In summary, during the 1930’s experience of legislative control of cartels did grow in a number of European national systems, but with the

110 Law on restraints of competition and price abuse of 1926 (“Trustloven”).
111 Until the abolition of this system following the beginning of World War II, the operation of the system of control was quite efficient, being capable of handling some 800 cases. As a result it was even characterized as ‘more consistently juridical than the German or the Swedish legislation’. L. LOEVINGER, “Antitrust Law” 23; see also C. HARDING AND J. JOSHUA, Regulating 79.
112 Entrepreneurs’ Agreements Act of 24 May 1935. Holland already had a parliamentary history of opposition to monopoly. In the late 19th Century the patent law system was abolished and was not reintroduced until 1910 due to fear that monopolies would emerge. The Law of 1935 was intended to prevent price wars as well as excessive prices. However, the Dutch law granted wide authority to the government, including among others the power to make cartels mandatory to the power to curb or prohibit them. E. D. CORWIN, “Cartelization in Western” 257. Belgium followed the Dutch lead and also allowed the public authorities to enforce cartel restrictions, although no regulatory or repressive provisions were enacted.
113 Decree N° 141 of 1933, Collection of Laws and Decrees of the Czechoslovakian State.
114 Decree N° 270 of 1933, Official Gazette of the Polish Republic, N° 31, 4 May 1933.
116 Royal Decree of June 16, 1932. The Decree provided detailed rules for the organization and regulation of compulsory, as well as voluntary cartels. While this regulation covered both types of cartels, the regulatory powers of the government rather blurred in the case of voluntary cartels and, as subsequently demonstrated, were more attractive for large private companies. See in general F. R. PETRILIANI, “The Development of Italian Cartels under Fascism”, 1940 (48-3) The Journal of Political Economy, 375-400.
exception of the Norwegian system, the predominant model was the one of Germany, entailing essentially an administrative, discretionary and arguably cartel favorable approach.

2.2.4. The emergence of ‘active’ competition systems

Despite the national legislative initiatives to regulate cartel practices, the idea that allowing firms to cooperate closely in the market would make them a stronger competitor was predominant until 1945. The risk of political abuse of collective business power combined with the desire to promote economic progress, led the Allies to finally impose antitrust laws on Germany (and Japan) where cartels, syndicates and trust were banned by the occupation authorities. During the twenty years after the end of war, public measures encouraging competition rather than restraint thereof reemerged – and competition legislation (re)appeared in most West European countries – as the culmination of the legal developments dating from the 20’s. Although right after the end of the war cartel legislation was adopted or reformed in certain States, the main wave of legislation, in most other western European countries arose after 1952, mainly as a result of supranational developments. By 1963, the existence of competition legislation, including enforcement mechanisms, was a reality in some European States like Austria, Belgium, Denmark, Finland, France, Germany, Ireland, the Netherlands, Norway, Spain, Sweden, Switzerland and the UK.

Although the particular elements of the legislation logically varied depending on the nation, a common regulatory approach can be observed throughout this legislative trend. Cartel agreements were in effect a main focus in all antitrust law systems. It seems that the endeavor to attack such collective business behaviour probably stemmed from a rather widespread belief that cartels constitute a larger barrier for economic progress than individual practices. This is particularity easy to understand given the unique European background. Other peculiar feature of antitrust legislation was its frequent emphasis on publicity. This is especially noteworthy because publicity as regards business relations was a great novelty back then in many countries. The most popular means to ensure publicity was the requirement that restrictive agreements had to be registered. Furthermore, it was typical for European legislation to consider the effect rather than the intent of restrictive business practices in order to delineate the grounds for public intervention. Finally, it is also important to mention that all the aforementioned agencies, whether judicial or administrative tribunals, were established to enforce antitrust law. Interestingly, the first enforcement agencies had from the outset investigatory powers including, usually, the right to require documents, to hear witnesses and to visit the premises of the enterprises being under investigation.

117 See C. HARDING AND J. JOSHUA, Regulating 76 et seq.
118 See W. WELLS, Antitrust and the Formation 140-141.
119 See also R. SOLO, “New Competition”.
120 For instance, in Sweden legislation was adopted in 1946. In the United Kingdom the enactment of the Monopolies and Restrictive Practices Act dates from 1948. (This Act set up a Commission to investigate industries with monopolistic tendencies. The duty of this Commission was to establish the existence and possible abuse of monopoly power and to recommend initiatives “in the public interest”). France, also had a number of price control measures during World War II. Such measures were superseded by laws passed in 1945 which provided, in general, that prices could not exceed those charged in 1939 or those which had been subsequently established by the authorities.
121 See C. HARDING AND J. JOSHUA, Regulating 98-102.
122 See identifying these (and more) features H. B. THORELLI, “Antitrust in Europe” 233.
123 Ibid. At that moment, the European legislation did not seem to be generally concerned with monopolies or corporate combinations as such.
Looking back at the difficulties concerning the historical context and the tolerant legal traditions as regards cartel practices, it can safely be said that, at that time, the mere existence of national laws controlling restrictive practices was (in its own) extremely significant. These domestic regulations and enforcement regimes not only represented a first proof of faith in the competitive process; they were as such the first recognition of the core notion that ‘no economy that claims to be free can exist without effective deterrence of cartels’. The ultimate confirmation of this solid statement came with the emergence of the first supranational cartel system in Europe, which is examined next.

2.3. The emergence of European cartel law: the European Coal and Steel Community

In May 1950, the French foreign minister Robert Schuman initiated a government proposal for the creation of a West European common market in coal and steel. The Schuman Plan led to the signing of the Treaty of Paris in 1951 by Germany, Italy, France and the Benelux countries, which established the European Coal and Steel Community.

The European Coal and Steel Community (“ECSC”) was conceived as the first key step towards the integration of the economic and political and life in Europe. It was designed to replace the national markets for coal and steel by one common and competitive market, which would serve as the main basis for economic development. To that end, the Treaty provided the first supranational regime of competition law and policy. The system contained a number of rules entailing the basic principles for the supervision of existing monopolies, the prohibition of cartels and the control of concentrations. The competition law and policy provisions of the ECSC are the fundamental predecessors of the European system of antitrust. They offered the basic pattern for the European competition regime and some of the key features of the ECSC system can still be found today, at least in their basic form, in the current European competition law system.

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126 The specific aims of the Treaty of Paris were explicitly stated by Schuman in his original proposal: ‘[t]he pooling of coal and steel production will immediately assure the establishment of a common basis for economic development, which is the first step for a European federation, and which will change the destiny of these regions which have long been devoted to the production of arms to which they themselves were the first to fall constantly victim.’ The Treaty of Paris also stated in Article 2 that ‘[t]he European Coal and Steel Community shall have as its task to contribute, in harmony with the general economy of the Member States and through the establishment of a common market as provided in Article 4, to economic expansion, growth of employment and a rising standard of living in the Member States’. The competition rules contained in the ECSC Treaty were based on a draft project prepared, at the behest of Jean Monnet, by the Harvard antitrust lawyer Robert Bowie, who was an adviser to John McCloy, the US High Commissioner for Germany and a close ally of Monnet. Monnet, a French economist and public official Deputy Secretary-General of the League of Nations 1919–1923, is considered, together with Robert Schuman, as one of the founding fathers of the European Union. See A. Jones and B. Sufrin, EC Competition 35. Jean Monnet, who later became first President of the ECSC’s High Authority, stated that ‘for Europe, [the competition rules of the ECSC Treaty] were a fundamental innovation: the extensive antitrust legislation now applied by the European Community essentially derives from those few lines in the Schuman Treaty’. See J. Monnet, Memoirs [R. Mayne trans.] (1978), Garden City - New York, Doubleday 1978, 554 p. at 352-353.
At the beginning of World War II, the coal and steel markets were strongly dominated by private and unsupervised commercial relations between businesses. National and international cartels established in several countries of Western Europe – both on private and public initiative – were controlling and organizing the industry. Particularly, the level of organization of the German steel industry was extremely high. This significant degree of concentration and cartelization had led to historic rivalries and conflicts between the States signers of the Treaty, which in turn made clear that supranational public treatment was greatly desirable and even needed in this key area of the industry. The Treaty of Paris created a supranational system of extensive public administration that was conceived not only with an economic purpose, but for political reasons. From an economic point of view, the system was seen as a mechanism to replace the uncontrolled private organization of the industry and thereby to promote further economic expansion. The underlying political objective was to reduce the Franco-German influence in the markets and the potential political tension between European countries. To that end, the High Authority, i.e. the new executive body established by the Treaty, was granted extensive powers to administer the coal and steel sectors as

128 H. A. SCHMITT, “The European Coal and Steel Community: Operations of the First European Antitrust Law, 1952-1958”, 1945 (38-1) The Business History Review, 102–122, at 103–104 (hereafter: ‘H. A. SCHMITT, “The European Coal and Steel”’). The ‘International Steel Cartel’, which was concluded by steel makers from seven central and west European countries, functioned from 1926 to 1930, briefly revived in 1933, and attempted to function a third time just before the beginning of World War II. When this arrangement was most successful, it controlled one-third of world production, including two-thirds of world exports. Fear of a fourth revival in the late 1940's constituted a strong motivation for the planners of future European Union. As it appears ‘[i]n coal mining, private and state monopolies were the rule, though only on a national scale. France nationalized her mines after World War II, as part of a world-wide practice to allow marginal industries to survive at public expense. Two-thirds of the Netherlands' production was owned and operated by the government under a law passed in 1908, and designed to forestall domination of the industry by foreign capital. Ever since the Prussian state acquired the Saar mines in the late nineteenth century they were publicly owned, though proprietorship changed with the uncertain political status of the region. While the overwhelming majority of Ruhr shafts remained in private hands, at least 80 per cent of their product fell under the control of a sales cartel founded in 1893 with the approval of the German government. In 1934 the same organization (Rheinisch-Westfälisches Kohlensyndikat) extended its sway over the output of the Aachen area. Belgium alone boasted undiluted private ownership of its mines, half of whose production, however, was controlled by two concerns, the Société Générale and Launoit. In addition a sales cartel, the Comptoir Belge des Charbons (COBECHAR), controlled 60 per cent of the national output and the prices of the remaining independents as well. After 1945 Luxembourg, which mines no coal, subjected all imports of solid fuels to government control under the auspices of the Office Commercial du Ravitaillement’. See E-J. MESTMACKER, “The applicability of the ECSC-Cartel Prohibition (Article 65) During a Manifest Crisis”, 1983-1984 (82) Michigan Law Review, 1399-1414, at 1405 (hereafter: ‘E-J. MESTMACKER, “The applicability of the ECSC”’). According to E-J. MESTMACKER the regulation of national markets was completely reserved for national cartels.

129 The coal and steel sectors were considered appropriate areas to start the integration process, both in a political sense (see P. H. MIOCHE, “Le patronat de la sidérurgie française et le Plan Schuman en 1950-1952: les apparences d’un combat et a réalité d’une mutation,” in (ed.) K. SCHWABE, *Die Anfänge des Schuman-Plans 1950/5*, Baden-Baden, Nomos Verlag 1988, 305-318, at 276. ‘It clearly appears that the choice of steel and coal was a good one for the promoters of European integration. It greatly facilitated the adoption of the Treaty of Paris and the setting up of the ECSC, particularly since it built upon historical traditions, geopolitical realities and on a more-or-less general consensus.’) and economically (‘a start toward economic unification seemed most promising in two industries responsive to internationally identical investment, rationalisation and organisational principles, accounting for relatively few firms and including a labour force not more than 1.5 per cent of the total ECSC population’, E. B. HAAS, *The Uniting of Europe: Political, Economic and Social Forces 1950-1957*, California, Stanford University Press 1958, 568 p., at 242 (hereafter: ‘E. B. HAAS, *The Uniting of Europe*’).

130 See for example G. BEBR “The European Coal and Steel Community a political and Legal innovation”, 1953 (63-1) *Yale Law Journal*, 1-43, at 2. See also M. MOTTA, *Competition* 12. According to MOTTA the first reason for the adoption of the competition law provisions in the Treaty was related to the desire to reduce German power by making available coal and steel markets to other European countries. Therefore, the prohibition of discriminatory practices can also be seen as a means to provide access to these key sectors.
The wide nature of such competences had given rise to the concern that the ECSC may just be a cover to organize coals and steel producers into a kind of public super-cartel. However, it would be erroneous to characterize this system as a cartel. There are fundamental differences between the system established under the Treaty of Paris and a cartel agreement. While, indeed, the High Authority was vested with broad powers that might recall cartel practices, its authority to interfere to reduce competition was limited to very concrete situations in which its intervention was considered absolutely necessary in light of extraordinary circumstances. Its powers were, therefore, only temporary and restricted to a minimum and could not be compared to the high level of (unlimited) private control of businesses. Although cartels have been called “children of distress”, normally their activity persists after the end of the crisis. In addition, cartel companies are the ones regulating and controlling the market, while in the case of the ECSC, the supranational institutions were not the ones influencing the industry through agreements.

The introduction of competition provisions should also be seen, as the materialization of the emerging appreciation for competition as the only viable way to make markets function efficiently. The Treaty ultimately sought to organize and maintain a competitive common market, free from any restrictive or monopolistic practices. Competition became thus the general rule and was with certainty preferred to strict national organization of markets, even if the High Authority was allowed to intervene in exceptional cases of severe market unsteadiness.

The ECSC Treaty provided strict competition rules designed to prevent and counteract anti-competitive practices in the field of coal and steel. The specific rules applying to cartels were set out in Article 65, one of the most detailed provisions of the Treaty. Notably, Article 65 ECSC was the first supranational legislative rule which (partly) replaced the Member States’ anti-cartel laws in the area of coal and steel. Taking into account the intense cartel background of Europe, certainly in these sectors of the industry, Article 65 was without any doubt one of the key rules of the novel system. Article 65(1) firmly set out the prohibition of cartels by forbidding agreements among (associations of) enterprises and all concerted practices tending directly or indirectly to prevent, restrict or distort the normal operation of competition within the common market. Arrangements to fix prices, to restrict or control production, technical development or investments, and to allocate

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131 For instance, Article 58 of the Treaty enabled the High Authority to impose production quotas in response to crisis conditions such as decline in demand. Article 61 allowed the High Authority to fix maximum and minimum prices and Article 63 enabled the High Authority to specify conditions of sale.

132 When the “Schuman Plan” for the creation of the European Coal and Steel Community was presented to U.S. Secretary of State, Dean Acheson, on May 7, 1950, Acheson’s first reaction was to fear that the plan was in fact a cover for a “gigantic European cartel”. See D. ACHESON, Present at the Creation: My Years in the State Department, New York, W. W. Norton 1969, 848 p., at 383. See also C. HARDING AND J. JOSHUA, Regulating 94.

133 See, for example, R. SOLO, “New Competition” 7.


135 Some authors also support the view that the success of the US economy, which had continually relied upon antitrust rules, had definitely an impact in this context, see for example M. MOTA, Competition 12. For an early comparison of the ECSC competition provisions (Articles 65 and 66) with the (then applicable) provisions of U.S. antitrust law, see N. LANG, “Trade regulations in the treaty establishing the European Coal and Steel Community,” 1958 (52) Northwestern University Law Review, 761-772.

markets, products, customers or sources of supply were specifically forbidden. By itself, this rule reflected the new trust in the competitive system and simultaneously illustrated a clear willingness to leave behind the past cartel background of the coal and steel sectors.137

The legal prohibition contained in the first section was subject to a system of exemptions. Article 65(2) conferred upon the High Authority the possibility to authorize specialization, joint-buying or joint-selling agreements under certain conditions. Namely, agreements had to contribute to a substantial improvement in production or distribution; they must be essential to obtain these results and not go further than what is indispensable and, finally, the agreement should not give undertakings power over price, production or marketing in respect of a substantial part of the market in question, or shield them from effective competition. Other “analogous” agreements could also be authorized and prolonged at the discretion of the High Authority, even if the exceptional conditions which initially justified the agreement were no longer present. The content of this provision illustrates that the abuse control approach,138 which is hostile to monopolistic practices or other distortive conduct when they have a negative effect on the industry, had also influenced the ECSC system.139

Agreements violating Article 65 ECSC were automatically void and, therefore, could not be invoked before national courts in the Member States. The only competent authority to evaluate their validity was the Community’s High Authority, 140 was subject to review by the Court of Justice.141 All infringements of Article 65 (and 66) ECSC could be sanctioned with fines not exceeding the limit of 10% of the annual turnover of the undertaking(s) involved in the infringement.

In addition, the objective of the ECSC to ‘progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity’,142 should be taken into account to understand the interpretation and application of the ECSC competition provisions. Adapting the problematic and complex coal and steel industries – which had always been strongly influenced by private regulation and cartelization – to the intense demands of a common competitive market, is an extremely difficult challenge, certainly if economic loss and instability want to be avoided. In effect, it should be recognized that suddenly exposing markets to unleashed competition was not the most appropriate way to establish a common market without causing some damage on the economy. Moreover, the special features of the coal and steel

138 See supra this Chapter, section 2.2.3.
139 The influence of the abuse control approach can be appreciated in Article 65(2) and also in 66(7). S. MARTIN explained that ‘[t]his combination of the prohibition and abuse control approaches was arrived at through a complex interaction of French strategic interests, changing Allied intentions regarding the post war structure of West German industry, and German pursuit of a restored place among the community of nations. This interaction had a ripple effect on post war German competition law, which in turn had its own direct effect on EC competition policy’. S. MARTIN, “The Goals of Antitrust and Competition Policy” in (ed.) WAYNE DALE COLLINS, Issues in Competition Law and Economics, American Bar Association 2008, 2450 p., at 45. See also infra Chapter 3.
140 Articles 65(4)(2) and 66(1) ECSC Treaty provided that the High Authority was exclusively competent for the implementation of the rules on competition. Only under certain circumstances it could consult the Governments of the Member States.
141 See Article 31 ECSC Treaty.
142 Article 2 ECSC Treaty.
industry make these markets fairly prone to cartels and monopolies.\textsuperscript{143} It is, thus, in this context where the role of the High Authority and its powers becomes crucial.

The High Authority offered the first practical experience in the enforcement of competition rules in Europe at a supra-national level in the special coal and steel sectors. As regards to the application of Article 65, reasonably, a drastic break up with the cartel precedents of this sector could not be expected. Taking into account the previous background of the field, the High Authority decided to proceed slowly and carefully, in order to limit the potential damage to the industry as much as possible. Accordingly, the decisional practice shows a consistent and flexible approach to cartels.\textsuperscript{144} In this assessment, the harm deriving from the restrictive conduct was weighed against the interest in permitting agreements that would be capable of increasing or improving production. This “balance exercise” was a highly complex task. In the words of JEAN MONET: “[the High Authority found itself] up against systems which are accepted through force of habit, though the compromises on which they were based are no longer in keeping with the new circumstances of the market. This is the first time that anti-cartel rules like those of our Community have been applied in Europe”.\textsuperscript{145}

The executive body of the Community was confronted with powerfull cartels practically in every one of the Member States of the ECSC.\textsuperscript{146} The French coal mines were at this time nationalized and their operation was supervised and supported by ATIC.\textsuperscript{147} This official coal import office was designed to control the import of coal into France. Likewise, in Holland, the Rijkskolenbureau had a monopoly over the coal sales. These two organizations were heavily pressured by the High

\textsuperscript{143} For an analysis of the factors facilitating collusion see G. SYMENONIS, “In Which Industries Is Collusion More Likely? Evidence from the UK”, 2003 (51-1) The Journal of Industrial Economics, 45-74. See also Chapter 2, section 5.2.

\textsuperscript{144} It should be noted that the anti-cartel provisions were retroactive. Therefore, any agreement in force before establishment of the Community had to be submitted for approval, and, if illegal, had to be ended within a reasonable time limit fixed by the High Authority. Reasonably, the first step of the High Authority in practice as regards to existing agreements was to request additional. For instance, the first report of the High Authority, covering the period from 10 August 1952 to 12 April 1953, lists certain forbidden practices (art. 94 of the report). According to this report, the High Authority also established contacts with producer organizations taking part in price fixing and market allocation and obtained a promise of discontinuance (arts. 96 and 99). However, certain agreements in the coal sector, which could not be terminated or adjusted without disrupting the industry were permitted to continue for some time (art. 97); the High Authority was also reluctant to adopt drastic measures (art. 98). For an overview of a number of relevant cartel decisions in this context see S.A. SIEBSGOLD, “Antitrust Law in the European Communities: The Path of the Schuman Plan”, 1964 (13) Journal of Public Law, 135-161; D. SPIERENBURG AND R. POIDEVIN, The History of the High Authority of the European Coal and Steel Community, London, Weidenfeld and Nicolson 1994, 650 p. (hereafter: ‘D. SPIERENBURG AND R. POIDEVIN, The History of the High Authority”).

\textsuperscript{145} J. MONNET, President of the High Authority, Debates in the Common Assembly – Session of 30 November 1954. Address concerning the activities of the High Authority, particularly with regard to implementation of the common market, available at http://www.europarl.europa.eu/pdf/cardoc/24663-5531_EN-CARDOC_JOURNALS_No6-complet_low_res.pdf


Authority to finalize their activities. Furthermore, in Belgium, the Cobechar, a private sales agency had a great influence on most of the sales of coal produced in this country. However, the most powerful cartels operated in Germany. On the one hand, OKU, was in charge of the administration of sales of both German and French coal, in what they regarded as the more competitive market of South Germany. GEORG, on the other hand, was an immense joint sales agency for Ruhr coal. This last case properly illustrates the High Authority’s practice and shows that, although its approach was no fully hostile, it cannot be accused for adopting an imprudent or permissive attitude.

The Ruhr Coal syndicate (GEORG / Gemeinschafts-Organisation Ruhrkohle), was a clear example of cartelization reappearance in the post war German coal sector. This cartel consisted of a massive collective sales agency, which had a monopoly of the distribution of more than half of the ECSC’s coal mining capacity. The Allies were capable of dissolving it by breaking it up into six individual sales companies but, subsequently, its members regrouped again under a sole joint administration. The extensive power of GEORG in the sector raised led to the concern that it could gradually acquire complete control over the coal market. Initially, in its pursuit to find a solution, the High Authority suggested to impose a higher degree of independency for each company. However, the German labour industry and government offered resistance. Finally, in 1956 these issues were resolved under Article 65 through a compromise to divide the cartel-syndicate into three autonomous and independent sales agencies, operating under the supervision of the High Authority. Yet, it appeared later on that the three new companies were far from independent in practice. As a result, the High Authority had to conclude that the settlement was not effective and, therefore, illegitimate. In 1959, it was decided that the existing arrangement would be prolonged on a yearly basis until a new agreement could be concluded.

This case shows that introducing a competitive mentality in an industry where a real competition tradition has never been cultivated before is highly complicated. The High Authority was not reluctant to apply the competition rules and, despite the constant obstacles, it remained resolved to promote the general education of the industry towards more rivalry. The High Authority’s decisions and measures suggest that it had firstly followed a remedial and instructive approach. Only when these measures were ineffective, additional initiatives were taken to resolve the relevant issues. It appears that the High Authority took into account the specific history, circumstances and concrete features of the industry, while aiming at reconciling them with the spirit of the ECSC Treaty. This gentle enforcement of the competition rules was particularly appropriate to facilitate the uneasy adjustment to the new standards.

148 W. FRIEDMANN “The European Coal and Steel” 20.
149 See also C. HARDING AND J. JOSHUA, Regulating 95-96.
150 According to HAAS ‘[GEORG’s] raison d’être lay in the policy of equalizing prices among high and low-cost producers, thereby assuring — according to its and generally prevalent German claims—stability of production for high-cost mines, employment stability, and guaranteed access for unpopular grades of coal.’ E. B. HAAS, The Uniting of Europe’ 77.
151 A. SCHMITT noted in this context that ‘ECSC inspectors found on an office directory in Utrecht three separate listings for three concerns representing Ruhr coal sales, but upstairs they met one agent acting in fact for all of them’. H. A. SCHMITT, “The European Coal and Steel” 112.
152 H. A. SCHMITT, “The European Coal and Steel” 112. See also for more details D. SPIERENBURG AND R. POIDEVIN, The History of the High Authority’ 518.
153 See also S. FRISHAUF, “The Present Status” 256. This author argued that ‘[t]he Ruhr coal sales matter illustrates that […] the High Authority […] will go easy in its antimonopoly policy and only when its patience with violations is strained to the utmost will it begin to look to enforcement provisions of the treaty; and even then only with much delay,
In the area of competition, the *Schuman Plan* aimed at serving the whole Community instead of a particular group of firms and their concrete interests. The unique nature of this philosophy is reflected in the statement of M. JEAN MONNET, who firmly argued that ‘there can be no Schuman Plan that will raise the living standards if cartels are permitted’.\(^{154}\) The system established under the ECSC was a tremendous step forward taking into account that this area of the industry in most European countries had been fully governed by cartels. The combination of innovative provisions and a genuine enforcement system represented a complete breakthrough for Europe. The inspiring supranational package including a solid and clear cartel prohibition, sanctioning measures and investigatory powers, contained all the basic ingredients of an effective competition order, which provided the blueprint for the first general European anti-cartel system established a decade later under the Treaty of Rome.

CHAPTER 2. Understanding (the recent focus on) cartels

During the last few decades, competition authorities all around the world began to pay more attention to cartel practices than ever before. This emphasis can be explained by different reasons. First, cartel behavior has not always been illegal. In Europe, particularly, governmental authorities have often participated in cartels, adopting policies encouraging their formation or even as direct members. Second, cartel activity was not only lawful but was seen as a positive element of the economy, designed to prevent undesired instability in the industry.\(^{155}\) Due to the scarcity of research evaluating the actual economic effects of collusive behavior, the detrimental impact of cartels on the economy and consumer welfare was completely underestimated.

The emergence of competition systems prohibiting cartels and the successive availability of specialized research in the area of industrial organization and economics, altered the benevolent perception of cartels. Once their devastating impact on the economy was accepted, cartels became the ‘most egregious violations of antitrust and competition laws’.\(^{156}\) Despite of the importance of this view, cartels were still not seen as a significant object of concern. In line with the predominant economic thoughts, there was a widespread conviction that cartel agreements were inherently instable and, therefore, meant to fail. Unfortunately, evidence and experience has shown that cartel members are actually capable of devising sophisticated techniques to overcome the instability problems and to protect their profits for decades. In addition, as a consequence of their (almost per se) illegality,\(^ {157}\) and the considerable sanctions that they face, these practices have spectacularly evolved. Currently, cartels contain highly complex organization techniques, including most notably concealment measures which protect them from discovery. There is, thus, no need to observe that modern cartels hardly resemble collusive agreements from the interwar period.

This Chapter is entirely dedicated to exploring the current nature of cartel conduct. In what follows, the general notion of cartel will be introduced, and the specific features of this activity will be extensively studied. To avoid a lack of precision deriving from the neutrality of the legal language, this examination will also lean on economic analysis. Economic theory can be useful from two perspectives. Firstly, economic analysis is essential to assess the negative impact of cartels on the economy. Secondly, it provides the basic insights to understand the formation and sustainability of cartels, thereby also indicating the characteristics of the industry that may facilitate cartel behavior, or make it more likely. Furthermore, this analysis will reveal that cartels require specific organizational and functioning features to succeed in increasing prices. By identifying the most common features of cartels, it will be easier to understand the unique nature of this conduct and to see that it fully differs from other type of anti-competitive agreements.

\(^{155}\) See Chapter 2, section 2.2.


\(^{157}\) See further Chapter 4.
1. Introduction to the concept of cartel

1.1. The generality of the legal language

In the business context, the term ‘cartel’ refers to an agreement between competing firms with the purpose of restricting competition and maintaining prices at a high level. Despite this fairly broad description, a cartel is not in itself an established legal form and a precise definition is not provided in many systems of competition law. This is in effect the case for the EU system, which broadly prohibits in Article 101 TFEU ‘all agreements and decisions by associations of undertakings and concerted practices which may affect trade between the Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’.

Providing a precise legal description of the special nature of cartels has been an extremely difficult exercise. The concept of cartel often differs depending on the jurisdiction and therefore it does not always refer to the same type of conduct. As economic analysis evolved, and especially during the last four decades, varying types of economic behavior were identified as ‘cartel’. In addition, the early debate on the desirability of cartels was marked by fervent controversy. The fact that the word “cartel” could have positive or negative connotations, further increased the difficulties to reach a common understanding with respect to a definition. It is thus important to keep in mind that defining and further refining the legal meaning of the term cartel can still be quite challenge nowadays.

During the last twenty years, legal language has been evolving towards a concept of cartel that is (more) aligned with serious types of anti-competitive practices. This trend can be illustrated by the appearance in the 1990s of the term ‘hardcore cartel’. The Organisation for Economic Cooperation and Development (the “OECD”) provided one of the most successful definitions in its 1998 ‘Recommendation on Effective Action against Hardcore Cartels’. In this document the OECD defines a “hardcore” cartel as:

‘an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce’.

158 See further supra Chapter 1.
159 See illustrating this aspect Chapter 12, section 2. The International Competition Network (“ICN”) Working Group on Cartels explains that one common definition that covers all aspects of a hard core cartel is not attainable due to differences across jurisdictions. Jurisdictional differences in the scope of application of a cartel definition become visible in the nature of the (per se) prohibition and the applicable exemptions as well as in the categorization of vertical conduct. However, these differences have not obscured the anti-cartel consensus that has led to strengthen enforcement around the world and to increase cooperation among jurisdictions. ICN Working Group on Cartels, “Defining Hardcore Cartel Conduct, Effective Institutions, Effective Penalties” (2005), at 15. See also C. HARDING AND J. JOSHUA, Regulating 11-16.
160 OECD, “Recommendation of the Council” 3. The OECD initiated its anti-cartel programme with the adoption of the 1998 Council Recommendation Concerning. The report generally focuses on the progress made in the fight against cartels, the public awareness of the harm caused by such practices, effective sanctions and international cooperation. On the other hand, it should be stressed that the OECD recommendation do not constitute binding principles and should rather been seen as a model or guiding principles.
The International Competition Network (the: “ICN”) confirmed in 2005 the widespread consensus as regards the basic elements contained in most of the statutory definitions of cartel, namely: an agreement, between competitors aiming to restrict competition. In describing the most typical hardcore practices, four categories of conduct are commonly identified across jurisdictions: (i) price fixing, (ii) output restrictions, (iii) market allocation and (iv) bid rigging. It is worth mentioning that Article 101(1) sections (a), (b) and (c) TFEU, which list a number of examples of prohibited anti-competitive conduct, explicitly refer to the ‘fixing of purchase or selling prices or any other trading conditions, the limitation or control of production, markets, technical developments or investment, and the sharing of markets or sources of supply’. The allusion to typical cartel behavior contained in Article 101 TFEU has led some authors to qualify this provision as the “cartel prohibition”. However, such description is rather inaccurate. Article 101 TFEU encompasses all sorts of – horizontal and vertical – collective anticompetitive behavior, ranging from agreements with potential pro-competitive effects (and possibly eligible for exemption under 101(3) TFEU), to hardcore restrictions, which are normally not exempted.

The Commission also offers a more precise definition in its Leniency Notice. Although such description only intends to delimit the scope of application of the Notice, and logically does not establish any requirement for the application of Article 101 TFEU, it does shed some additional light on the notion and meaning of cartel. The Leniency Notice defines cartels as:

‘[a]greements and/or concerted practices between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors’.

Furthermore, the description offered by the Commission in its Glossary of Terms used in EU Competition Policy also gives an indication of the damaging effects of cartels. This text defines cartels as:

‘[a]rrangements between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits. In practice, this is generally done by fixing prices, limiting output, sharing markets, allocating customers or territories, bid rigging or a combination of these specific types of restriction’.

This description indeed highlights that the main outcome of successful cartels is higher prices which, as explored below, can have a completely negative impact on the economy. Additionally, this description may suggest how Article 101 TFEU is to be applied: under the EU competition system, cartels are seen as practices that systematically restrict competition and are, therefore, prohibited as a rule. Moreover, due to their naked nature, they are considered most unlikely to qualify for an exemption under Article 101(3) TFEU.

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162 Commission, “Glossary of Terms”.
163 As it is argued below, it is likely, although not completely verifiable, that Article 101(1) TFEU in combination with Article 101(3) TFEU distinguishes cartels as competition law restrictions that are normally too damaging to obtain an exemption. See infra Chapter 4.
To some extent, there are two main features that characterize the definitions discussed above: (relative) simplicity and clarity. These two virtues make these definitions appropriate to illustrate the consensus as regards the key features and categories of cartel behavior. At the same time though, these descriptions no doubt show the generality and, in certain cases, neutrality of the legal language used to define cartels, especially at the substantive level. In particular, the legal vocabulary mainly tends to identify the economic methods used by firms to restrict competition and focuses, far less often, on the effects of the conduct. The discussion under the next heading, however, illustrates that there has been an entire revolution as regards to the perception of cartel behavior, which makes the relative neutrality of the legal language somewhat mild to illustrate the real essence of cartels.

1.2. The shift in the perception of cartels

In 1944, Lord McGowan, Chairman of Imperial Chemical Industries (ICI), affirmed in a speech before the House of Lords that:

‘[s]uch agreements [cartels] can lead to a more ordered organization of production and can check wasteful and excessive competition. [...] They can lead to a rapid improvement in techniques and a reduction in cost, which in turn, with enlightened administration of industry, can provide a basis of lower prices to consumers. They can spread the benefits of inventions from one country to another by exchanging research results, by the cross-licensing of patents, and by the provision of important “know-how” in the working of these patents’.

Yet more recently in 2000, Professor M. MONTI, European Commissioner for Competition 1999-2004, strongly stated that:

‘[c]artels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition they cause serious harm to our economies and consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies. By their very nature [cartels] eliminate or restrict competition. Companies participating in a cartel produce less and earn higher profits and society and consumers pay the bill. Resources are misallocated and consumer welfare is reduced. Of all restrictions of competition, cartels contradict most radically the principle of a market economy based on competition, which constitutes the very foundation of the Community’.

More than 50 years separate the European tribute to cartels from the vigorous attack that they are experiencing nowadays. During this period, Europe has witnessed an extraordinary shift in the perception of business collusion. The whole continent left behind a time characterized by public encouragement of cartels and moved towards a new era in which cartels are heavily sanctioned and, in some States, even considered a crime. Although the strong rejection of cartels in Europe had its natural origin in the process of emergence of competition law systems, this “anti-cartel” mentality goes far beyond the European frontiers.

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164 In its decision in Matières colorantes ([1969] OJ L 195/11) the Commission found that, ICI – registered in the UK which was not then a member of the European Community – had engaged in concerted practices and fined it € 50,000.

165 H. McGowan, speech before the House of Lords in 1944, quoted in W. WELLS, Antitrust and the Formation 10.

166 M. MONTI, SPEECH/00/295.

167 Criminal sanctions for cartel activity are increasingly becoming a reality in Europe. See further Part III, subpart II and more specifically Chapter 13, section 1.1.
The view that collusion among competitors is “the supreme evil of antitrust”\(^\text{168}\) has gained increasing acceptance at an international level. Since 1990, several countries have enacted their first regimes including anti-cartel provisions.\(^\text{169}\) Today, a total of more than hundred jurisdictions have enacted anti-cartel legislation to fight the most pernicious forms of collusion. In the United States, antitrust laws date back to the Sherman Act of 1890. As one of the best known and most actively enforced competition systems in the world, the Sherman Act and the U.S. enforcement tradition has been greatly influential on a global scale. In fact, the recognition that ‘cartels are devoid of any efficiency justification and inflict tremendous harm on our economy’\(^\text{170}\) led the U.S. Antitrust Division to make anti-cartel laws a top priority.

Furthermore, cartels have also been condemned by international bodies. The OECD is one of the multilateral organizations that plays a key role in the area of international cartel policy, both through its Recommendations (which set a benchmark for agencies all around the world) and through its meetings in the Competition Committee and the Global Forum on Competition (where essential issues in the fight against cartels are discussed). The key OECD work concerning the definition of hardcore cartels and the calculation of their harm, has been of crucial importance to underpin national efforts to fight cartels.

The 1998 OECD Recommendation’s preamble lays the rationale of its substantive recommendations by describing the harm that cartels cause to consumers and to the global trading system. This policy document refers to cartels as ‘the most egregious violations of competition law’, and explains that they ‘injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchases and unnecessarily expensive to others’. The Preamble further notes that hardcore cartels create market power, waste, and inefficiency in countries whose markets would otherwise be competitive. The Recommendation calls on OECD members to provide for ‘effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels’. Moreover, member countries are encouraged to sign mutual assistance agreements between their antitrust authorities, and to enact legislation that blocks collusive behaviour. The OECD has explicitly acknowledged that since the adoption of the Council Recommendation, the Competition Committee has considered anti-cartel initiatives as one of its top priorities.\(^\text{171}\)

The OECD initiative has been strongly reinforced by the ICN. In 2004, the ICN established its Cartel Working Group, which focuses on two main areas: the key principles to fight cartels, and the techniques to detect and investigate such practices. The results of a number of important projects

\(^{168}\) This was the description of the US Supreme Court, in its recent Trinko decision. Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).


include a definition of hard-core cartels, an effective institutional set-up and effective sanctions. In the Report prepared for the 4th Annual Conference, the ICN stated that ‘secret cartel agreements are a direct assault on the principles of competition and are universally recognized as the most harmful of all types of anticompetitive conduct’.\textsuperscript{172}

The United Nations’ Commission on Trade and Development (UNCTAD) started to organize annual conferences on antitrust law in the mid-1970s. In 1980, the UNCTAD published a number of non-binding recommendations for its Member States to enact legislation designed to control restrictive business practices, including clear prohibitions of cartel activities. The current work of the UNCTAD in the area of cartels specially focuses on providing technical assistance to developing countries which have little experience in drafting and implementing anti-cartel systems.

The WTO Working Group on the Interaction between Trade and Competition Policy, which was established in 1996,\textsuperscript{173} also highlighted the need to adopt measures to deal with hardcore cartels and acknowledged that ‘cartels are the most pernicious type of anti-competitive practice from the point of view of trade and development as well as of competition law enforcement; that they can have the effect of undermining the benefits that should flow from international trade liberalization, and hence are an important concern for the multilateral trading system’.\textsuperscript{174}

In the context of the European Union, the EU Courts and the Commission are well-known for predicking their view that cartel activity thwarts by its very nature the objectives of the EU competition system, and more precisely the goal of market integration.\textsuperscript{175} Ruling on appeal in \textit{PO/Elevators and Escalators}, one of the most (in)famous cartel cases of recent times, the General Court reiterated that cartels are among the most serious breaches of Article 101 TFEU. The Court added that:

‘apart from the serious distortion of competition which they entail, such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the isolation of those markets, thereby countering the EC Treaty’s main objective of integrating the Community market’.\textsuperscript{176}

This quotation emphasizes that market-sharing agreements are usually considered as egregious violations, as they contravene the two main goals that the EU competition systems: competition-efficiency and market integration. Agreements to share the market are frequently based on the rule of non-intrusion in the national industry and they only benefit domestic companies.\textsuperscript{177} Their direct

\textsuperscript{172} Other international initiative is for example the International Competition Policy Advisory Committee (ICPAC) which was formed in November 1997 to address the global antitrust problems of the 21st Century. Following the completion of its work, the Committee was officially disbanded in June 2000.

\textsuperscript{173} The Working Group was established as a result of the Singapore Ministerial Conference of the WTO (1996) ‘to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework’. Interestingly, the document also highlights that cartels ‘impose heavy costs on consumers and user industries, and thereby also on the development prospects of poor countries; that the magnitude of harm caused particularly by international cartels has recently been shown to be greater than was previously known; and that cartels proliferate wherever countries lack legislative and other tools to deal with them’.


\textsuperscript{175} See infra Chapter 4.

\textsuperscript{176} General Court 13 July 2011, T-151/07, \textit{Kone and Others v Commission}, not yet reported.

\textsuperscript{177} For a more detailed description of market-sharing agreements supra Chapter 2, section 5.3.1.2.
object and result is the elimination of the exchange of goods between the Member States concerned. By protecting their home market, the agreement allows producers to pursue a unilateral commercial and pricing policy in that market. As a consequence, the market in question will be isolated from the benefits of competition in other Member States. The conclusion of agreements based on quotas directly endangers trade between Member States from the moment the sales quotas are applied.  

The Commission also commonly stresses the damage caused by cartels:

‘Cartels are particularly harmful to European industry and consumers. They diminish social welfare, create allocative inefficiency and transfer wealth from consumers to the participants in the cartel by modifying output and/or prices in comparison with market-driven levels. Cartels are harmful also over the long run. Engaging in cartels to avoid the rigours of competition can result in the creation of artificial, uneconomic and unstable industry structures, lower productivity gains or fewer technological improvements and sustained higher prices. Furthermore, the weakening of competition leads to a loss of competitiveness and threatens sustainable employment opportunities. For all these reasons, the detection, prosecution and punishment of secret hardcore cartel agreements is one of the central elements of the Commission's competition policy’.  

In stark contrast with the earlier vision of cartelization as an admirable practice necessary to stabilize and equalize conditions in a particular industry, at present there is a complete consensus on its detrimental nature and damaging effects. Since the hostile reactions against cartels seem to be strongly based on their inherent harm, the economic effects resulting from cartel conduct are explored next.

2. The harm of cartels

From the dawn of modern market economies it has been recognized that cartel activity can significantly damage economic development. As ADAM SMITH observed, ‘people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise price’.  

An important step in understanding the real nature and impact of cartels is, therefore, ‘overcoming the knowledge gap concerning the harm done by hard core cartels’.  

2.1. Allocative efficiency, consumer welfare and cartels

Economic models conceive two basic types of markets: competitive markets and monopolized markets. In competitive markets, it is assumed that there are different sellers competing against each other without colluding on price. In the case of a monopolized market, there is only one firm

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178 According to E. COMBE AND C. MONNIER more than 75% of cartels adopted market allocation mechanisms, which include production quotas and customers, products, and/or geographic area allocations. E. COMBE AND C. MONNIER, “Cartels in Europe: Main features”, 2010 (2) Concurrences, 23-31, at 28 (hereafter: ‘E. COMBE AND C. MONNIER, “Cartels in Europe”’). The high frequency of market allocation can be explained because the existence of national barriers to entry in Europe before the adoption of the single European market, may have facilitated the creation of these “mutual respect pacts”. See for example, S. BRENNER, “An empirical study of the European corporate leniency program”, 2009 (27-6) International Journal of Industrial Organization, 639-645, at 644 (hereafter: ‘S. BRENNER, “An empirical study”’). In addition, as it is explored below (section 5.3.) market allocation agreements allow to detect cheating attempts.  


determining the market price. The great majority of product markets are located somewhere between both extremes. Although true monopolies and perfect competition are uncommon, these constructions are useful to explain what actually occurs in many real markets and to illustrate the consequences of diminished competition.  

When there is perfect competition, due to the abundance of producers, prices set above marginal cost will be undercut by a competitor which will increase its sales. In this sense, competitive rivalry forces prices to be set at marginal costs. Such price will be the market price for all consumers, even for those who are willing to pay more (i.e. with a higher reservation price). The fact that these inframarginal consumers \(^{183}\) pay a lower price than they are willing to pay, creates what is called “consumer surplus”. \(^{184}\) Consumer surplus is the difference between the total amount that consumers are willing and able to pay for a good or service and the total amount that they actually pay (i.e. the market price for the product). On the other hand, producers do also benefit by selling their goods at a market price that is higher than the lowest price they would be willing to offer, which maximizes producer surplus. Shortly said, in perfectly competitive markets, where price is equal to marginal cost, allocative efficiency is achieved. At the ruling market price, consumer and producer surplus is maximized: no one can be made better off, without making some other agent at least as worse off. In economic terms it is then said that the conditions for the optimal allocation of resources under a Pareto model are satisfied.

The shift in a market from (relatively) competitive to (relatively) non-competitive can take place in two main situations. On the one hand, a dominant firm can acquire monopoly power. On the other hand, producers in a market can engage in a cartel, thereby agreeing to stop competing against each other. Both actions will have a comparable harmful impact on consumers and market efficiency. Monopolies maximize their profits by reducing output and increasing prices. The more expensive product will be sold to inframarginal consumers who valued the item more and are still willing to pay the supra-competitive price.  

Cartels aim at increasing collective profits by adopting the monopolist’s strategy of limiting production in order to increase prices. The most successful cartels are potentially capable of raising prices from the competitive level to the monopoly level. However, as observed, the alternative to cartel activity is not perfect competition. Instead, the counterfactual market price is normally above the competitive price (although below the cartel price). Similarly, in practice, cartels face obstacles that make it difficult to raise prices to the monopoly level. \(^{186}\) In particular, cartel participants have to be careful in choosing a coordination strategy that does not put the stability of the agreement at risk. If the difference between the cartel price and the counterfactual price is too large (i.e. when the cartel price is too high) companies outside the cartel will be tempted to enter the market motivated


\(^{183}\) “Inframarginal consumers” are those consumers who give a value on the original product that is substantially higher than the original price. In this sense, these consumers are relatively insensitive to price increases which are needed to fund a change in product quality. Even if, according to their valuation of the product, the improvement does not warrant the additional cost, they will not reduce their consumption of this product.


\(^{185}\) Ibid.

\(^{186}\) *Infra* Chapter 2, section 5. See also K. S. MARSHALL AND S. H. KALOS, *The economics* 46-47.
by attractive profits.\(^{187}\) In addition, this situation may create incentives for cartel members to deviate from the cartel agreement.\(^{188}\) In other words, in order to succeed a monopolist must only prevent market entry, while cartelists must also manage the risks “inside” the cartel. If cartels are successful, although they will normally not be able to raise prices to the monopoly level, they will set the cartel price somewhere between the counterfactual market price and the monopoly price, thereby increasing profits.

The technique of reducing output and raising prices has two main consequences.\(^{189}\) In the first place, consumers who had a higher reservation price and are still willing to purchase the product, will have to pay more and, accordingly, will have less capital to spend on other products. This capital extracted by the cartel will be redistributed among the parties and is equivalent to the harm of cartel activity on the remaining buyers. Put otherwise, there is a direct transfer of wealth from consumers to producers.\(^{190}\) Moreover, whenever cartelists are capable of increasing price successfully, rivals that are not part of the cartel could benefit from softened competition and, motivated by additional profits, charge higher prices too. This is generally known as the “umbrella effect” of the cartel, which logically leads to more consumer harm.

The second effect of cartel pricing is related to allocative inefficiency, which involves both a loss for consumers and a loss for producers. These losses result from the reduction in sales and output. For consumers, this loss follows from their withdrawal from the market due to an extremely high price. In particular, they have to give up consumption of the cartelized product to purchase a less valuable or inferior substitute. For producers, the diminished output means they are operating at suboptimal levels. Labor and plant resources will thus become redundant and remain inoperative. This efficiency loss is called “deadweight loss”. This harm or deadweight loss fully reflects allocative inefficiency caused by the cartel in the sense that no wealth or potential benefits are transferred to other agents of the economy.\(^{191}\)

### 2.2. Other efficiency aspects: productive and dynamic efficiency

In theory, the relationship between innovation and competition is kind of paradoxical. On the one hand, a competitive market environment provides the basic incentives for companies to innovate. On the other hand, firms are motivated to innovate because, by doing so they may escape competitive pressure.\(^{192}\) The positive effects that competitive rivalry can have on innovation have been

\(^{187}\) The presence of barriers to entry enhances the ability of monopolists and cartels to raise prices while not fearing that price-reducing competitors’ come into the market.

\(^{188}\) The theory of cartel stability is discussed in more detail below (section 5.1).


\(^{190}\) Not all antitrust commentators agree that this transfer represents a sort of harm that antitrust law should be concerned with. Theorists associated with the Chicago school believe that this transfer is efficiency-neutral and, therefore, should be of no concern to antitrust. Other scholars (who consider that antitrust law is concerned with consumer protection) see this wealth transfer as significant harm. K. S. MARSHALL AND S. H. KALOS, The economics 46-47; J. M. CONNOR, Global Price-Fixing 44-45.

\(^{191}\) This welfare loss may be significant in size, particularly if the price increase is large and demand is very elastic. J. M. CONNOR, Global Price-Fixing 44-45.

\(^{192}\) However, it has been argued that in some cases competition may lower firm’s profits and the level of funds available to invest in innovation. See S. Ahn, “Competition, Innovation and Productivity Growth: A Review of Theory and
confirmed by several studies.\textsuperscript{193} Cartel conduct by definition eliminates, or at least reduces, the competitive pressure that motivates firms to invest in research and development, improve their products and ultimately increase productivity. Furthermore, cartels may also have a negative impact on product and process innovation. When cartels are successful and produce high profits, the cartel participants are normally interested in maintaining the agreement functioning. This naturally implies that firms will have to invest in mechanisms designed to support and enhance the coordination of their collusive behavior. If firms have to spend their resources in the maintenance of the cartel, they will logically have to reduce (if not suppress) other types of investments, such as research and development. While low innovation in products inevitably has a long lasting impact on both quality and variety, low innovation generally limits improvements in internal efficiency and, thereby, productivity. Moreover, it is interesting to note that cartels parties are not only demotivated to innovate; they actually conceive innovation as a threat for the stability of the agreement and its success. Accordingly, cartelists will not only not pursue innovation in an active way, but may attempt to reduce it if necessary.\textsuperscript{194} In the very best scenario, if any type of innovation is sought, this will be done gradually and at high prices, to ensure that it does not undermine the stability of the agreement. If a non-cartel company plans to introduce an innovative product in the market, the cartel may try to acquire the new technology in order to suppress it, control its introduction, or organize an attack to the firm holding the technology if the acquisition offer is rejected.\textsuperscript{195} Although there is limited empirical research on the link between innovation and cartel activity, some studies demonstrate that cartels slow down productivity and innovation.\textsuperscript{196}


\textsuperscript{195} This was, for instance, the case Commission Decision of 21 October 1998 (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel) [1999] OJ L 24/1. See also infra section 5.3.

\textsuperscript{196} See for example P. MOLLGAARD, “Calculation of Damages in the District Heating Pipe Cartel” in B. LYONS (ed.) \textit{Cases in European Competition Policy: The Economic Analysis}, Cambridge, Cambridge University Press 2009, 510 p., 159-176. P. MOLLGAARD, for example, affirmed that the Danish pre-insulated pipe cartel delayed innovation in this sector. J. M. CONNOR argued that cartels reduce industry efficiency through lower process innovation. J. M. CONNOR, “Price Fixing”. In contrast, SYMEONIDIS finds no apparent effect between collusion and innovation. This also reasons that this may be because cartel tends to emerge in sectors with relatively homogenous products, with a low level of innovation is low and a limited the scope for innovation (G. SYMEONIDIS, “Price Competition, Innovation and Profitability: Theory and UK Evidence”, \textit{CEPR Discussion Paper} 2816 (2001)). However, there are also a few defenders of the idea that cartels increase(d) efficiency and productivity. S. WEBB commented that cartels lower demand fluctuations which reduces the riskiness of capital intensive technologies. As a result, companies are more willing to invest in new technologies (S. WEBB, “Tariffs, Cartels, Technology and Growth in the German Steel Industry, 1879 to 1914”, 1980 (40-2) \textit{Journal of Economic History}, 309-329). In the case of export cartels it has been argued that this activity can be beneficial for the domestic economy because it allows exporting firms to exploit possible market power in export markets and/or achieve efficiency gains by centralising common sales activities. Even though export cartels might be beneficial for the hosting country, the harm from the cartel is most likely displaced to foreign buyers. (For a discussion of the effects of export cartels see, for example, A. R. DICK, “Are Export Cartels Efficiency-Enhancing or
In light of the issue of innovation and productivity, it has been observed that when firms’ owners cannot control the market performance and the effort of managers, the cartelization of an industry may weaken internal inefficiency in the whole sector, including also non-cartel companies.\textsuperscript{197} The objectives of managers and owners within a firm are in fact not always aligned. For example, achieving a specific profit target without misbehaving will certainly require more effort from managers (i.e. the real decision makers) than from owners. In the case of cartel firms, internal inefficiencies may emerge when managers decide not to invest (legitimate) efforts to achieve a target, but instead chose to collude. Internal inefficiencies may also emerge if owners increase the managers’ incentives to engage in cartel activity by setting a higher performance-based target. From a more general perspective, the idea that cartels reduce productivity also follows from the fact that fierce competition increases productivity and efficiency.\textsuperscript{198} If competition is eliminated or reduced, it is thus highly likely that innovation and productivity also diminish.

3. Reasons to form cartels

3.1. Cartels as solutions for declining industries

The notion that cartels emerged as a normal reaction to periods of economic depression, characterized by poor financial performance, high uncertainty and elevated risks in the markets, has been prevalent for a long time. Economic crises typically induce demand falls and, as a consequence of the decline, companies need to quickly adjust their structure and performance to the new conditions. This process of adaptation can be incredibly costly and, logically, firms that are less prepared to quickly adjust, tend to be eliminated by the competitive process.\textsuperscript{199} Moreover, it is possible that the struggle for survival leads to cutthroat competition and price warfare.\textsuperscript{200} When firms engage in the so-called ‘wars of attrition’, their only objective is to induce their rivals to give up and exit the market. In this scenario, firms are very much willing to wait and suffer economic losses to push their rivals to exit the market. In such a context, firms use their best efforts to avoid closing plants and giving up market shares which would, otherwise, increase their costs. Mutually recognizing the undesirability and devastating consequences of this situation, companies may


\textsuperscript{198} See also supra Chapter 1, section 1.

\textsuperscript{199} It has been frequently argued that government intervention can be justified on efficiency grounds to adjust industrial processes. See e.g. J. P. NEARY, “Intersectoral Capital Mobility, Wage Stickiness, and the Case for Adjustment Assistance” in J. N. BHAGWATI (ed.) \textit{Import Competition and Response}, Chicago, University of Chicago Press 1982, 420 p., at 39-67; M. MUSSA, “Government Policy and the Adjustment Process” in J. N. BHAGWATI, (ed.) \textit{Import Competition and Response}, Chicago, University of Chicago Press 1982, 410 p., at 73-120. Furthermore, G. B. RICHARDSON supports the idea that restrictive agreements should be permitted in certain cases and even argued that “[w]here the losses from the maladjustment of capacity to demand are likely to be serious, then it may be desirable to permit firms (or oblige them) to co-ordinate their investment plans, subject to some control designed to ensure both that aggregate capacity is planned in accordance with the best estimate of future demand and that the more efficient firms have an opportunity to expand their share of the total market”. See G. B. RICHARDSON, “The Theory of Restrictive Trade Practices, 1965 (17-3) \textit{Oxford Economic Papers, New Series}, 432-449, at 439 (hereafter: ‘G. B. RICHARDSON, “The Theory of Restrictive”’).

\textsuperscript{200} This situation is especially likely to occur in industries characterized by increasing returns to scale and/or high fixed costs (and thereby high costs of exit and entry).
engage in cartels by agreeing on prices and production levels. This choice was in effect seen as an alternative to costly adjustment and a means to combat drastic price-cutting applied by companies with excess capacity.\textsuperscript{201} Taking into account these circumstances, it is understandable that collusion was considered a suitable instrument to stabilize the industry by mitigating aggressive competition through the adoption of a unified business response.\textsuperscript{202} Put differently, firms were mainly driven to join cartels by the “obvious need” to protect themselves and the industry in its entirety, and not by a selfish plan to exploit the market. Agreements were commonly designed to safeguard the stability of the market by maintaining prices (thus, helping firms in the declining industries to adjust their activities) and controlling potential entrants and the design of new products.

From a historical perspective, during the last decades of the nineteenth and beginning of the twentieth century, innovation in the area of production technology systems and cost structures was a decisive factor for the emergence of collusion characteristic of the period.\textsuperscript{203} At this time, companies had particularly high fixed costs and a slight economic decline could put at risk the survival of the entire industry. In addition, as demand was particularly unpredictable, adapting capacity to demand was a complicated exercise. Given the combination of high fixed costs and unstable demand, at times, excess capacity made the market price drop below average costs.\textsuperscript{204} The best means to save the industry by combating price drops and excess of capacity was to conclude cartels. This benevolent perception of cartel activity undoubtedly played a significant role in the early history of European cartel tolerance.\textsuperscript{205}

\section*{3.2. Cartels as simple means to increase profits}

Although unsatisfactory financial performance, high risks and market uncertainty are obviously relevant factors when deciding whether or not to engage in collusive agreements, the theory that cartels are only reactions to harsh economic periods is nowadays no longer supported. Contemporary research demonstrates that modern cartels are only likely to emerge when participants believe that their collective profits will be higher if they agree to coordinate their operation in the market than if they act independently.\textsuperscript{206} To be more specific: the initial formation of a cartel will depend on the predicted collusive profits, predicted costs of managing the cartel, and predicted “but-for profits”

\begin{flushleft}
\textsuperscript{203} See e.g. W. LAZONICK, “Industrial Organization and Technological Change: The Decline of the British Cotton Industry”, 1983 (57-2) \textit{The Business History Review}, 195-236; S. B. WEBB, “Cartels, Technology, and Growth in the German Steel Industry, 1879 to 1914”, 1980 (40-2) \textit{The Journal of Economic History}, 309-330. WEBB even argued that the restriction of competition by tariffs and cartels may have contributed to the increase of productivity of the German steel industry by reducing the riskiness of capital-intensive technologies. See also G. B. RICHARDSON, “The Theory of Restrictive” 439.
\textsuperscript{205} See infra Chapter 4.
\end{flushleft}
(i.e. profits in the absence of the collusive agreement). Economic research shows that certain industries contain factors that can favour cartelization, by making it more profitable. When deciding whether to conclude or join an agreement, companies will certainly keep in mind these factors, not only because they will determine whether collusion is attainable, but also because they influence the profitability of the agreement.

In an effort to further clarify the economic and structural factors that contribute to the formation and maintenance of collusion, a study on how to predict cartels prepared for the (former) UK Office of Fair Trading suggested that – once it is demonstrated that a market has an appropriate background for strong collaborative behavior – a number of conditions are key to finally trigger collusion. The authors of the report stress the importance of that higher and safer profits for the formation of cartels. Given the key role of profits for cartel formation, the crucial question according to the authors of the report is ‘why is higher and safer profit an issue for this market at this time?’ They conclude that demand factors are decisive for the formation of cartels in two situations: (i) where there has been a long run decline in demand and/or prices affecting (almost) all companies and (ii) where there is a sudden market shock that affects all market participants.

The report strongly emphasizes the connection between these ‘negative demand factors’, the general decline in prices and cartel formation. Inevitably, in both hypothesis, potential cartel members are likely to have experienced low prices and, thus, low profits. As a result, the potential participants are likely to obtain significant profits by forming a cartel. The decline in prices can take place in an abrupt manner or gradually.

Whereas a gradual price decline may be caused by persistent adverse demand conditions, an abrupt price drop can be triggered by a negative demand shock. When a shock hits all firms in sector simultaneously, each firm will have to assess how to react when each firm is aware that others are in the same situation. In this scenario, the drive to find out how others are responding and to coordinate efforts may be extremely strong, particularly if the industry is favorable to collusion. In addition, when demand is low but is expected to increase, collusion will be profitable and easier to sustain. This is because the maximization of future benefits to compensate current losses is easier when demand is temporarily low.

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207 J. M. CONNOR, Global Price-Fixing 23.
208 The factors conducive of collusion are examined below in section 5.2.
210 P. A. GROUT AND S. SONDREGGER “Predicting cartels” 16.
211 See infra section 5.
212 As experience corroborates, sudden negative market shocks may trigger collusion. There are several examples where abrupt changes have led to the conclusion of a cartel. For example, the Ferry Operators case (Commission Decision of 30 October 1996 (IV/34.503 - Ferry operators - Currency surcharges) [1997] OJ L 26/23) fits this model clearly. In this case the driver was the devaluation of sterling in September 1992, which had a detrimental effect on the profits of five operators. Despite the differing impact on the companies, they each announced identical surcharges in response to the devaluation with a common introduction date and common method of calculation. The French Beef (Commission Decision of 2 April 2003 (Case COMP/C.38.279/F3 — French beef) [2003] OJ L 209/12) and German Banks (Commission Decision of 11 December 2001 (Case COMP/E - I/37.919 (ex 37.391) [2003] OJ L 15, 21/1) are other good examples in this regard.

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Similarly, prolonged adverse demand conditions may make collusion attractive because it might help companies to limit economic damage. In some cases, negative demand conditions are likely to produce excess capacity.\textsuperscript{213} Taking into account the costs and difficulties to restructure the industry on the one hand, and the fear of exit on the other hand, engaging in cartels could be a lucrative option.\textsuperscript{214}

This discussion shows that nowadays firms are not motivated by altruistic reasons when they decide whether or not to collude. No firm will engage in a cartel if it considers that it will be better off (in the economic sense) without colluding. Just like in the past, adverse economic conditions will certainly play an important role as a factor influencing the decision to engage in cartels, but not because cartels are ‘knights in shining armor’ prepared to save the industry, but because they necessarily have an impact on how much profit can be obtained by cooperating.\textsuperscript{215}

4. Empirical studies of overcharges

Empirical investigations have demonstrated that a great majority of cartels are capable of successfully raising prices. The increase in prices for customers deriving from an effective cartel is commonly known as an ‘overcharge’. The overcharge rate is calculated by comparing the prices charged during the cartel period with appropriate competitive benchmark prices. This benchmark is referred to as the “but-for price”, \textit{i.e.}, the market equilibrium price that would have been applicable in absence of the collusive conduct.\textsuperscript{216} These counterfactual or ‘but-for prices’ are difficult to observe and, therefore, need to be carefully estimated. The estimates of the overcharge are normally specified as a percentage of the counterfactual price.\textsuperscript{217}

It seems pertinent to stress that although at first sight, cartel overcharges may give an indication of the level of profitability of the agreement, this equation is not that straightforward. As it is examined below, the organization and functioning of a cartel normally involve very costly mechanisms, which diminish the final amount of benefit that is divided among the participants. In this sense, cartel

\textsuperscript{213} However, excess capacity may have been built expressly, with the purpose of capturing market share. The impact of prolonged adverse conditions is reflected in many cases, e.g. \textit{Petrochemicals} (Commission decision of 27 July 1994 (IV/31865 - PVC II) [1994] OJ L 239/14), \textit{Seamless Steel Tubes} (Commission Decision of 8 December 1999 (Case IV/E-1/35.860-B seamless steel tubes) [2003] OJ L 140/1) and \textit{Graphite Electrodes} (Commission Decision of 18 July 2001 (Case COMP/E-1/36.490 — Graphite electrodes) OJ L 100/1).

\textsuperscript{214} Several cases show that intense competition precedes cartel formation. This was typically generated by the expansion – through acquisition and/or the building of new capacity – of one of the members or by the entry of a new rival. See e.g. \textit{Citric Acid} (Commission Decision of 5 December 2001 (Case No COMP/E-1/36 604 — Citric acid) [2002] OJ L 239/18), \textit{Methionine} (Commission decision of 2 July 2002 (Case C.37.519 — Methionine) [2003] OJ L 255/1), \textit{ Vitamins} (Commission Decision of 21 November 2001 (Case COMP/E-1/37.512 — Vitamins) [2003] OJ L 6/1), and \textit{Plasterboard} (Commission Decision of 27 November 2002 (Case COMP/E-1/37.152 — Plasterboard) [2005] OJ L 166/8).

\textsuperscript{215} As it is seen below, this idea is strongly supported by empirical studies which corroborate the profitability of collusion (section 4).

\textsuperscript{216} J. M. CONNOR, “Price Fixing” 5. ‘This benchmark may be the purely competitive price, or it may be a somewhat higher price generated by legal tacit collusion by companies in an oligopolistic industry’.

\textsuperscript{217} For example, if the cartel price is €125 and the counterfactual price is €100, the overcharge would be 20% (€25 is 20% of €125). However, some studies present the overcharge as a percentage of the cartel price. In this case, it is a simple exercise to rebase the overcharge in order to show it as a percentage of the cartel price using the following rule: the overcharge as a percentage of cartel price = the overcharge as a percentage of the counterfactual price / (1 + the overcharge as a percentage of the counterfactual price). See OXERA, “Quantifying Antitrust Damages. Towards Non Binding Guidance For Courts”, Study Prepared for the European Commission, December 2009, at 89, (hereafter: ‘OXERA, “Quantifying Antitrust”’ available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf}
profitability – in the accurate sense of the word – can only be examined case by case. Nonetheless, overcharge calculations do not only provide relevant indications of the level of cartel benefits. The overcharge also reflects the direct damage inflicted on the customers of the product in question.\(^{218}\) The fact that such harm requires quantification stresses even more the importance of the calculation of cartel overcharges in the context of private damages actions.\(^{219}\) With respect to public enforcement, the calculation of overcharges also plays a significant role. In fact, certain principles of the fining guidelines (of the Commission or NCAs) can only be justified (at least to some extent) by the size of cartel overcharges.\(^{220}\) This aspect is also intrinsically linked to the issue of the calculation of penalties with a sufficient level of deterrence.\(^{221}\)

There is some literature assessing how effective cartels are raising prices.\(^{222}\) The following table summarizes the results of a number of empirical studies that considered overcharges in multiple cartel episodes.\(^{223}\) The median overcharge estimates vary from 14% to 45% of the counterfactual price and the average overcharge ranges from 8% to 53% of the cartel price.

\[^{218}\text{Although the term ‘customers’ refers in this context to direct buyers (who are usually industrial companies) customers of cartel companies may be able to pass-on the cost of cartel overcharges to buyers in the lower supply chain. In this case, final consumers may end up being the victims of the cartel. The degree of pass-through depends on various factors.}\\textit{Competition:} if there is perfect competition in the downstream market, if all sellers are affected by the overcharge, and if the cartelized product affects variable costs rather than fixed costs, cartel overcharges will be fully passed on (although there may be some time lapse). \\	extit{Demand characteristics:} pass-through rates will vary substantially depending on the detailed parameters of demand. \\	extit{Pricing contracts:} if price contracts are cost-plus based, pass-through rates will be 100%. However, if contracts have a long duration, pass-through is limited or delayed.}\\textit{M. Trier Damgaard, P. Ramada, G. Conlon and M. Godel, “The Economics of Cartels: Incentives, Sanctions, Stability, and Effects”, 2011 (2-4) Journal of European Competition Law & Practice, 405-413, at 412; Oxera, “Quantifying Antitrust”}\)

\[^{219}\text{See Oxera, “Quantifying Antitrust” 89.}\)

\[^{220}\text{See further Chapter 10 and Chapter 11.}\)


\[^{222}\text{A cartel episode is a period during which the terms of the agreement remain generally unchanged. As it is examined below cartel participants often need to renegotiate their agreement to address changes in the market environment. For instance, new participants can join the agreement, the geographic area may change, market shares can be (re)negotiated, etc. The delineation of cartel episodes is often characterised by a return to more competitive pricing conduct. J. M. Connor, “Price Fixing” 18.}\)
Some precautions should, however, be taken when interpreting this empirical information. In particular, one must keep in mind that the data described in the table does not necessarily offer a representative sample of cartel overcharges. Instead, this information is based on published estimates for price overcharges. This aspect hinders the examination of the impact of current enforcement tools on cartel overcharges. CONNOR AND LANDÉ (2008) only cite a few estimates for price-fixing cases from the 1970s. WERDEN (G. J. WERDEN, “The Effect”) cites 14 studies examining cartel operations after 1974, the first year in which cartel could be prosecuted as felonies in the United States. M. C. COHEN AND D. T. SCHEFFMAN, “The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?”, (27-2) 1989 Journal of Criminal Law, 331-366 (hereafter: ‘M. A. COHEN AND D. T. SCHEFFMAN, “The Antitrust”’).

In essence, when the number of selections is low, the study in question will generally not be representative. In addition, the selection should respect quality considerations. For instance, if only the estimates of the most harmful cartels are taken into account, the study will not be representative.

226 M. C. LEVENSTEIN AND V.Y. SUSLOW, “What Determines Cartel Success”.
230 Overcharge studies commonly quantify the overcharge as a percentage of the counterfactual. In contrast, in the report prepared for the Commission by OXERA (OXERA, “Quantifying Antitrust”), overcharges are considered as a percentage of the cartel price.
231 J. M. CONNOR, “Price Fixing”.
234 This is indeed the case for some of the studies cited in the table. GRIFFIN’s study used data on cartels operating from 1888 to 1984, most of which operated during the interwar period and were also legal. This aspect hinders the examination of the impact of current enforcement tools on cartel overcharges. COHEN AND SCHEFFMAN (1989) only cite a few estimates for price-fixing cases from the 1970s. WERDEN (G. J. WERDEN, “The Effect”) cites 14 studies examining cartel operations after 1974, the first year in which cartel could be prosecuted as felonies in the United States. M. C.

<table>
<thead>
<tr>
<th>Study</th>
<th>Number of cartel episodes</th>
<th>Overcharge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Griffin 224 (1989) private cartels only</td>
<td>38</td>
<td>39%</td>
</tr>
<tr>
<td>Cohen and Scheffmann 225 (1989)</td>
<td>5-7</td>
<td>14%</td>
</tr>
<tr>
<td>Levenstein and Suslow 226 (2006)</td>
<td>22</td>
<td>45%</td>
</tr>
<tr>
<td>Werden 227 (2003)</td>
<td>13</td>
<td>18%</td>
</tr>
<tr>
<td>OECD 228 (2003)</td>
<td>13</td>
<td>14%</td>
</tr>
<tr>
<td>Connor and Lande 229 (2008)</td>
<td>674</td>
<td>25%</td>
</tr>
<tr>
<td>Oxera 230 (2009)</td>
<td>114</td>
<td>18%</td>
</tr>
<tr>
<td>Connor 231 (2010)</td>
<td>1.089</td>
<td>23%</td>
</tr>
</tbody>
</table>

Source: J. M. Connor (2010) and London Economics 232
One of the most comprehensive and representative compilations is the study conducted by J. CONNOR (2010). There are two main reasons why the estimates of this paper can be considered reliable. Firstly, the study is fairly recent and, therefore, also includes contemporary cartels which adequately reflect the (current) harmful impact of this activity. Secondly, the results are based on a significant number of cartel episodes which implies that issues of sample selection are less likely. J. CONNOR’s impressive work surveys almost 600 published economic studies and judicial decisions, dating from 1888 to 2009, which contain 1517 quantitative estimates of cartel overcharges that belong to 381 cartels. The primary finding is that the median episodic cartel overcharge for all types of cartels over all time periods is 23.3%. J. CONNOR highlights that the overcharge is lower for cartels with domestic membership (17.2%), and higher for international cartels (30.0%). Accordingly, international cartels have been about 74% more effective raising prices than domestic cartels. Only 6.8% of the examined cartel cases were unsuccessful. Interestingly, as regards overcharges found in Commission’s decisions J. CONNOR finds a median overcharge of 33.3% and a mean overcharge of 54.5%, based on 58 observations. More precisely, in the pre-1990 decisions (based on 14 observations), a median overcharge of 53% and a mean overcharge of 116% is established, which contrasts with the median of overcharge of 29% and the mean overcharge of 29-39% found after the post-1990 period.

The work prepared for the Commission by Oxera can also be considered another recent and illustrative study. The study firstly collected more than 1000 observations. These observations were filtered according to a quality selection criteria, which reduced the sample to over 114 observations. The results determine a median overcharge of 18% of the cartel price, and a (mean) average overcharge of 20%. Only a 7% of cartels were unsuccessful raising prices.

In conclusion, numerous studies on cartel overcharges confirm that, in a great majority of cases, the overcharge is at least expected to be positive and, very frequently, consists of substantial gains extracted from customers. Cartel profits (in the sense of overcharges) can vary significantly from case to case, and sometimes they can reach very high levels. The median cartel overcharge will normally range from 23% to 25% of the counterfactual price, while the average cartel overcharge ranges from 46% to 49%. The fact that the median value is much lower than the average value, suggests that the size of overcharges can vary significantly and that only a few cartels result in very high overcharges. While a regular cartel will most frequently increase the price by 10%-20%, in certain cases, the cartel will not succeed in raising prices, and in some other instances, the overcharge

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LEVENSTEIN AND V.Y. SUSLOW (“What Determines Cartel Success” (2006)) investigate the determinants of cartel success for both interwar and more contemporary cartels. According to J. M. CONNOR ‘their work represents an unusually reliable compilation of data on mark-ups by contemporary cartels that have been prosecuted’. Finally, an influential OECD (2003) report on private “hardcore” cartels reports on a 2001-2002 survey of its government-members on the economic harm caused by cartels recently prosecuted by the European Commission and several national antitrust authorities (‘OECD: “Competition” 2003’). There is only scarce empirical data supporting these percentages.

236 The observations satisfy the following conditions: (i) the cartels started after 1960; (ii) an average overcharge estimate is available for the entire cartel duration; (iii) the method to calculate overcharge is specified and (iv) the study has been published in peer-reviewed journal or book.
237 It is, however, important to underline that the overcharges are provided as a percentage of the cartel price. This nuance should be taken into account when the results of the different studies are compared (it is not the same to have an overcharge of 20% on a counterfactual of 100 than to have an overcharge of 20% which is already included in the ‘cartel price’). Overcharges expressed as percentage of the cartel price will obviously be lower.
can even amount to more than 100% of the counterfactual price. The fact that only a minority of cartels can raise prices near to a monopoly level is, in effect, an indication of the numerous obstacles that cartels must overcome to be profitable. Due to their illegality, cartel members will have to invest considerable efforts to avoid detection and remain unpunished. As it is easier to keep cartels secret when overcharges are low, this may explain the reluctance of cartel parties to charge extremely high prices. In addition, collusive agreements are characterized by being intrinsically unstable and difficult to sustain. Given this instability, charging considerably high prices can be a risky exercise. By examining the theory of cartel instability, the next section will illustrate the difficulties to form and maintain cartel agreements, as well as the complex mechanisms that must be used to attain profitable results.

5. The economics of cartels

5.1. The theory of cartel instability

In a perfectly competitive industry, market players have no control over demand and cannot influence the level of prices. By definition, this type of markets presupposes free-entry, which implies that the actions of one firm will only have an infinitely small impact on industry supply or product price. In this context there is no reason for competitors to develop a cooperation strategy because, in any case, such plan would not generate any profits. The likelihood that competitors attempt to raise prices by coordinating their behavior in the market will be much higher in an oligopoly, i.e. an industry with few sellers. In a nutshell, when the number of producers in a given market is small, companies will be capable of controlling a substantial share of sales. In this situation, they are in a better position to appreciate that their independent decisions as regards price and output will have a direct effect on the output and prices of their competitors. Likewise, they will perceive that by coordinating their actions, they can be capable of raising their collective profits. The leading approach to oligopolistic markets in the 1950s and 1960s was based on the practice of the Structural school. The Structural or Harvard school commonly maintained that the pricing conduct of oligopolists can be expected to result in high prices, comparable to the prices charged by successful cartelists. In an oligopoly, firms interact under conditions of interdependence. In order to adopt successful business decisions, each firm must take into account the price and output decisions of its competitors and, conversely, each firm observing its competitors will react to any decision on price or output they make. Because oligopolists will adapt their conduct to each other’s behavior, they will have the tendency to compete in a less hostile manner than they would if they operated in a market with a high number of rivals. Within this overall environment of “mitigated competition”, companies will obviously have the inclination to adopt a less aggressive market strategy which, in turn, leads to higher prices. The structural vision assumes, therefore, that

239 Ibid.
241 The structural ideas were based on the economics of oligopoly as originally conceived by E. CHAMBERLIN who argued that “[s]ince the result of a cut by any one is inevitably to decrease his own profits, no one will cut, and although the sellers are apparently independent, the result is the same as though there were a monopolistic agreement between them”. E. CHAMBERLIN, *Theory of Monopolistic Competition* [1933], Cambridge MA, Harvard University Press 1962, 396 p. at 48.
oligopolistic firms are capable of charging supra-competitive prices, without feeling the need to negotiate an agreement.\textsuperscript{242}

The structuralist view that supra-competitive pricing is almost by nature linked to oligopolistic markets was subsequently challenged by the Behaviouralist or Chicago school, which linked supra-competitive pricing to behavioral factors. The main behaviourists ideas were based on STIGLER’s extremely influential article “Theory of oligopoly”, which he wrote in 1964.\textsuperscript{243} The key contribution made by STIGLER’s was the identification of the \textit{unilateral incentive to deviate from an agreement} as the major threat for cooperative behavior. In order to develop a successful cooperation strategy, it is not enough to establish the terms of the understanding; companies must also be capable of maintaining their compromise, even if individual firms have a strong incentive to deviate from the agreement (cheat). To elaborate somewhat, a firm can indeed be tempted to secretly alter the cooperative terms (by, for instance, setting lower prices or producing more output than they had agreed to produce) with the objective of expanding its own sales. If a firm decides to charge a price slightly lower than the ‘cartel price’, its sales can be significantly incremented. Such conduct would certainly be beneficial when the charged price covers the production costs. Whenever companies have a greater incentive to compete rather than cooperate, they would deviate from any cooperative strategy agreed with their rivals. In light of this situation, companies may not be motivated to initiate any cooperation in the first place.\textsuperscript{244}

STIGLER’s finings led to the recognition that oligopolists do not necessarily behave in a non-competitive manner.\textsuperscript{245} In order to be able to cooperate successfully, companies will have to overcome three crucial issues. First, the firms willing to cooperate need to \textit{reach a consensus} on the terms of the agreement. Economic analysis has shown that there are certain structural conditions that reinforce the incentive to cheat on any cooperative understanding.\textsuperscript{246} If these conditions are present in the industry, cooperation is not only unlikely to persist throughout time, but also extremely hard to attain from the outset.\textsuperscript{247} Furthermore, if firms are capable of reaching an agreement, there are two further requirements that are essential to maintain compliance with its terms, especially in light of the individual incentives to deviate. First, the cooperating firms must develop a mechanism to monitor the observance of the terms of the agreement. Second, they must find a credible way of threatening to punish those who cheat on the pact. These mechanisms will assure that firms find it worthwhile to follow the (terms of) the arrangement rather than to deviate from it. Unsurprisingly,

\textsuperscript{242} This approach illustrates the so-called “oligopoly problem”. According to the structural perspective oligopolies are prone to collusion in the economic sense of the word (see also infra this section). In contrast to the economic literature, the legal language differentiates explicit collusion (i.e. cartels) from tacit collusion. The chief difference between these two types of behavior relates to the existence of communication or its absence. When companies explicitly agree, thereby communicating, to charge higher prices they engage in a cartel or \textit{explicit collusion}. On the other hand, the situation where companies in an oligopolistic market, in recognition of their mutual interdependence coordinate (or align) their behavior in an independent manner, without communicating to reach an agreement (for example as a natural reaction to the market conditions) is described as \textit{tacit collusion}.


\textsuperscript{244} See J. B. BAKER, “Two Sherman Act section 1 dilemmas: parallel pricing, the oligopoly problem, and contemporary economic theory”, 1993 (38-1) \textit{The Antitrust Bulletin}, 143-219, at 150-151 (hereafter: ‘J. B. BAKER, “Two Sherman”’).

\textsuperscript{245} See also e.g. K.G. ELZINGA, “New Developments on the Cartel Front”, 1984 (29-1) \textit{The Antitrust Bulletin}, 3-26, at 6-7 (“the lesson that collusion was not inevitable in oligopolies may also have been suggested by the complexity of the express agreement to fix prices uncovered in the electrical equipment industry around 1960”).

\textsuperscript{246} See G. J. STIGLER, “A Theory” 49.

\textsuperscript{247} See \textit{infra} this Chapter, section 5.2.
STIGLER arguments had a profound impact on the economic perception of coordinated behavior among oligopolists.\textsuperscript{248} Since the publication of STIGLER’s 1964 landmark article, further progress in economic theory has deeply contributed to the understanding of oligopolistic conduct. Regardless of the importance of the economic insights developed during the recent decades, the following discussion shows that G. J. STIGLER’s finding of the three decisive conditions for successful cartel cooperation (\textit{i.e.} (i) reaching an understanding on the terms of the agreement, (ii) detecting deviation and (iii) punishing that deviation) are still at the center of modern analysis of cartel behavior. The remainder of this analysis describes the more contemporary economic insights into cooperative conduct.

\textit{Game Theory}

Even though oligopoly as a concept can be correctly situated between the models of perfect competition and monopoly, it cannot be examined by using these static models. A proper study of oligopolistic markets necessarily requires instruments that can consider the constant interaction between competing companies. With the appearance of new industrial organization, new instruments to explore and predict oligopolistic and interdependent behavior were developed. The revolutionary \textit{theory of games} constitutes now a crucial economic tool to analyze markets entailing industrial concentration.\textsuperscript{249} Game theorists envision market behaviour as a game where the competing agents are rational players in the market which aim to maximize their profits. The whole point is to find a possible equilibrium, \textit{i.e.}, a combination of (individual) strategies that represent, at the same time, the best strategy for each player.\textsuperscript{250}

From the point of view of modern economic theory, G. J. STIGLER’s study of business cooperation was based on a model known as a “one-shot game”. This is a static game setting in which each firm can only “move once” without knowing the moves of the rest of the players.\textsuperscript{251} In the market context, this means that to determine their business behavior, companies will only have one decision to make and two choices: (i) to cooperate with their competitors or (ii) to compete independently. As examined, G. J. STIGLER observed companies confronted with this situation face a conflict of interests. While initially a collective (profit) incentive encourages collusion, strong private incentives will motivate firms to deviate from any coordinated scheme. This uncertain situation becomes even more complex when companies realize that other cartel parties are in the same


\textsuperscript{249} The groundbreaking work that created the interdisciplinary research field of game theory was firstly published in 1944 by J. VON NEUMANN AND O. MORGENSTERN (J. VON NEUMANN AND O. MORGENSTERN, \textit{Theory of Games and Economic Behavior}, Princeton, NJ, Princeton University Press, 1980 (original 1944), 648 p.). However, their work did not receive much interest until the 1970’s. Since then, game theory has been evolving and today is in effect considered the primary instrument to study oligopolies.

\textsuperscript{250} See also Chapter 8, section 1.

\textsuperscript{251} The one shot game models constitute the simplest form of non-cooperative game theory. Game theory is divided into two different branches: the \textit{non-cooperative} branch and the \textit{cooperative} branch. In cooperative games competitors are allowed to communicate and make binding agreements. Since the “oligopoly problem” is precisely that firms do not need to communicate to collude (thus, in the sense of tacit collusion) oligopolies are normally analyzed using non-cooperative game theory. See S. STRoux, \textit{US and EC oligopoly control}, The Hague, Kluwer Law International 2004, 290 p., at 13 (hereafter: S. STRoux, \textit{US and EC}). For an analysis of both branches of the game theory see J. W. FRIEDMAN, \textit{Oligopoly and the Theory of Games}, North-Holland, Amsterdam 1977, 311 p. (hereafter: J. W. FRIEDMAN, \textit{Oligopoly}).
situation and, thus, have similar incentives. From the perspective of the game theory, the model of a “prisoner’s dilemma” illustrates the choices that oligopolists have in the market game, and their respective pay-offs.\textsuperscript{252} If a company decides to charge the cartel price (cooperate) while all its rivals do the same (cooperate), the group’s profits are in effect increased. However, if a company charges the cartel price (cooperate) while all its rivals compete (cheat), it may lose demand in a dramatic way, which means that it will be substantially worse off than if it had charged the competitive price. On the other hand, a firm can charge a competitive price (cheat) and if its rivals charge the cartel price (cooperate), the demand of the ‘cheater’ will substantially increase and, thereby, its profits. If all companies cheat, they would all earn lower profits than if they all had charged the ‘cartel price’. Just like STIGLER pointed out, when firms face this situation, the outcome of the dilemma will be that each company will believe that cooperation is too risky. The individual incentives that firms have to cheat are very strong and, thus, the possibility that firms will cheat is high. In addition, the uncertainty about the decisions of the other competitors, added to the harming consequences of cooperation (if a company is the only one charging the cartel price), lead to the final conclusion that deviation from the agreement will be the dominant strategy.\textsuperscript{253}

However, the evolution of economic theory has demonstrated that it is preferable to study oligopolistic business behaviour from a dynamic repeated game perspective, rather than from the static one-shot game framework used by STIGLER.\textsuperscript{254} Firms operating in real markets do not only interact one time with their competitors. On the contrary, they are well aware of the fact that they will “play the game” repeatedly with the same rivals. A given market player will thus be able to monitor the strategies that its competitors followed in the past and base its decisions on their previous behavior. As a consequence, in a repeated game, the outcome or “equilibrium” cannot be seen as a unique “one-time” outcome, but rather as the result of a process of interaction.\textsuperscript{255}

The most widely studied repeated games are games that are repeated an infinite number of times.\textsuperscript{256} In contrast to the situation where agents interact only once, any collectively beneficial outcome can

\textsuperscript{252} The Prisoner's Dilemma starts from the premise that two crime suspects are arrested, but the police does not have sufficient evidence to convict them. Each prisoner is interrogated separately and the police offers both a similar deal: if one testifies against his partner (deviate), and the other remains silent (cooperate), the “betrayal” will not be convicted and the cooperater will receive the full one-year sentence. If both remain silent (cooperate), both will be sentenced to only one month in jail for a minor charge. If each betrays the other (deviate), each will be sentenced for three-months. Each prisoner must choose to betray or to remain silent. The concept of the prisoners’ dilemma was originally investigated by RAND Corporation scientists Merrill Flood and Melvin Dresher and was later formalized by Albert W. TUCKER (A. W. TUCKER, “A Two-Person Dilemma”, unpublished notes, Stanford University, May 1950, hereafter: A. W. TUCKER, “A Two-Person”).

\textsuperscript{253} The irony of this situation is that this dominant strategy is not the most profitable outcome from a collective point of view. In economic terms, the best combination of unilateral strategies of each firm to maximize profits, given the strategies chosen by the other competitors, is known as the Nash equilibrium. In this equilibrium, neither of the firms has an incentive to change its (unilateral) strategy, considering the behaviour of the other firms. The Nash equilibrium of the prisoner’s dilemma is however “Pareto inferior”, meaning that from a collective perspective it is not the best outcome. The Pareto optimum combination would be that all firms charge the cartel price and by doing so maximize their collective profits. See S. STRoux, US and EC 14.

\textsuperscript{254} It seems interesting to highlight that the decisive instruments for the success of collusion as identified by STIGLER (i.e. reaching an agreement, and monitoring and punishing deviations) necessarily imply that collusion can only be sustained if firms interact repeatedly in the marketplace. There is in effect no way to monitor and punish deviations when firms only interact once. From a game theory perspective, collusion will thus not feasible in a one-shot game. This interpretation also shows that collusive behavior should be analyze on the basis of repeated games. See also M. MOTTa, Competition 139.

\textsuperscript{255} See also J. B. BAKER, “Two Sherman” 154.

\textsuperscript{256} Repeated games are known as “oligopoly super-games”. As observed, the game can be played infinitely or for a limited number of times but without knowing when the last game will take place. In contrast, models in which games
be achieved and maintained as an equilibrium when agents interact repeatedly and infinitely. 257 The point of departure for this reasoning will again be the oligopoly model as conceived by STIGLER. As observed, oligopolies reflect a conflict of interests (individual incentives to compete versus a collective incentive to cooperate), the pay-offs of which are represented by the Prisoner’s dilemma. When firms only interact once, the overriding strategy is that each firm will deviate. Nevertheless, this situation changes if this scenario is transported into a model of infinite interaction between competitors. The fact that firms interact repeatedly and infinitely and that they recognize this situation, may modify the player’s preferences and thereby the solution of the dilemma. 258 Agents may, thus, realize that the optimal method of playing a repeated game is not by repeatedly using the same strategy they would use in a “one-shot game”, but by cooperating and “playing” a collective optimal tactic. Although the Prisoner's dilemma has only a one-time equilibrium (all firms defect), cooperation can be sustained in the repeated Prisoner’s dilemma if the players are interested enough in future outcomes of the game. 259 In other words, to decide whether to cheat or to stick to the collusive agreement, a firm will have to consider and compare the short-run profits following from deviation with the medium and long-term gains flowing from cooperation. In order to secure the unprofitability of deviation from the agreement and, thereby the stability of the cartel, it is still essential that deviation can be quickly detected and that credible punishment mechanisms exist to offset the potential profits from deviation. 260 261

Modern economic theory offers a perception of oligopolies that appears more prone to cartel practices than STIGLER’s reasoning suggested. In effect, this discussion has shown that, in contrast


258 A formal statement of this fact is known as the Folk Theorem. The Folk Theorem states that when players are patient enough a cooperative outcome that satisfies all the features required by a Nash equilibrium can be reached under the moder model of a non-cooperative game. See further D. FUDENBERG AND J. TIROLE, Game 152-154.


260 The earlier vision assumed, in contrast, that since firms are as a general rule more interested in future profits (than in the short run profits) they would automatically charge the cartel price. The reasoning behind this assumption was that if a firm would decide to cheat, it will never receive the cartel benefits in the future because its rivals will never be willing to cooperate again. This implied that firms only had two choices: to cheat one time and then forever compete or to desist from cheating and obtain the cartel rewards. Unless a company is only interested in the present and short term profits it will commonly opt for the second choice and never deviate from the agreement. As all firms have a similar motivation, they will charge the cartel price and none of them will ever cheat. Developments in economic theory (since the folk theorem) have demonstrated that the existence of detection and punishment mechanism can make the (re)emergence of cooperative possible, even after a firm has cheated. See J. B. BAKER, “Two Sherman” 155; C. SHAPIRO, “Theories of Oligopoly Behavior” in R. SCHMALERSEE AND R. WILLIG (eds.) Handbook of Industrial Organization, New York, Elsevier 1989, 329-414.

261 See S. STROUX, US and EC 14. STROUX comments that “[a]s punishment is costly also for the punishing firms, the punishing firms need to possess or be able to produce low cost excess capacity in order to lower the prices. While below cost pricing might not constitute a credible threat for punishment, as the punishing firms also have to suffer losses, the threat to return to competition instead might be convincing. This strategy is however only credible if it is more profitable for the punishing firms to return to competition than to passively accommodate, i.e. allowing the cheating firm to deviate. To enhance the credibility of punishment firms can tie their hands by making irreversible (sunk) investments, i.e. in order to acquire excess capacity, or commit themselves to most favored customer clauses or meeting competition clauses in sales contracts’.

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with STIGLER’S almost tolerant vision of oligopolies, this type of markets may in fact lead to supra-competitive pricing when such conduct is seen as the (coordinated equilibrium) outcome of a repeated game. Notwithstanding this perception, STIGLER’S insights remain crucial in the economic context of repeated game models. When companies plan to coordinate their behavior, they must first solve the three issues entailed in the cartel problem as originally identified by STIGLER: they must (i) establish the terms and conditions of the cooperative understanding, (ii) monitor deviation and (ii) credibly threaten and effectively punish deviation. These three conditions cannot be implemented – in a profitable manner – in every market environment. In fact, certain industries may contain factors that favor cartelization by facilitating it and make it more profitable but may also comprise elements that hinder it up to the point of making it unfeasible. The factors conductive of collusion are examined under the next heading. This examination is not only useful to illustrate the remarkable efforts that firms must undertake to collude. It can also be helpful to identify industries that are susceptible to cartel formation and thereby facilitate the proactive detection of cartels.

5.2. Cartel formation: factors conductive of collusion

Cartel companies have proved to be quite efficient devising techniques to facilitate reaching a consensus on the terms of the agreement and, subsequently, maintaining its stability. In this context, the features of the market play a decisive role because they will influence the level of profitability of the agreement, thus determining whether collusion is an advantageous choice for companies. More precisely, the conditions of the industry will typically have an impact on two different aspects. First, they influence the profit differential between the ‘cartel profits’ and the ‘but-for profits’. Second, they also have an impact on the cost of the operation of the agreement. For example, it seems reasonable to assume that reaching a consensus and maintaining it will be more costly in a market with a high number of firms than in a market with only two companies. Initial negotiations (and subsequent monitoring and enforcement) are typically more complex and, therefore, require more costly techniques when ten parties negotiate than when only two firms are involved. In the light of this, it can be concluded that, in theory, a market with a small number of competitors facilitates collusion, as it is the case of oligopolistic markets.

Economic literature has identified a range of structural factors that tend to make the formation of cartels easier and, therefore, more probable in certain sectors. In a study on the use of economics for cartel detection, P. REY classified structural factors into three categories: (i) basic structural variables; (ii) supply-related factors and (iii) demand-related factors. Basic structural variables that ease collusion are: a low number of competitors, high entry barriers, frequent interaction between

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262 As it has been examined above, modern cartels are only likely to emerge when companies calculate that their collective profits will be higher if they cooperate than if they choose to compete independently. This calculation will, thus, need to take into consideration the predicted collusive profits, predicted costs of managing the cartel, and predicted “but-for profits”. See supra this Chapter, section 3.2 and 4.

263 R. SELTEN investigated the connection between the number of competitors and the inclination to cooperate. SELTEN argued that few suppliers will maximize their joint profits whereas many suppliers are likely to behave non-cooperatively. According to his analysis the dividing line between “few” and “many” is 5, meaning that if the number of firms is higher than 5 firms in SELTEN’s model it will be more profitable to compete independently (which in turn further reduces the gains for the cartel participants). R. SELTEN, “A Simple Model of Imperfect Competition Where Four are Few and Six are Many”, 1973 (2-1) International Journal of Game Theory, 141−201.

264 This approach was originally developed by STIGLER and subsequently refined by others. See e.g. R. A. POSNER, Antitrust Law, Chicago and London, University of Chicago Press 2001, 304 p., Chapter 3; D.W. CARLTON AND J. M. PERLOFF, Modern Industrial Organization, New York, HarperCollins 1994, 672 p., Chapter 5; P. A. GROUT AND S. SONDEREGGER “Predicting cartels”.

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firms and market transparency. Demand side factors typically include market growth, absence of significant fluctuations, low demand elasticity, buying power and the absence of network effects. Finally, supply-related conditions comprise mature industries (with stable technologies), symmetric costs, symmetric capacities, product homogeneity, multi-market contact, structural links and the existence of contractual agreements.  

This brief discussion illustrates that there is an extensive catalogue of factors capable of affecting potential benefits and costs of cartel practices and, therefore, their likelihood. Although these factors may help to identify the markets in which collusion is considered more or less appealing for companies, their presence in a given industry constitutes no full guarantee of finding a cartel. The existence of structural conducive factors in a market simply indicates that the probability of finding a cartel in such an industry may be higher than, for instance, in an industry with completely different conditions. In addition, real industries are often characterized by factors facilitating of collusion and factors which may hinder it. As experience has shown, cartels can thus emerge in markets with mixed structural conditions. Given the caveats of this approach, it has been commented that structural assessments do not offer a clean selection of the markets in which in-depth investigations are worthwhile.  

An important limitation of the structural approach is that economic literature mainly focuses on tacit collusion which, in contrast to common modern cartels, lacks explicit coordination mechanisms such as information exchange. It can be argued that explicit cartels and tacit collusion share many common features, because in both cases, companies must have adequate incentives to reach and maintain an agreement.  

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266 See also for a similar discussion K. HUSCHELRATH, Competition Policy Analysis: An Integrated Approach (ZEW Economic Studies), Heidelberg, Physica-Verlag HD 2008, 530 p., at 90 (hereafter: ‘K. HUSCHELRATH, Competition Policy’).  

267 See e.g. J. HARRINGTON, “Detecting Cartels”. Working Paper, Johns Hopkins University 2004, Baltimore (revised in 2005), at 3, available at https://www.competitionpolicyinternational.com/assets/Uploads/Detecting-Cartels.pdf. J. HARRINGTON explains the weakness of the structural approach with an example: ‘imagine the “ideal” market for collusion: two firms, homogeneous products, stable demand, no large buyers, excess capacity, and so forth. Even though such a market would surely be flagged by a structural investigative tool, my own prior belief is that a very high fraction of those markets are not cartelized. Based on what we know (which, admittedly, is only discovered cartels), the frequency of collusion in most economies is rather low. Hence, given a low prior probability of collusion, the posterior probability - conditional on all those structural variables taking values conducive to collusion - is still probably quite low’. See also M. C. LEVENSTEIN AND V.Y. SUSLOW, “What Determines Cartel Success” LEVENSTEIN AND SUSLOW observe that although case study confirms in several cases the presence of structural factors facilitating collusion, their importance will vary from case to case.  

268 WHINSTON observes that ‘[t]he difficulty, however, is that most of the factors that one might think of here have ambiguous effects, because a factor that makes coordination easier is likely to make coordination easier both when the firms talk and when they don’t’. M. WHINSTON, Lectures on Antitrust Economics, MIT Press 2008, 261 p., at 30 (hereafter: ‘M. WHINSTON, Lectures’). M. MOTTAS explains that, ‘in economics, collusion is usually referred to as a situation where the prices charged by undertakings on a specific market are higher than a certain competitive benchmark. A slightly different definition would label collusion as a situation where firms set prices which are close enough to monopoly prices. In any case, in economics collusion coincides with an outcome (high-enough price), and not with the specific form through which that outcome is attained’. As this description shows, economic theory does not take into account whether companies communicate or not in order to be able to charge the higher prices. M. MOTTAS, Competition
implement the collusive agreement. Nevertheless, it should be acknowledged that if tacit collusion and cartels (i.e. explicit collusion) were facilitated by exactly the same market factors and lead to equal gains, firms would logically prefer to collude tacitly and avoid detection. In fact, explicit cartel agreements entail several advantages compared to tacit collusion. It is generally accepted that by communicating, firms are able to reduce the three main impediments for cartel success (as originally identified by Stigler). If firms communicate, reaching a consensus on the (terms of) coordination and adjusting the agreement when it is necessary, will be considerably easier. In addition, regular communication and information exchange among firms increase market transparency, meaning that companies will be able to monitor adherence to the arrangement. In turn, regular and effective monitoring can lead to swift and more effective punishment of deviators. These differences between explicit agreements and tacit collusion should be considered in the analysis of structural conditions facilitating the emergence of cartels. A crucial point is to identify the factors which have a positive impact on communication. A larger impact is associated with (more) decisive factors. In accordance with this approach, it is also possible to develop efficient pro-active detection methods.

One of the most elaborated works that takes into account the need to differentiate tacit collusion from explicit cartels is the study on how to predict cartels conducted by P. A. Grout and S. Sonderregger. Interestingly, these authors observe that the need for cartel members to communicate is more intense when the agreement is harder to sustain. This indicates that firms may have a greater motivation to engage in overtly collusive practices specifically in those circumstances that are considered as adverse to collusion from an economic point of view. It is, thus, possible that an analysis of structural factors based on economics (and hence on tacit collusion) leads to opposite results than studies following an empirical approach. The project ‘Predicting cartel’ demonstrates, however, that this is not necessarily the case for all market factors. P. A. Grout and S. Sonderregger explain that there are crucial factors that will help to find markets that are prone to cartelization. These market factors are identified in their study and categorized in three groups: (i) fundamental background, (ii) collaborative evidence and (iii) the “why and where” conditions.

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269 See e.g. P. Rey, “On the Use” 71.
271 Reaching a (tacit) understanding is one of the major issues in the context of tacit collusion because when firms do not communicate, it is extremely difficult to reach a consensus on essential aspects like, for instance, what is the optimal level of prices or the adequate quantity to produce. In order to “tacitly agree” on a price to charge firms will have to use the market signals to indicate their intentions, which can be an incredibly costly strategy. If a firm considers that the collusive price should be higher, it will have to indicate it by firstly taking the initiative to increase its own price. This will lead to a decline in its individual demand until the other firms follow the price increase. On the other hand, if a firm considers that the collusive price should be lower, it should set a lower price to signal it which could be interpreted as cheating and thus might a trigger punishment techniques like a costly price war. See M. MotTA, Competition 141.
272 See also M. Whinston, Lectures 30-31; K. Hüscherlath, Competition Policy 92.
273 P. A. Grout and S. Sonderregger “Predicting cartels”.
274 P. A. Grout and S. Sonderregger “Predicting cartels” 9.
275 This work follows three different approaches. The first one consists of a study of the economic theoretical literature to identify factors that influence cartel stability and formation. The second is empirical and evaluates recent evidence of legal cases and economic data. The final approach undertakes a number of case studies. The findings of the three approaches are then collected and analyzed collectively to draw final conclusions. P. A. Grout and S. Sonderregger “Predicting cartels”.

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Fundamental background factors can be seen as the basic requirements for cartel formation in a market. If such elements are not present in the industry in question, explicit collusion will (almost) be unfeasible. These basic conditions concern three core issues. The first central question relates the homogeneity of the product in the industry. It appears that when the product is fairly homogeneous between companies, cartels are far more likely to emerge. In contrast, considerable product differentiation has the opposite effect. The second issue is whether the industry displays volatile turnover over a sustained period of time. When output and market conditions are generally stable, the presence of cartels is more likely. P. A. GROUT AND S. SONDEREGGER clarify that the lack of volatility does not preclude occasional market shocks, but this is not the norm. Similarly, the lack of volatility does not imply a constant turnover, but when there is a decline, it is likely to be persistent. The final issue is whether the market shares of leading companies are relatively constant. Theory and case studies indicate that important or regular changes in market shares (and/or market entrants) diminish the likelihood to find cartels. In contrast, if the market agents are stable throughout years, the presence of cartels is more probable. A market that scores high on at least two out of these three fundamental conditions is likely to favor collusion.

Furthermore, studies have identified an additional set of factors associated with cartelization. Although none of these features are considered essential – and cannot replace the fundamental factors – a market where ‘collaborative evidence’ is strongly present indicates that cartels may exist. These conditions include: relatively high transparency, comparatively high payroll per employee, a low number of large firms in the industry, high barriers to entry and evidence of excess capacity. Finally, the report concludes that if a market has a fundamental background and strong collaborative evidence is present, the existence of overcharges on that precise moment should be further investigated. This question is called the “why and when” issue. The suggestion that cartels can exist in industries where the three fundamental background elements are strongly present, seems reasonable from an intuitive point of view. The propensity to address a decline in the industry with a collective business response is likely to be higher when products are relatively homogeneous, volatility is limited and firms are familiar with each other.

Taken as a whole, the report shows that certain market factors are indispensable for the emergence of cartels, whereas others can facilitate their formation and stability. Although predicting collusion solely on the ground of these factors will be rather complicated, in the context of competition law the presence of these conditions combined with other detection tools (such as complaints) can be

276 See P. A. GROUT AND S. SONDEREGGER “Predicting cartels” 15.
277 The ranking in econometric model shows that there are 8 industries where the probability of finding at least one cartel lies above 50%. The industries are telecommunications, manufacture of aircraft and spacecraft; manufacture of grain mill products, starches and starch products; legal, accounting, bookkeeping and auditing activities; tax consultancy; market research and public opinion polling; business and management consultancy; and cargo handling and storage. P. A. GROUT AND S. SONDEREGGER “Predicting cartels” 8.
278 As examined above, there are two categories where there is good evidence that demand factors are decisive for the formation of cartels: (i) where there has been a long term decline in demand and/or prices affecting all or almost all companies and (ii) where there is a sudden market shock that affects all companies in the market. See P. A. GROUT AND S. SONDEREGGER “Predicting cartels” 16.
279 However, the study highlights that “the why and when” category can only focus on some factors that will be critical. The absence of these factors does not imply that a cartel is unlikely to emerge. Whereas the fundamental background and collaborative evidence could almost be seen as a “check list”, the ‘why’ and ‘when’ questions do not seem decisive. See P. A. GROUT AND S. SONDEREGGER “Predicting cartels” 17.
280 For a more detailed analysis of this detection tool see Chapter 7, section 2.
helpful to assess whether the risk of finding a cartel in a given market is significant. If this is indeed confirmed, a deeper investigation into the industry will probably be necessary.

5.3. The need to reach a unanimous goal and the outcome of collusion

Experience has shown that the elimination of competition by cartel companies is an important challenge which requires much more than an attractive structural environment. The first obstacle that firms must overcome for the success of their initiative is reaching a unanimous consensus on the (terms of the) strategy that will be used to reduce competition. The question now is: how do firms conclude an agreement in practice? Reaching a common understanding can be a difficult because companies do not completely set aside their individual interests to focus on the collective goal. Moreover, cartel members have varying visions as regards the type of agreement and cooperation terms that are most appropriate to limit competition. Finally, markets normally comprise characteristics that facilitate collusion but also factors that tend to hinder it. Accordingly, cartel participants have to invest significant efforts and create sophisticated mechanisms to surmount the difficulties deriving from both their individual vision and the obstacles of the market.

To better understand the complex nature of cartel practices, the subsequent discussion delves deeper into cartels and explores how the most common forms of collusive agreements – namely, price-fixing, market allocation and output limitation – function in practice.

5.3.1. Price-fixing agreements

While raising prices (and thereby profits) can generally be seen as the ultimate objective of cartel participants, there is a large list of initiatives that can be agreed on to support this purpose. The most straightforward strategy for cartelists to influence prices is to engage in the classic price-fixing agreement. However, as is illustrated by the practice of the Commission, price-fixing agreements rarely exist in isolation from other anti-competitive techniques. Most frequently, agreements on prices are used in combination with market allocation and/or output limitation arrangements, which taken as a whole are intended to achieve and maintain the desired level of prices.

As observed, price fixing agreements are principally designed to raise the market price of products or services above the competitive level in order to obtain economic profits in the form of cartel rents. Very often, this type of agreement is quite complex and elaborated, and can adopt several

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282 Given the great number of methods and (ancillary) techniques used by cartel firms to restrict competition, this analysis does not intend to provide an exhaustive overview of such strategies, but to offer some finer details on the efforts undertaken by companies to cooperate in practice and their strong resolution to do so.

283 See e.g (Summary of) Commission Decision of 20 July 2010 (Case COMP/38.866 — Animal feed phosphates) [2011] OJ C 111/19, para 8). ‘The aim of the cartel was to share a large part of the European feed phosphates market by allocating sales quotas to cartel members, as well as coordinating prices and, to the extent necessary, sales conditions’. In DRAMs the Commission found that ‘contacts among certain suppliers took place relating to output/capacity strategy as well as to spot pricing, exclusively in order to support and/or favour price coordination. Overall, the purpose of contacts among competitors was, in a rising market, to maximize the supplier profit, and, in a falling market, to keep prices from falling too quickly’. See non Commission Decision of 19 May 2010 (COMP/38511 – DRAMs) [2011] OJ C 180/15, paras 28-29 of the summary decision and para 114 of the non-confidential decision.

284 For an overview of the different types of price-fixing practices see e.g. F. RUSSO, M. P. SCHINKEL, A. GÜNSTER AND M. CARREE, European Commission Decisions on Competition Economic Perspectives on Landmark Antitrust and
Besides agreements setting a concrete price level, cartel companies can take part in price fixing activity by, for instance, determining only certain components or parts of the price, setting minimum prices, agreeing on target prices or ‘recommended’ prices, or establishing a percentage of price increase. Furthermore, firms may also reach an understanding on the elements that will have a more lateral (but still direct) impact on prices. These aspects can include a wide range of trading conditions, such as discounts and rebates, (sur)charges for ancillary services, commission and interest rates or other credit terms. A classic price fixing cartel is commonly characterized by a comprehensive mix of these restrictive practices. All the different forms of price-fixing will, in any case, have the effect of reducing the total number of prices that producers can charge, which in turn deprives customers of their bargaining capacity over price. In addition, as will be examined bellow, the elimination of price variety entails additional advantages for cartelists.

Most cartelists initiate their cooperative relation by agreeing on a list of uniform prices among them. The scope and level of precision of the price lists can vary greatly from agreement to agreement. While in some cases firms agree on one single price per product or service, other cartelists include a number of different prices, which are frequently set according to the special characteristics of the product, the buyer and the selling company. Two of the most common techniques consist of, on the one hand, setting (a list of) minimum prices which allows cartel participants to charge higher

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286 In the industrial tubes industry, the total price of the product results from a metal (copper) price element, based on the London Metal Exchange index, and a conversion price corresponding to the value added in the manufacturing company. In the Industrial tubes cartel, accordingly, price cooperation related to the conversion prices. See Case COMP/E-1/38.240 – Industrial tubes [2004] OJ L 125/50, paras 96-97. In Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate [2006] OJ L 353/54, para 337, fixing target prices was an important component of the agreement.
287 In the Airfreight cartel, the main goal of the cartel members was to ensure that these surcharges were introduced by all the carriers involved and that increases (or decreases) of the surcharge levels were applied in full without exception. By refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers. See Commission, Press Release IP/10/1487, “Antitrust: Commission fines 11 air cargo carriers €799 million in price fixing cartel”.
290 For example, the participants of the Lysine cartel contemplated the market on a global level and fix only a single price. See Commission Decision of 7 June 2000 (Case COMP/36.545/F3 — Amino Acids) [2001] OJ L 152/24.
291 See e.g. Commission Decision of 9 December 1998 (IV/34466 - Greek Ferries) [1999] OJ L 109/24. In Greek Ferries the Commission found that a number of ferry operators had fixed prices for several years. Prices were fixed for each line and for each type of vehicle. In Citric acid (Case COMP/E-1/36 604 [2002] OJ L 239/18), on the other hand, five cartel undertakings agreed to set only two prices: a price for regular customers and a discounted price for select larger customers. In Candle Waxes prices were agreed upon for specific customers (see Commission Decision of 1 October 2008, Case COMP/39181 – Candle Waxes [2009] OJ C 295/17, para 107). The Vitamins cartel (Case COMP/E-1/37.512 — Vitamins) [2003] OJ L 6/1, para 284) fixed target and minimum prices, depending on whether the products were destined for human consumption and non-human consumption. See also E. HARRINGTON, “How Do Cartels Operate?”, Economics Working Paper Archive 531, The Johns Hopkins University, Department of Economics 2006, at 7 et seq (hereafter: ’E. HARRINGTON, “How Do Cartels”’).
prices.\textsuperscript{292} and on the other hand, setting target prices, which are meant to be charged after a given period of time.\textsuperscript{293}

Agreeing on a price list can be rather simple for firms when such the arrangement concerns products (or services) with an acceptable degree of homogeneity.\textsuperscript{294} Reaching a common view regarding prices for products like acid, for instance, should normally not entail major difficulties.\textsuperscript{295} As examined above, the more homogeneous the product, the easier it will be for firms to come to an understanding on a specific price level.\textsuperscript{296} On the other hand, fixing prices becomes more complex for cartel members when the product has different (quality) variants. This issue will be more or less relevant depending on the type of product, the specific consumer preferences and the technology constraints of the firms to provide a wider range of products.\textsuperscript{297} When setting prices becomes too complicated, cartelists may have the tendency to change their cooperation strategy by, for instance, agreeing to allocate market shares or sales quotas.\textsuperscript{298} However, in other cases cartel members address this question by attempting to create a maximum degree of compatibility of products. Sometimes, firms dedicate extensive efforts to this challenging exercise. They can agree to supply only a selection of standardized products and then set a price for each of them.\textsuperscript{299} Standardizing products will not only facilitate the process of reaching a consensus on price, but additionally, can be very useful to prevent the so-called “quality cheating”. This last strategy consists in essence in deviating from the agreement by offering higher product quality for the same price than the rest of the cartel members. As a probable consequence, the demand of the firm in question will increase, thereby destabilizing the cartel.\textsuperscript{300} Another possible solution devised by cartelists to agree on common prices

\textsuperscript{292} The Commission notes in \textit{Candle Waxes}, (Case COMP/39181 [2009] OJ C 295/17, para 107) that negotiations concerned both price increases and target prices for specific customers and general price increases as well as minimum and target prices for the whole market. See also Commission decision in \textit{Citric acid} (COMP/E-1/36 604 — [2002] OJ L 239/18, para 80). In the \textit{Citric acid} case ‘the cartel pursued four main objectives, namely the allocation of specific sales quotas to each member and their adherence to those quotas; the fixing of target and/or ‘floor’ prices; the elimination of price discounts; and the exchange of specific customer information’. In the \textit{Methionine} cartel (Case C.37.519 — [2003] OJ L 255/1, para 68). For other cases where minimum prices were fixed see e.g. J. FAULL AND A. NIKPAY, \textit{The EC Law of Competition} 754-755.

\textsuperscript{293} See e.g. Commission Decision in \textit{Industrial tubes} (Case COMP/38354 — [2004] OJ L 125/50, para 100). In this case price increases target were established per customer category and country.

\textsuperscript{294} Compare \textit{supra} section 3.2.

\textsuperscript{295} J. M. CONNOR observes, in this context, that ‘[t]he expected collusive price may be one of the easier items upon which agreement can be made. An approximate notion of the elasticity of market demand and knowledge about substitutes at anticipated cartel enhanced price levels will usually suffice’. J. M. CONNOR, \textit{Global Price-Fixing} 23.

\textsuperscript{296} This was, for instance illustrated by the \textit{Amino Acids} case (Case COMP/36.545/F3 — [2001] OJ L 152/24), in which the cartel participants were able to fix one single price for the market product.

\textsuperscript{297} See E. HARRINGTON, “How Do Cartels?” 9.

\textsuperscript{298} See generally this Chapter, section 3.1.

\textsuperscript{299} In its decision in the \textit{Special Graphite} case, the Commission states that ‘[i]n order to be able to fix prices according to equivalent categories of products, the parties established an appropriate Product Grouping Standard. This classification of grades was done in accordance with the product applications: EDM (electro discharge machining), CC/GP (continuous casting/ general purpose) and Semiconductors. Much effort was devoted to obtaining a proper classification (the issue recurrently appeared on the agenda of meetings)’. Commission Decision of 17 December 2002 (Case C.37.667 — \textit{Speciality Graphite}) [2006] OJ L 180/20, para 99).

\textsuperscript{300} In order to prevent cheating the members of the \textit{Electrical and Mechanical Carbon and Graphite Products} cartel agreed on an interesting principle:’[i]f technically new design is introduced the present market leader has to be contacted before first quotation’. Commission Decision of 3 December 2003 (Case No C.38.359 — \textit{Electrical and mechanical carbon and graphite products}) [2004] OJ L 125/45, para 130). Other interesting case in this context is the \textit{Graphite Electrodes} cartel (Case COMP/E-1/36.490 — OJ L 100/1, para 56). In this case the cartel participants also developed standard products. However, in this case one of the firms, SDK, succumbed to the temptation of cheating by introduced a higher quality. According to the Commission other producers objected because this product was priced in line with a cheaper product. Subsequently, ‘SGL and UCAR allegedly put pressure on SDK to either stop selling the product or price it in line with [the higher quality offered]. Eventually production of this model by SDC was discontinued […]’.
when products are not homogeneous, is to focus on the most common or basic product and then establish a pricing formula to calculate the product price based on its specific characteristics. This technique was successfully used, for instance, in the *Electrical and Mechanical Carbon and Graphite Products* cartel. In this case, cartel members developed an extremely sophisticated method for the calculation of the price of products, by referring to a number of objective factors, including: the price of raw materials, the size of the product and the number of components it included. This formula intended to enable each cartel participant to calculate the price of its own products in a way that a uniformity of the prices was guaranteed, notwithstanding the differences between products. It is particularly remarkable that the effectiveness of the pricing rule was such that it even allowed for quantity discounts and dealt with currency issues. The issues deriving from the existence of multiple currency regimes stresses the need to address exchange rates, especially in the context of international cartels. If differences in prices across countries are considerable, this could give rise to arbitrage opportunities for companies outside the cartel because resellers would purchase the product in the country with the lowest price to, subsequently, resell it in other country where the price is higher. As a result of these practices, the average transaction price will not only diminish but, the stability of the agreement can also be at risk if a firm established in a country where the price is low sells more and vice-versa.

Furthermore, cartelists will need to deal with customers that have considerable buyer power or are in a relevant bargaining position. Ordinary consumers, who only purchase in a limited manner, will normally pay the price of the (cartel) list in their transactions. In contrast, major buyers often expect a discount given that they purchase large quantities and have contracts on a long term basis. Cartel companies are well aware of this situation and, frequently, include in their agreement a list of common prices as well as a series of *ad hoc* negotiated discounts. However, over time, non-negotiable price lists (maybe encompassing discounts) or an established set of discounts, commonly become the general approach. This tendency to allow fewer discounts and to enhance price

These competition concerns about standardisation agreements are well reflected in the recently published Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ([2011] OJ C 11/1). In this policy document the Commission recognises that ‘standardisation agreements usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefitting economies as a whole (footnotes omitted)’. However the Commission also emphasizes that through this type of cooperation agreements companies may also collude. More specifically, the Commission states that ‘if companies were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome on the market. See Guidelines on the applicability of Article TFEU 101 to horizontal cooperation agreements ([2011] OJ C 11/1), paras 263-265.

See also J. M. CONNOR, *Global Price-Fixing* 26.


See E. HARRINGTON, “How Do Cartels” 11; J. M. CONNOR, *Global Price-Fixing* 16 and 30. Frequently, cartels are quite concerned with reaching the so-called harmonization in prices. In *Manufacturers of glass containers* ‘differences in selling prices between producers and between national markets were caused by differences between methods of calculating costs - based in some countries on the weight of the product, in others on the complexity of its manufacture - it was decided to establish a single calculation method [...]’. This method enable[d] its users to reach similar if not identical cost curves’. Commission Decision of 15 May 1974 (Case IV/400 - *Agreements between manufacturers of glass containers* [1974] OJ L 170/1, para. 19-20). Other techniques to avoid arbitration opportunities consist in using the US dollar or the Euro as the benchmark currencies to then adjust regularly price across countries. See also *Graphite Electrodes* cartel (Case COMP/E-1/36.490 — [2001] OJ L 100/1, para 60) and *Amino Acids* (Case COMP/36.545/F3 — [2001] OJ L 152/24).

See e.g. *Copper Plumbing Tubes* (Case COMP/E-1/38.069 – [2006] OJ L 192/21, paras 204 and 207). In this case, with respect to price agreements, three principal elements for setting prices were to be distinguished: (i) price lists, (ii)
uniformity across customers is quite usual, probably because it entails several advantages for the colluding companies. Agreeing on prices requires an intense process of negotiation which can be exhausting as well as very costly. Logically, by reducing the number of prices to be agreed on, cartel members are capable of simplifying pricing discussions and reducing the high cost of collusion. Another important advantage is that a tight price catalogue minimizes the risk of disintegration of the agreement, a risk that is strongly present when firms do not share the same vision on “the optimal cartel price”. Moreover, since price negotiations normally take place in meetings, frequent personal contact may increase the detection probabilities and should be preferably avoided. Finally, limited prices catalogues make it easier to monitor whether the price charged by a firm was appropriate, given the features of the product or/and the type of customer.

The risk concerning the “incentive to deviate” is also deeply patent in price-fixing cases. In effect, while companies are well aware of the importance of controlling price and quality dimensions, cartel participants can find creative alternatives to cheat on the accord. For instance, firms can provide ancillary services at low prices or even offer the collusive product in a package together with other goods, without pricing the additional items. For this reason, in cases where the conditions of sale are not a customary industry practice, cartelists often negotiate a common set of detailed trading conditions. These may include payment dates, price ratios for different quality grades (if any), transportation charges and supply contracts that contain promises to match the price cuts of other sellers (‘most-favored-nation’ clauses) or to ‘meet-or-release’ buyers who find lower prices. All these different practices concerning trade conditions are most commonly used to support collusion, and fall under the category of ‘price fixing’ agreements. Efforts to harmonize trading conditions were, for instance, critical for the functioning of the Fine Arts Auction Houses Cartel and are frequently present in Commission decisions.

Once cartel parties have reached a unanimous understanding on prices, it is understandable that they attempt to eliminate uncertainty as to how such agreement will be implemented. Therefore, price-lines, and (iii) rebates. With respect to rebates, the Commission decision notes that “in order to avoid price erosion through large rebates, the suppliers established guidelines on rebate levels. The plumbing tube manufacturers in the respective national markets divided customers into three or four groups according to size, without, however, discussing individual customers”. See also Citric acid (COMP/E-1/36 604 — [2002] OJ L 239/18); Fine Art Auction Houses (COMP/E-2/37.784 — [2004] OJ L 200/92); E. HARRINGTON, “How Do Cartels” 14-15; J. M. CONNOR, Global Price-Fixing 26.

305 See also J. M. CONNOR, Global Price-Fixing 26.

306 See Fine Art Auction Houses (COMP/E-2/37.784 — [2004] OJ L 200/92, para 76). Given that the companies were competing on several parameters, they attempted to reach an agreement on as many aspects as possible in order to minimize the risk of cheating. More precisely, they agreed to introduce a new “sliding scale” for the vendor’s commission and made it non-negotiable and to monitor the compliance with such scale; not to make advances to vendors on single lots, the setting of minimum interest rates for loans and the limitation of credit terms to trade buyers at 90 days. For more illustrations of decisions fixing trading condition see e.g. Commission Decision of 24 July 2002 (Case COMP/E-3/36.700 — Industrial and medical gases) [2003] OJ L 84/1, para 101. The companies forming the Industrial and medical gases cartel ‘agreed to respect other minimum trading conditions for supplies in cylinders and in bulk. These conditions notably concerned the rent and transportation costs charged to customers. They furthermore agreed to introduce a drop charge for supplies in bulk and a charge for safety and environment on supplies in cylinders. See also Specialty Graphite (Case C.37.667 — [2006] OJ L 180/20), para 100; Electrical and mechanical carbon and graphite products (Case No C.38.359 — [2004] OJ L 125/45), paras 118-119; Industrial tubes (Case COMP/38354 — [2004] OJ L 125/50), paras 102 and 195).

“implementation agreements” regarding the rate, date and place of the implementation are a usual features of cartels. It is interesting to note that while early cases show that price increases used to be abrupt and simultaneous, more recently, they are cautiously planned. In contemporary cartels, company members implement price lists gradually and sequentially. There are good reasons why firms prefer to increase prices in a steady manner and over a certain period of time. In particular, sudden price increases entail important risks for the stability of the agreement for different reasons. Firstly, this conduct may increase the firms’ incentive to deviate from the cartels by charging a slightly lower price. Secondly, the absence of a well-established and firm consensus on price increases could lead to a price war if a firm sets a price at a level that is not easy to maintain by all cartel participants. Furthermore, when prices are raised abruptly, antitrust authorities may become suspicious of the existence of a cartel and be motivated to conduct an inspection. Explicit schedules to slowly raise prices can be found, for instance, in Pre-insulated Pipes.

The Commission’s decisions have indeed shown that cartel firms are highly concerned with detection. In fact to avoid discovery, cartels contain very clear rules regulating in detail how price should be raised in a staggered manner. Normally, one cartel member will take the lead by initiating the raising operation, while the rest of the cartel firms are supposed to adopt the same conduct later on. This can be a matter of days, week or even months later. This practice has been illustrated by numerous cartels. It is interesting to observe that cartelists try to prepare their customers for the increased prices by making public announcements. Despite this impressive level of organization,

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308 See e.g. ECJ judgment of 14 July 1972, C-48-69, *Imperial Chemical Industries Ltd. v Commission* [1972] ECR 619, para 123. Ruling on the appeal in the Dyestuffs case the ECJ pointed out that ‘the fact that the increases were uniform and simultaneous has in particular served to maintain the status quo, ensuring that the undertakings would not lose custom, and has thus helped to keep the traditional national markets in those goods “cemented” to the detriment of any real freedom of movement of the products in question in the common market’.

309 In *Pre-insulated Pipes* one of the cartel members (Tarco) stated that the purpose of the agreement ‘was to increase prices by approximately 30 to 35 % within a period of two years. It was expected there would be gradual increases every quarter […]. Not all companies were supposed to increase their prices by the same percentage at the same time. The usual practice was to have a 6 to 8 % increase per quarter depending on the individual company price list’. (Case No IV/35.691/E-4 — *Pre-insulated Pipe Cartel* [1999] OJ L 24/1, para 58). See also Summary of Commission Decision of 23 June 2010 (Case COMP/39.092 — *Bathroom fittings and fixtures*, [2011] OJ C 248/12, para 5). In *Bathroom fittings and fixtures* prices were increased annually as well as the on the occasion of specific events (such as increase of raw material prices, road toll, introduction of the euro).

310 In *Graphite Electrodes* (Case COMP/E-1/36.490 — [2001] OJ L 100/1) tables circulated, indicating prices increases in each country and currency with the date on which they were supposed to take place (para 62). ‘Price increases were often staggered and came into effect on different dates for different countries or groups of countries. In countries where the product was invoiced in German marks, the price would be increased at the same time as in Germany. The increase in France, Belgium and Luxembourg would normally be at a different date and would for a time bring prices in line across Europe (until the process started again and prices were moved up first in the DEM zone). On occasions, a planned price increase might be postponed’ (para 69). In the *Cartonboard* case, the Commission decision reproduces the statements of the applicant’s managing director relating to the steps taken in order to keep the cartel secret. In response to the question whether all participants knew that notes should not be taken, he stated: […] the cartel members sought to disguise it to a far greater degree than is normal, for example by instituting a system of staggered price increases (Commission Decision of 13 July 1994 (IV/C/33.833 — *Cartonboard*) [1994] OJ L 243/1, para 73). See also Commission Decision of 20 December 2001 (Case COMP/E-1/36.212 — *Carbonless paper* [2004] OJ L 115/1, para 233). ‘At the general cartel meeting of 2 February 1995 the participants also agreed on a system for launching the price increases according to which AWA would lead the price increases and others would follow. As stated in the minutes: ‘AWA will lead announcement of following increases per market. To follow, Koehler AG, Zanders, Stora, Sappi, Torras’. See for other decisions Commission Decision of 30 October 2002 (COMP/E-2/37.784 — *Fine Art Auction Houses*) [2004] OJ L 200/92, paras 109-111; Commission Decision of 01 October 2003 (Case COMP/E-1/37.370 – *Sorbutes*) [2005] OJ L 182/20, para 103).

311 See Commission Decision of 3 September 2004 (Case COMP/E-1/38.069 - *Copper Plumbing Tubes*) [2006] OJ L 192/21, (para 204). In this case the list price was also freely available in the market. The other producers would then generally issue a similar price list within one to two weeks. [...] other suppliers were expected to adapt their prices to
raising prices is never a safe exercise. During the period between the first price increase adopted by
the leader, and the moment when other firms follow such conduct, there is a considerable risk that
the demand of the former declines. This can be quite costly for the firm in question. Moreover, if
the decrease in demand is substantial, the rest of the cartel participants may be reluctant to follow
the leader. As a result, the agreement could be destabilized.\textsuperscript{312} Cartel participants try to prevent this
situation by, firstly, rotating the role of leader among cartel parties and, secondly, by taking the
precaution of checking prior to an actual price increase whether the others are prepared to follow.\textsuperscript{313}

Fixing prices is undoubtedly one of the most common types of cartels. Nevertheless, given the
difficulties in reaching and later implementing the agreement, firms often realize that other strategies
are necessary to make the cartel profitable. A common solution is to (try to) allocate the market.

\subsection*{5.3.2. Market allocation agreements}

If a group of cartelists decides to fix prices at (too) high a level, the individual incentive for firms to
deviate will automatically become stronger. When prices are closed to the monopoly level, such
motivation will be extremely high. Cheating on the price agreement (e.g. by charging lower prices)
may logically increase the market share of a deviating company and, thereby, its individual profits.
However, the overall effect of such conduct on the cartel agreement will be negative, as it will reduce
joint profits. A possible solution to counteract the deviation trend is to assign a certain market share
to each cartel member.\textsuperscript{314} Although cartels can also be successful without a market sharing
agreement, the potential of this practice to strengthen collusion is widely accepted. Moreover, it is
relatively easier to monitor the adherence to market shares than, for instance, to check whether a
firm is offering discrete discounts to particular clients.\textsuperscript{315} Changes in market shares can thus be quite
useful to detect cheating. Finally, companies may also be inclined to engage in market sharing when

\begin{footnotesize}
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\item \textsuperscript{\textcircled{312}} The delay in matching the new non-negotiable rates appeared to be problematic in \textit{Fine Art Auction Houses (COMP/E-2/37.784} – [2004] OJ L 200/92). See also E. Harrington, \textquote{How Do Cartels?} 24.
\item \textsuperscript{\textcircled{313}} In \textit{Electrical and mechanical carbon and graphite products (Case No C.38.359} — [2004] OJ L 125/45, para 101), \textquote{[f]or the new prices to take effect, one of the cartel members would circulate its new price list to customers in the year following the meeting. The other cartel members would follow suit and issue their new price lists over the following weeks or months, thereby trying to create the impression that the companies concerned took their pricing decisions autonomously. The cartel members broadly rotated who would issue their price lists first in each country. Sometimes they also collectively thought up possible explanations they could give to their clients as justification for the price increases’}.\textsuperscript{314} The advantages of market allocation agreements were also recognized by Stigler who argued that \textquote{[f]ixing market shares is probably the most efficient of all methods of combating secret price reductions. No one can profit from price-cutting if he is moving along the industry demand curve, once a maximum profit price has been chosen. With inspection of output and an appropriate formula for redistribution of gains and losses from departures from quotas, the incentive to secret price-cutting is eliminated. Unless inspection of output is costly or ineffective (as with services), this is the ideal method of enforcement’. G. J. Stigler, \textquote{A Theory” 46.}}
\item \textsuperscript{\textcircled{315}} The acknowledge effectiveness of allocation agreements was illustrated, for instance, in \textit{Copper Plumbing Tubes (Case COMP/E-1/38.069} - [2006] OJ L 192/21, para 220). In this case an executive connected to the cartel stated that cartel members chose to fix market shares rather than price, because \textquote{if there was allocation of volumes, prices would follow’}. See also M. C. LEVENSTEIN AND V. Y. SUSLOW, \textquote{’Breaking up is hard to do: Determinants of Cartel Duration’}, Ross School of Business Paper No. 1150, September 2010, at 22, available at \texttt{http://ssrn.com/abstract=1676968}, hereafter: \textquote{’M. C. LEVENSTEIN AND V. Y. SUSLOW, ‘Breaking up’’}).
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\end{footnotesize}
agreeing on stable prices becomes too complicated. This can, for instance, be the case when there are considerable differences among product characteristics and/or asymmetries in cost structures.\textsuperscript{316}

Agreements to allocate markets typically involve the assignation of a given share of the product market (or a sales quota),\textsuperscript{317} the allocation of specific territories within the market, customer groups or specific customers, and even sharing sources of supply.\textsuperscript{318} Furthermore, a market-sharing cartel can consist of one of these techniques or a complex combination of different practice. For instance, cartelists can use exclusive territories and customer allocation to implement a sales quota scheme.\textsuperscript{319}

Market allocation agreements have an extremely adverse impact on competition because, by granting exclusivity in a particular geographic zone, or over a particular customer group, they create an artificial division of the market. Each cartel participant will be sheltered from competition within a predetermined area of the market or as regards a certain customer group. Consumers, on the other hand, may be victims of arbitrary prices. Additionally, agreements allocating market shares or sales quotas involve almost by definition a restriction of output, which inevitably leads to artificial scarcity and higher prices.\textsuperscript{320}

One of the most classic techniques employed by companies to allocate the market is, in effect, by assigning a share of the market. Depending on the type of agreement, shares can consist of a part of total demand or a part of the member’s supply. Furthermore, market shares can be set at different levels: globally, per region or even per country.\textsuperscript{321}

The first issue faced by cartelists when they decide to allocate market shares is (how) to determine which portion of the market will be assigned to each company. It is essential that the members of the cartel first analyze the size of the market in question and share a unanimous vision on this aspect, so that they may then proceed to allocate the market demand. The resulting market allocation scheme will typically become the reference point for other important aspects of the cartel, including the “budget” for the arrangement, the reporting activities and the compensation schemes.\textsuperscript{322}

\textsuperscript{316} See also F. RUSSO et al., European Commission 43-44; compare supra 5.2.
\textsuperscript{317} A market share is the percentage of an industry or market’s total sales that is earned by a particular company over a specified time period. The term sales quota, on the other hand is the minimum sales goal for a set time span. In this discussion the term sales quota is thus used to refer to both an allocation of quantities and of market shares. See also infra this Chapter, section 5.3.1.3.
\textsuperscript{318} For an overview of these practices see e.g. J. FAULL AND A. NIKPAY, The EC Law of Competition 754-755.
\textsuperscript{319} For instance, the Choline Chloride cartel used a system combining these three methods. Commission Decision of 9 December 2004 (Case No C.37.533 — Choline Chloride) OJ L 190/22.
\textsuperscript{320} See A. JONES AND B. SUFRIN, EC Competition 891. See also F. RUSSO et al, European Commission 43-44.
\textsuperscript{321} The Lysine Cartel (Amino Acids) Case COMP/36.545/F3 — [2001] OJ L 152/24, para 77) set quotas for both the global market and the European market. Interestingly, in the Citric Acid cartel (COMP/E-1/36 604 — [2002] OJ L 239/18, para 81) firms first agreed to set a global sales quota for each firm, as the citric acid business is essentially a global market. Little time after having fixed a tonnage figure for each member, this was converted into a market share figure. In Industrial bags (Commission Decision of 30 November 2005 (Case COMP/38354 — Industrial bags) [2007] OJ L 282/41, para 318) and Carbonless paper (COMP/E-1/36.212 — [2004] OJ L 115/1, paras 241-251) sales quotas were allocated at a national level.
\textsuperscript{322} The importance of determining and agreeing on the size of the market has been highlighted in some Commission decisions. See e.g. Vitamins (Case COMP/E-1/37.512 — [2003] OJ L 6/1), paras 163 and 393); Methionine (Case C.37.519 — [2003] OJ L 255/1), para 88; Sorbates (Case COMP/E-1/37.370 — [2005] OJ L 182/20), para 106. In the Sorbates cartel, firms agreed on volume allocations for sorbates sales in Europe. The market was allocated in two ways. First, the producers estimated the total demand in Europe, and then subtracted the estimated sales volume of [non-cartel producers]. The remaining market was divided among them. See J. M. GRIFFIN, “An inside look at a cartel at work: Common characteristics of international cartels” in “Fighting Cartels: Why and How”, Proceedings of the 3rd Nordic Competition Policy Conference, Swedish Competition Authority, 2000 Sweden at 48; available at http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf (hereafter: "J. M. GRIFFIN, “An inside”").
In order to assign market shares (or sales quotas), it is a common practice to take into account pre-existing evidence in this area or what is called “historical shares”. In other words, the partition of the market will frequently be based on the sales of each producer during a preceding year, which is used as a benchmark. To give an example, the *Copper Plumbing Tubes* cartel attempted to stabilize the market by using market shares of each cartelist of a previous year as a basis to determine a target for future market shares. Alternatively, companies can use the average of each firm’s sales during a certain period to, subsequently, set sales quotas. Besides market sharing based on past information, this type of cartels may also involve the allocation of future market growth among cartelists, which should be previously calculated. Once the market is finally divided, cartel agreements typically specify that the assigned market shares among the companies involved must remain unaltered or “frozen”, even of the market changes or evolves.

Although it is frequently assumed that market sharing agreements are (relatively) easy to implement, this certainly does not imply that they escape the deviation threat. Since companies can always be tempted to cheat by exceeding their assigned market share, extremely strict enforcement mechanisms have been developed to frustrate such intention. In order to ensure compliance, two critical elements are present in a great majority of cartels. These are monitoring measures, on the one hand, and systems of prearranged penalties and compensation techniques, on the other hand.

Monitoring cartel compliance can, in some cases, be done based on a rather informal pact, according to which cartel participants must inform each other about the (evolution of the) implementation and the tools used to achieve such objective. Nonetheless, since self-reporting is not the most trustworthy method, cartels use to comprise more elaborated and institutionalised schemes. The *Car Glass* case can illustrate this aspect. The object of the *car glass* agreements was the allocation between the competitors of the supply of car glass pieces to car manufacturers through price coordination and exchanges of sensitive information. In this case, the “big three” (the three largest companies) - Saint-Gobain, Pilkington and AGC - were appointed to closely monitor market shares and actual supply by using their market positions as a reference point for the purpose of the allocation. In particular, at the meetings the competitors made sure that both the individual shares of each brand or vehicle

324 In the *Citric acid* cartel (COMP/E-1/36 604 — [2002] OJ L 239/18, para 81) firms used their individual average of sales over 1988–90 to establish sales quotas one year later. In *Zinc phosphate* (Commission Decision of 11 December 2001 (Case COMP/E-1/37.027 - Zinc phosphate) OJ L 153/1, para 66) “[t]he allocation of sales quotas was the cornerstone of the cartel. Respective market shares were initially calculated in 1994 on the basis of the figures for the years 1991 to 1993’. See also e.g. *Sorbates* (Case COMP/E-1/37.370 – [2005] OJ L 182/20), para 106.
325 See e.g. *Methionine* (Case C.37.519 — [2003] OJ L 255/1, para 88). ‘At a meeting held in Frankfurt in the autumn of 1987, Nippon Soda, Rhone-Poulenc, Degussa and Sumitomo exchanged and compared their respective estimates of the total volume of the world market, gave their opinions as to future incremental market growth and how to allocate quotas between producers’. See also J. M. GRIFFIN, “An inside” 48.
326 It should be noted that these two elements are obviously not only devised for market allocation agreements. As it was examined in the previous subsections, monitoring compliance and punishing deviations are two practices which are considered key to the success of the agreement and, therefore, are also present in price fixing cases and agreements concerning output limitation. However, in the case of market allocation agreements, far more efforts are invested in order to enforce the agreement through monitoring and punishing deviations. In addition, price fixing agreements are often accompanied by market allocation which, again, means that monitoring sales is often far more important than monitoring price compliance. See also E. HARRINGTON, “How Do Cartels” 30–32.
account and the global sales (that is, all vehicle accounts together) remained more or less stable over time.\textsuperscript{327}

Moreover, cartelists often establish compensation measures or even penalties which are applied to the cartel participants who deviate from the agreed terms. When a given enterprise exceeds its assigned market share, one of the classic corrective measures is that the firm in question must compensate the companies which have their sales below their quota by purchasing its product during a certain period.\textsuperscript{328} In cases where a compensation scheme did not exist, enterprises who deviate from (or simply do not accept) the cartel principles, could also be punished through “aggressive market conduct” by the rest of the cartel parties.\textsuperscript{329}

While the assignation of market shares among companies should in principle not be a decisive issue, this question may become more complex when market shares are unstable. If the share of a given company has been growing more and faster than the rest, this company may not be satisfied with the assignation scheme and may, thus, demand a larger share. Also the members of the cartel with lower production cost and/or higher capacity may have the inclination to request a larger quota.\textsuperscript{330}

In this case, reaching a consensus on the allocation of the market shares will require more intensive negotiations and deeper compromises among the cartelists. It is even possible that the leading firms of the market are required to transfer some of their market share in order meet the expectations of the quickly emerging firms.\textsuperscript{331} When it is not possible to reach an agreement only through

\textsuperscript{327} Commission Decision of 12 November 2008 (Case COMP/39.125 — Car glass) OJ [2009] C 173/13, para 508. In Graphite electrodes (Case COMP/E-1/36.490 — [2001] OJ L 100/1, para 55) ‘[f]or the purpose of formalising the exchange of volume information and making the collection of data more efficient, SGL proposed at the ‘Top Guy’ meeting in Tokyo in February 1995 the adoption of a ‘Central Monitoring System’. Tokai was designated by the cartell to collect the data from the Japanese producers, UCAR and SGL. For other structured systems see also Vitamins (Case COMP/E-1/37.512 — [2003] OJ L 6/1), paras 577, 276 and 359; Plasterboard (Case COMP/E-1/37.152 — [2005] OJ L 166/8), para 462; Sorbates (Case COMP/E-1/37.370 — [2005] OJ L 182/20), para 114. In earlier cases, monitoring systems seemed to involve more interfering methods than the usual exchanges of information. In preserved mushrooms, the cartel companies specifically agreed that ‘on request either party will allow the other to check sales, production and dispatch documents’. Additionally, a joint accounting organization was appointed to collect such data for the common information of the parties. Commission Decision of 8 January 1975 (IV/27.039 — preserved mushrooms) [1975] OJ L 29/26, para 4 (e). For a more specific discussion of the level of aggregation in reporting, the accuracy of the reports and the frequency in reporting see E. HARRINGTON, “How Do Cartels” 49-56.

\textsuperscript{328} In Citric acid (COMP/E-1/36 604 — [2002] OJ L 239/18, para 88) ‘[a] compensation scheme was agreed to as a corollary to the quota agreement and in order to penalise those companies selling above their assigned sales quota and at the same time compensate those that did not reach it. If a company went over its assigned quota in any one year, it would be obliged to purchase product from the company or companies with sales below their quota during the following year’. In Car glass (Case COMP/39.125 — [2009] OJ C 173/13, para 112) the Commission observed that ‘[t]he competitors […] needed to apply certain correcting measures in situations where the initial plans of allocation did not work out in the end, including situations where the sales volume for a given car model deviated from the quantities initially forecasted. In particular, correcting measures were put in place to allow the competitors to compensate each other for losses occurred, this maintaining the agreed market-share stability’. Another alternative to compensate the (negatively) affected companies is by adjusting the sharing-out scheme or, simply, by paying an according sum. See e.g. Pre-Insulated Pipe Cartel (Case No IV/35.691/E-4 — [1999] OJ L 24/1), para 35; Zinc phosphate (Case COMP/E-1/37.027 - [2001] OJ L 153/1), para 72. In the Zinc Phosphate case companies selling under their assigned market shares or quota would receive specific customers to compensate.


\textsuperscript{330} This situation, additionally, highlights that asymmetries among cartel firms as regards production costs and capacity, can in effect obstruct the process of reaching an agreement. See also J. M. CONNOR, Global Price-Fixing 29.

\textsuperscript{331} In LCD (Case COMP/39.309 — [2011] OJ C 295/8, para 105), the Commission decision shows that, when the circumstances require it, companies will in effect be willing to transfer their own market shares. (‘The parties discussed
negotiations and discussions, powerful cartel members may be willing to show their discontent by taking more drastic measures. One method is to refuse to engage in the agreement by causing a price war. These “bargaining price-wars” can be used by unsatisfied companies to augment their own market share and, subsequently, use it as a new starting point for the allocation-agreement. The whole point is, thus, to redistribute market shares across cartel members in a manner that is considered “fair”.332

The significant difficulties surrounding the process of reaching an agreement on the distribution of market shares, enlighten why only in very rare occasions (if at all) the conditions initially agreed upon will be definitive. The terms of cooperation will constantly need to be renegotiated because external and internal circumstances affecting the agreement can change. In particular, the cartel may need to be adjusted as a consequence of an unanticipated external shift in product demand but also when cartel members act in a way that was not stipulated in or predicted by the negotiations.333 For example, if companies set prices and allocate sales quotas but do not make any specifications regarding investment plans, cartel members may increase their investment and produce over-capacity. Confronted with this situation, firms will normally only be satisfied with an allocation agreement that allows them to utilize their capacity. Logically, this will require further and more complex negotiations among the cartel members.334 In these cases, exchange of information (on capacity) can be extremely influential to finally determine a market allocation agreement that is consistent with the use of capacity. 335

Cartels can also consist of agreements to allocate geographical areas. The question of how to calculate the shares is frequently dealt with by following the so-called “home-market principle”. According to this standard strategy, cartel participants mutually consent to restrict their sales or


333 See Vitamins (Case COMP/E-1/37.512 — [2003] OJ L 6/1, para 225. ‘In 1994 the rapid increase in demand for vitamin E for human consumption necessitated a revision of the quota allocated to Rhone-Poulenc. To maintain its agreed 16% share of the overall market Rhone-Poulenc had to increase its sales in the animal feed sector. The producers agreed in August 1994 that the Rhone-Poulenc share of the feed segment be capped at 21%; if the agreed increase in quota in that area did not however give Rhone-Poulenc its full 16% overall, the other two European producers would purchase product from it to compensate for the shortfall. Compensating purchases were made by Roche in 1996 and by Roche and BASF in 1997’.

334 See Choline Chloride (Case No C.37.533 — OJ L 190/22), para 95: ‘[a]t a meeting in 4/94, firms failed to agree to anything. Chinook, which has recently started a new plant, would not agree to price floors. Chinook declared it would no longer participate’; see Amino Acids [2001] OJ L 152/24, para 152.

335 See e.g. Amino Acids (Case COMP/36.545/F3 — [2001] OJ L 152/24), para 63. According to HARRINGTON in the Lysine cartel companies invested serious efforts to exchange information on capacities when agreeing on how to allocate the market. ‘ADM even went so far as to engage in the unprecedented act of inviting representatives from Ajinomoto, Kyowa, and Sewon to inspect its production plant. Though doing so ran the risk of trade secrets being revealed (in fact, a representative of Ajinomoto attempted to get a sample of the microbe used by ADM in producing lysine), it was important for ADM to reveal the extent of its capacity and its low-cost of production; both towards assuring that the cartel form and, in that event, that ADM would be allocated a sufficiently large sales quota’. E. HARRINGTON, “How Do Cartels” 32-33.
distribution activities in the home markets of the rest of the participants, or even to withdraw from such markets. The concrete delineation of the “reserved market” will depend on the area of operation of the cartel firm in question. Ultimately, cartelists seek to dominate and protect their (assigned) home market and to share among them the demand which does not fall under any firm’s home market. To achieve this objective, companies can also agree to allocate distribution channels.

The implementation of agreements allocating territories can become quite challenging. Companies may not be willing to renounce to supply in the “home-market” territory of another cartel member. In order to stimulate compliance with such agreement, the home-market producer may be required to purchase some of the other firm’s reduced supply. It should come as no surprise that, from the perspective of EU competition law, this type of agreements has been regarded as one of the most serious violations, as they directly contradict the internal market objective.

In addition to these techniques, it is very common that companies agree to allocate (at least) the most important customers to particular suppliers in the cartel. Often, this is done by respecting the traditional customers of each cartel company. The usefulness of this technique is related to the difficulties in implementing uniform prices for large customers, given their buying power. By allocating the major customers to individual companies, cartel members are in fact capable of engaging in price discrimination without putting at risk the collusive agreement. In *Choline Chloride*, customer allocation pacts were used to support the home-market principle. In this cartel “[p]rice agreements regarding individual clients were implemented by allocating clients to particular producers and by agreeing that the other European producers concerned would offer higher prices than the European producer to whom the client had been allocated. This was done in such a way as to respect the overall market shares in the EEA of the participating producers. Price agreement, client allocation, and market share agreements worked hand in hand*. In addition, by using this

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336 An elevated number of cartels have employed the “home-market” principle. In *Choline Chloride* (Case No C.37.533 — OJ L 190/22, paras 77–78) case the cartel participants were companies from Europe and North America. According to the Commission Decision European companies would no longer supply the North American market and North American firms would exit Europe. See also *Copper Plumbing Tubes* (Case COMP/E-1/38.069 - [2006] OJ L 192/21), para 239: ‘the basic goal of the meetings was to protect the main producers’ home markets and to freeze the market shares on the basis of the volume figures of previous reference periods’; in the *Seamless Steel Tubes* cartel (Case IV/E-1/35.860-B [2003] OJ L 140/1, paras 54, 62-63) the basic rule of the agreement was to observe the domestic markets of the different producers. See for other examples *Methionine* (Case C.37.519 — [2003] OJ L 255/1), paras 82–83; *Specialty Graphite* (Case C.37.667 — [2006] OJ L 180/20), para 106. See also E. HARRINGTON, “How Do Cartels” 34 et seq.

337 In *Belgian Beer*, cartel companies mutually consented on a general non-aggression pact in which sales were also broken down by distribution channel. See Commission Decision of 5 December 2001 (Case IV/37.614/F3 PO/Interbrew and Alken-Maes, para 115). See also J. FAULL AND A. NIKPAY, The EC Law of Competition 766-768.

338 See e.g. Commission decision of 17 December 2002 (Case COMP/C.37.671 — Flood flavour enhancers) [2004] OJ L 75/1, para 69). In this cartel two Japanese producers wanted to induce two Korean companies to reduce their supply in Europe and Japan. In order to attain this objective the Korean companies would not offer their products to the three largest European clients. To compensate this situation the Japanese suppliers would purchase their products.

339 See supra Chapter 3 and infra Chapter 4. It has been argued that the existence of national barriers to entry in Europe before the adoption of the single European market, has facilitated the emergence of “non-aggression pacts” See S. BRENNER, “An empirical study” 644; see generally S. J. EVENETT, M. C. LEVENSTEIN AND V. Y. SUSLOW, “International cartel enforcement: lessons from the 1990s”, 2001 (24-9) World Economy, 1221-1245.


342 *Choline Chloride* (Case No C.37.533 — OJ L 190/22), para 65.
strategy, cartel participants will avoid competing among themselves to gain a specific purchaser.\textsuperscript{343} Firms can, thus, specifically agree not to compete for each other’s allocated customers and adopt practices to ensure that customers do not switch their (assigned) supplier. For example, firms can actively support the agreement by communicating that an allocated customer is planning on switching suppliers. In this case, the “not-assigned” supplier could intentionally offer higher prices or even refrain from making an offer.\textsuperscript{344} However, the last mentioned option is more problematic as customers dealing with a refusal to deal may suspect the infringement and lodge a complaint with the competition authorities.\textsuperscript{345}

In some cases, projects can also be allocated as part of bid-rigging. A bidding process, as such, is intended to secure the procurement of products or services on the most favorable terms and conditions. However, if instead of competing to submit the most attractive tender at the lowest possible price, companies agree as to the most successful bidder or as to the conditions of the offer, the very purpose of bidding is directly contravened.\textsuperscript{346} Bid-rigging typically concerns the allocation of individual projects by fixing the winning bid among cartel members. Often, the agreements include rotation schemes in which cartel members alternate to get projects.\textsuperscript{347}

\textsuperscript{343} In the \textit{Copper Plumbing Tubes} (Case COMP/E-1/38.069 — [2006] OJ L 192/21, para 137) cartel customer allocation was used as an instrumental technique: ‘producers allocated a share of the respective estimated national demand to each […] producer. In certain markets they fixed “extremely precise quantities” to be sold to each distributor. Thus, customers were allocated (like distributors, for example, in the Netherlands). In the case of allocation of customers (distributors), the demand of certain customers was either reserved for one producer or split between several producers. In \textit{Methylglucamine} (Case COMP/E-2/37.978 [2004] OJ L 38/18, para 96) cartel firms allocated customers to eliminate competition among them. ‘Market sharing was achieved only through customer allocation […] That is, [the cartel participants] would endeavour not to compete for their respective major customers’).

\textsuperscript{344} In \textit{Car glass} (Case COMP/39.125 — [2009] OJ C 173/13, para 118, a sort of customer allocation mechanism was used by the companies to fine-tune the market share balance. This consisted in claiming vis-à-vis car manufacturers to have a technical problem or a shortage of raw material which will lead to a disruption of delivery of the contracted glass part. The supplier informs the car manufacturer that it will have to stop supply in the near future and suggests an alternative supplier.

\textsuperscript{345} See e.g. Commission Decision of 29 June 2001 (Case COMP/F-2/36.693 — Volkswagen) [2001] OJ L 124/60, para 1. (‘A Volkswagen AG circular dated 17 April 1997 was brought to the Commission's attention in the form of an annex to a complaint from a car buyer. In it, Volkswagen's Marketing Director for Germany called on Volkswagen dealers and garages to sell the new VW Passat Variant model, introduced in Germany on 6 June 1997, for not less than the recommended retail price and to observe "strict price discipline"’). See also ECJ 24 October 1995, Case C-70/93, \textit{Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH} [1995] ECR I-3439, concerning refusal to supply and territorial protection within the meaning of Article 101 TFEU. See also J. M. CONNOR, \textit{Global Price-Fixing} 29.

\textsuperscript{346} See A. JONES AND B. SUFRIN, \textit{EC Competition} 893. See also F. RUSSO et al, \textit{European Commission} 61. These authors explain that ‘[i]n bidding markets sales are concluded through tender processes. Bidding processes are typically used for the tendering of specialty assignments for larger sums of money, such as construction projects. The projects are often specialized and unique, so that there is no regular market for them and bidding allows buyers to compare potential suppliers. Suppliers submit tender bids to win project. Buyers prefer a large number of firms bidding independently. The firm that submits the winning bid typically supplies the entire tendered project while its competitors submit their costly bids for the project in vain. For the type of market in which they are used, tenders are a recurrent allocation mechanism in which a relatively small group of suppliers regularly bids against each other. The combination of high winning takes, significant bidding costs and repeated interaction may exert substantial pressure on bidders to collude and so eliminate (or at least soften) price competition’.

\textsuperscript{347} In the \textit{Pre-Insulated Pipe Cartel} (Case No IV/35.691/E-4 — [1999] OJ L 24/1) cartel the participants used a whole range of methods to restrict competition including bid rigging. They ‘divided national markets and the whole European market amongst themselves on the basis of quotas, allocated national markets to particular producers and arranged the withdrawal of others, agreed prices for the product and for individual projects, and allocated individual projects to designated producers and manipulated the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question’ (para 2). In this case the Commission obtained a detailed table of projects, showing not only the successful bidder and the price for tenders already awarded for the year, but also the ‘expected supplier’ and ‘expected price’ for procedures that were still open and for projects that were likely to be announced (para 37). Bid-rigging was also a, important component of the \textit{Elevators and Escalators} cartel (Commission Decision of 21 February 2007 (Case COMP/E-1/38.823 — Elevators and Escalators) [2008] OJ C 75/19, para 658).
5.3.3. Limiting production or sales

The law of demand states that when the price of a product rises, the amount that is demanded falls. This inverse relationship between prices and quantities demanded implies that, as J. CONNOR notes, ‘raising prices and reducing quantity should be in principle perfect substitute conducts’. By reducing output, market prices will simply increase and vice versa. There is consequently no need to pursue both initiatives simultaneously. In practice, cartel participants frequently engage in agreements to limit production in an attempt to secure and support the stability of their pricing objectives. However, on certain occasions, agreement may solely aim at restricting output. The most common method to restrict output is through the limitation of production or sales quotas. The members of a cartel typically allocate among themselves a maximum permissible volume of production or deliveries. The assignation of quotas frequently relates to the respective market share of each cartel participant. Just as it is the case for market sharing agreements, the implementation of a quota system is easier than the operation of a pricing policy, simply because companies will see no benefit in deviating by charging lower prices when their sales or production are limited to a maximum volume. Moreover, the adherence to quotas may be easier to monitor. Finally, a quota system is simpler to establish when, due to different cost structures, companies experience difficulties to reach a consensus on the prices to be charged.

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348 J. M. CONNOR, Global Price-Fixing 29.
349 In Vitamins, (Case COMP/E-1/37.512 — [2003] OJ L 6/1, paras 189-193) the basic operation principle of the agreements was to freeze the quantities that should be available on the market the year preceding the cooperation of the cartel members. The so-called budget meetings would enable forms to control and ensure the desired volumes. In Cartonboard, (IV/C/33.833 — [1994] OJ L 243/1, paras 51-60) the ‘price before tonnage’ policy led to strict control of volumes. The LCD cartel (Case COMP/39.309 — [2011] OJ C 295/8, paras 72, 98 and 102) involved a whole range of anti-competitive practices including price fixing in the form of agreements on future prices, price ranges and minimum prices, on pricing and commercial matters for specific accounts, on future production planning and future capacity utilisation, exchange of information on pricing and other commercial aspects including sales volumes or capacity plans, as well as exchange of price information and price coordination for customers. The main objective of the cartel was to increase and maintain prices of the LCD panels for IT directly. To achieve this goal, the companies involved entered into price fixing agreements and adopted a common future strategy on the parameters that determine prices such as production, capacity, shipments and demand. More precisely, in order to secure favourable market conditions for the price increase the parties decided to consider the reduction of capacity: ‘[t]o achieve this target, every maker must review how to maintain an optimum loading rate, lowering production capacity’. See also J. FAULL AND A. NIKPAY, The EC Law of Competition 761.
350 The relevance of this type of agreements is, for instance, reflected in LCD (Case COMP/39.309 — [2011] OJ C 295/8, para 139). In this case the parties discussed capacity issues and [one of the firms] suggested that ‘production should be adjusted since the companies might force themselves into a price war in case large amount of products are accumulated in stock’. See for a more detailed examination supra this Chapter, section 5.3.1.2.
351 This, again, highlights the importance of coming to an agreements as regards the size of the market and the respective market shares of each cartel undertaking. See also J. J. FAULL AND A. NIKPAY, The EC Law of Competition 761.
352 See A. JONES AND B. SUFRIN, EC Competition 888-889.
Other forms of production limitation may also constitute an effective means to restrict competition. In this regard, agreements regarding future investment may be particularly useful for the effective working of the cartel.\textsuperscript{353} Furthermore, in growing markets, the presence of capacity constraints would inevitably lead to higher prices especially when demand increases. In this context, the relevance of controlling output is perfectly illustrated by the Liquid Crystal Displays case. According to the Commission decision, one cartel member stated that it ‘[could] no longer comply with price rule, besides a few makers' inability to follow agreement, production capacity oversupply is the main reason. […] It is suggested to immediately hold a meeting to discuss possibilities of production reduction or other measures to stabilize the situation. [Other cartel member] agreed about holding a meeting to help make an overall production and sales policy and it emphasised that ‘if upstream source cannot reduce production capacity, and downstream inventory increases, it would be impossible not to cut price’.\textsuperscript{354}

Output limitation (and/or market sharing) can also be the result of the so-called “product specialization agreements”. Under this type of pacts a company must abstain from producing a given good, in favour of a competitor. When different cartel companies agree to produce only certain products, they automatically increase their market power, to the point that they grant themselves a virtual monopoly of the product market, being thus completely free to exploit their customers. These agreements can thus be seen as a mean to separate markets into different products, rather than as strict market allocation. In many occasions, specialization agreements are, indeed, used to support market allocation techniques.\textsuperscript{355} This was the case in Italian cast glass, in which the agreement “fixed a quota for sales on the Italian market for each of the three companies concerned, and also the kinds of cast glass which each undertaking could sell on that market within its quota”.\textsuperscript{356}

\textsuperscript{353} Compare \textit{supra} section 5.3.2. See e.g. \textit{LCD} (Case COMP/39.309 — [2011] OJ C 295/8, para 102). ‘To ease the expected oversupply [one of the cartel participants] was requested to delay its 5th generation line investment’. In the MCAA, one of the cartel companies, Akzo, clearly stated that the main disruptive factor was the behaviour of Eka in the market, including a substantial increase in its production capacity as a result of opening a new plant. Therefore, Eka's three European competitors, which were part of a cartel agreement, set out to convince Eka not to build its new capacity plant in Sweden. With this purpose, Eka was subsequently invited to participate in the cartel meeting. Since Eka finally did open its new plant “[i]n early 1993, Akzo and Hoechst (two cartel participants) met to discuss the fact that Eka was cutting into the other producers' volume. Hoechst agreed to contact Eka and see if Eka would commit to a reasonable price level in Europe if offered a certain volume of the MCAA market in Europe’. Commission Decision of 19 January 2005 (Case No C.37.773 — MCAA) [2006] OJ L 353/12, paras 96, 97, 114). See for more cases e.g. J. FAULL AND A. NIKPAY, \textit{The EC Law of Competition} 762.


\textsuperscript{355} It should, however, be noted that even if specialisation agreements (generally) have a negative impact on competition, they may in certain cases contribute to improving the production or distribution of goods, because the firms concerned can concentrate on the manufacture of certain products and thus operate more efficiently. Given this property, they may be exempted from the Article 101(1) TFEU prohibition (see Commission, Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements [2010] OJ L 335/43). Notwithstanding their potential benefits, specialization agreements may also involve output limitation and market allocation and, in this case, the Commission has made very clear that the agreement will be excluded from the benefit of the exemption (see Regulation 1218/2010, para 11). Additionally, it should be stressed that since cartels are, by definition, practices which do not entail any redeeming virtues, they typically fail to fulfill the two first conditions of Article 101(3) TFEU and therefore, do not qualify for exemption (see \textit{infra} Chapter 4).

\textsuperscript{356} See Commission Decision of 17 December 1980 (IV/29.869 - \textit{Italian cast glass} [1980] OJ L 383/31, para 2.C). Quite interestingly, “[i]n the parties wanted to perceive these practices as an specialization agreement, since SIV and Fabbrica Sciarra abandoned the manufacture of profiled glass and coloured wired glass in favour of Fabbrica Pisana; Fabbrica Sciarra abandoned the manufacture of 150 cm-wide double patterned glass, and Fabbrica Pisana that of 8 to 10 mm-thick profiled glass. In addition, all three companies abandoned the manufacture of horticultural glass’. See also Commission Decision of 18 July 2001 (Case COMP.D.2 37.444 — \textit{SAS Maersk Air} and Case COMP.D.2 37.386 — \textit{Sun-Air versus SAS and Maersk Air}) [2001] OJ L 265/15, paras 24 and 77). In this case, the cartel members agreed to withdraw from certain routes where they were previously competing. The Commission made particularly clear that,
Additionally, it seems correct to assume that monitoring the adherence to specialization agreements is relatively easy since, firms which have the “right” to supply or manufacture a particular (range of) product(s), will quickly learn whether other cartelists end up producing the same good(s).

6. Concluding remarks

PART I has shown the important evolution in the perception and regulation of cartels in Europe during the last century. After a long tradition of cartel tolerance, which was predominant during the first half of the twentieth century, a new perception of cartels started to emerge and after 1945 the idea that cartelisation hinders economic progress finally gained strength. As a result, the first domestic and supra-national competition regimes in Europe were created.

Cartels have now been the primary target of the European competition system more than fifty years. Although the prohibition contained in the original Article 85 EEC (now article 101 TFEU) is broadly formulated and does not reflect the special essence of cartels, it cannot be denied that the perception of this practice no longer relates the benevolent view of collusion that was common in the past. This shift in the view of cartels can be seen as the logical consequence of awareness raising activities conducted by international organisations such as the OECD or the ICN, but also of the availability of more economic research that demonstrated the devastating effects that cartels have on the economy. Today there is a full consensus that cartels do not only lead to an inefficient allocation of resources. The restriction of competition caused by cartels also has a negative impact on other efficiency related aspects such as productive and dynamic efficiency.

While successful cartels have a devastating effect on the economy as a whole, cartel participants on the other hand, are capable of ripping considerable financial benefits by fixing prices, sharing markets and restricting output. In contrast to the past – when cartel members concluded collusive agreements to address structural issues of the industry – the current objective of cartel participants is only related to the extremely high profits that are directly ripped from consumers. This recent and harmful perception of cartels is no doubt also related to selfish reasons that drive cartelists to conclude this type of agreements.

Taking a close look to cartels from a more economic perspective, one can observe that this activity represents a sophisticated fusion of anticompetitive practices. Companies seeking to restrict competition by concluding cartels devise complex mechanisms to stabilise what, according to economic theory, would otherwise be an intrinsically unstable arrangement. Cartel companies leave nothing to chance: every little detail is deeply considered in an attempt to ensure the success of their cooperative strategy. While it is true that there will always be difficulties in reaching and maintaining collusive schemes, one cannot help being impressed by the efforts and even sacrifices that companies make in order to align their interests and maintain the stability of their pact. Even if firms have a common desire to cooperate, most cartels face significant problems in their attempt(s) to get their rivals to agree on prices and market allocation. Remarkably, certain companies have no

‘[t]he sharing-out of the route network may be advantageous to the parties. It is unlikely that the parties would have concluded the agreement if it had not been in their mutual economic interest. For example, each party now has a guarantee that the other will not start to operate on its routes. However, the improvement of the parties’ position by anti-competitive means does not satisfy the requirements of Article [101(3) TFEU]’:
problems giving up their own market shares, or refraining from producing certain goods, as long as they finally reach a unanimous goal and increase the stability of the cartel. The risk of cheating will in effect be minimized when cartelists adopt a restrictive strategy that “satisfies” the individual interest of each member of the cartel. Monitoring and punishment schemes constitute key elements for the maintenance of the stability of collusion. These enforcement mechanisms can effectively counteract the deviation trend but, at the same time, require considerable dedication and costly investments. On the whole, it appears that even though internal and external threats and risks are usually present, the endeavor to cooperate seems to be a strong incentive to overcome the most complex obstacles. No doubt, the ultimate motivation to obtain higher profits is an effective driving force, capable of keeping cartels alive.

In the light of the conclusions of this part, it seems essential to explore the European competition law system, with the view to establish whether (and if so to which extent) the devastating effects of cartels go against the objectives of the European competition law system. After assessing this issue, the question whether cartels are as a rule prohibited under Article 101 TFEU will be addressed. Finally, the main features of the modernised enforcement system – as established by the reforms brought about Regulation 1/2003 – and their specific impact on effective anti-cartel enforcement will be assessed.
CHAPTER 3. The goals of European competition law and policy

The rationale of competition law and policy systems can be hardly understood without answering a key question: what does the system seek to achieve — what are its goals? The objectives of the system constitute its raison d'être. They underpin the application and interpretation of the substantive competition rules and, thereby, clarify why it is so important to protect the competitive process. In the context of cartel enforcement, a discussion of the goals of the system will not only elucidate to which extent this type of agreements goes against the spirit of the regime, but is also essential to understand why cartels should be prohibited. Furthermore, general policy orientations and enforcement priorities largely depend on the system’s rationale.

As observed, all systems of competition law and policy are based on the assumption that effective competition, rather than governmental control over the industry or private monopolization, constitutes the most appropriate mechanism to promote economic efficiency, reduce prices, enhance innovation and improve choice which, in turn, improves the standard of living.357 Competition systems are designed to achieve these results by preserving and enhancing the competitive structure of markets. In this context, it can be affirmed that the attainment of economic efficiency is the general and common purpose of competition systems. However, this question is not as simple as it might appear at first sight. The goals of the system are not static and tend to change and evolve over time. In the course of this evolution the ‘efficiency objective’ can be overridden by other – temporary or not – priorities or possible goals. In addition, the context of the European Union is more complex given that competition system is also one of the tools designed to achieve the imperative goals of the European Treaties. The coexistence of multiple aims, which might conflict with each other and are constantly expanding, stresses even more the importance of delineating such objectives.358

1. The approach to competition in the Treaties: goals and means

The European Union seeks to attain a wide range of comprehensive objectives, which have been developed throughout its history. Since the very beginning of the European integration project, the concept of competition has occupied a core position in the context of the Treaties and their goals. However, just as in a vast majority of jurisdictions, the precise objectives that the regime of competition seeks to accomplish have never been explicitly identified in the Treaties. Notably, Articles 101 and 102 TFEU, the core antitrust provisions, have always been an important and permanent component of the Treaties and their content has, remarkably, never been substantially modified. This has been possible precisely because the competition provisions were broadly conceived and their flexible structure allowed them to evolve in accordance with the interests of the

357 See supra Chapter 1, section 1.
The real significance of the system, its general purpose and ultimate aims can, therefore, only be examined in relation to the European Treaties as a whole and in the context in which it was placed.

The Preamble to the Treaty of Rome of 1957 announced that the Member States recognize, inter alia, ‘that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition’. Right from the start the Treaties perceived the competition system as a means to further achieve their objectives. This vision was first reflected in Article 3(f), which established that ‘for the purposes of the Treaty, the activities of the Community would include the institution of a system ensuring that competition in the common market is not distorted’. The original objectives of the Treaty were set out in Article 2, stating that ‘the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it’.

The Treaty of Rome was subsequently amended in 1992 and 1999 by the Treaties of Maastricht and Amsterdam. After the last reform, Article 2 EC set out a new range of objectives including ‘the promotion of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States’. Just like it was originally stipulated, the Community’s activities would include a system of undistorted competition to contribute to achieve these goals. Further, the introduction of Article 4(1) EC by the Treaty of Maastricht was of particular significance as it firstly referred to competition as a principle. This provision stated that ‘the activities of the Member States and the Community shall include the adoption of an economic policy conducted in accordance with the principle of an open market economy with free competition’. At the same time the principle of Article 4 EC was connected to Articles 98 and 157 EC. Article 98 EC, on economic policy, underlined the free competition principle and added a reference to the ‘favouring of an efficient allocation of resources’. Article 157(1), which dealt with the Community’s industrial policy, stipulated that the activity of the Community shall be ‘in accordance with a system of open and competitive markets’.

In 2009, the Lisbon reform modified the goals of the EU and altered the “position” of the regime of competition in the new Treaties. According to the new Article 3 TEU, which specifies the objectives

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359 D. GERBER, Law and Competition 345. According to GERBER, the former Articles 85 and 86 of the EEC Treaty (now Articles 101 and 102 TFEU) were meant to be constitutional, they were brief and broadly perceived, and their concrete application would determine their content. See also L. PARRET, “Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy”, 2010 (6-2) European Competition Journal, 339-376, at 344 (hereafter: ‘L. PARRET, “Shouldn't we know”’).

360 This reference to fair competition is interesting because it reflects the ordoliberal influence on the value of competition in the European Treaties. See infra section 2.2 of this Chapter.

361 See infra section 2.2 of this Chapter.

362 Now Article 120 TFEU.

363 Now Article 173 TFEU. See section 2.4 of this Chapter.
of the Union, the establishment of an internal market remains an essential goal. ‘The system of undistorted competition’, in contrast, is no longer specifically listed at the beginning of the Treaty as a method or instrument to achieve the common market (now “the internal market”), as it was in the previous Article 3(1)(g) EC Treaty.\textsuperscript{364} This reference is now made in the Protocol No 27 which, in essence, confirms that the system of undistorted competition is part of the internal market. Through the allusion to the internal market in Article 3 TEU, the relevance of the competition system for the goals of Union is still fully present.\textsuperscript{365} Further, the principle of free competition as established in the former Article 4 EC is now stated in Article 119 TFEU, at the beginning of the chapter on economic and monetary policy, which at the same time is connected to the goals of the Union as set out in Article 3 of TEU.\textsuperscript{366}

2. The evolving goals of European competition law and policy

As observed, the objectives of the European project as established by the Treaties have been constantly developing and expanding. In the light of the discussion above, the central question is now whether the competition rules have a range of independent objectives or whether the system is meant to pursue the global objectives of the EU. Or put differently, what is the concrete role of the competition system and how can it contribute to the accomplishment of the EU objectives?

2.1. The original goal of market integration

The contributors of the Spaak Report originally envisioned a competition system oriented towards the creation and maintenance of the internal market and the promotion of greater economic integration.\textsuperscript{367} The link between competition and the internal market, as later reflected in Article 3

\textsuperscript{364} Article 3(3) TEU, as amended by the Treaty of Lisbon states that ‘[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced’. In contrast, the 2004 EU Draft Constitution did refer to competition stating in Article I-3(2) — The Union’s Objectives — that ‘the Union shall offer its citizens […] an internal market where competition is free and undistorted’. The constitutional text was rejected during the process of approval, in the referendums in France and Holland.

\textsuperscript{365} Following this discussion, it appears that these modifications will not have an impact on the competition system as a whole or, in particular, in the application and interpretation of the competition provisions. However, it has also been argued that the Lisbon reform may have undermined the role of the competition system. See e.g. A. RILEY, ‘The EU Reform Treaty and the Competition Protocol’, September 2007 (142) CEPS Policy Brief, 1-6. See also L. PARRET, “Shouldn't we know” 345. PARRET comments that “the place” in the Treaty (TFEU) is significant because ‘the common provisions at the beginning express the fundamental principles that are at the basis of the EU’s legal system. Although the ECI has said that the objectives cannot create rights for Member States or for individuals, and that they constitute general objectives and should be read together with the treaty provisions that further implement them, the objectives and the text of Article 2 and 3 EC Treaty have been an important source for the interpretation of the treaty provisions on competition’.

\textsuperscript{366} Article 119(1) stipulates that ‘for the purposes set out in Article 3 TEU the economic policy of the Union and Member States will be based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition’.

of the EEC Treaty in 1958, is unique to the European system and, therefore, essential to understand the design and application of the competition rules. Specially in the earlier phases of integration, when the menace that private agreements could fragment the market into national and regional markets was still strongly present, the competition provisions were key to support the Treaties’ goals and, more precisely, to promote European integration by complementing the rules on free movement. From the moment this paramount objective was identified, the European Courts have repeatedly stressed its importance.

While the significance of the market integration goal is undeniable, it is also important to note that the efficiency aspects of competition have similarly been embraced and underlined since the creation of the system. The permanent emphasis on these two aspects can lead us to the conclusion that the EU competition law system was designed to perform a double function: the maintenance and enhancement of the competitive structure of markets – i.e. the “efficiency” or “competition” role – on one hand, and the promotion of the market integration objective, on the other hand. In this regard, one may actually argue that the foundation of the single market was motivated by efficiency

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368 In 1969, the Court of Justice stated about Article 101 TFEU that ‘while the Treaty's primary goal is to eliminate by this means the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, actions with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty’. Judgment of 13 February 1969, C-14/68, Walt Whelum v. Bundeskartellamt [1969] ECR 1, para. 5. See also e.g., Judgment of the Court of 13 July 1966, C-32/65, Italy v. Council and Commission [1966] ECR 234, 405. See M. Siragusa, “The Millenium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules”, 1997 (21-3) Fordham International Law Journal, 650-681, at 656 (hereafter: “M. Siragusa, ‘The Millenium’”).

369 See also Judgment of the Court of 13 July 1966, C-56 and 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission [1966] ECR 322 (Consten and Grundig). In Consten and Grundig the ECJ emphasized that private parties should not engage in practices that lead to the revival of restrictions on trade between Member States that are prohibited by the free movement rules. This statement was later confirmed in the case Van de Haar (Judgment of April 1984, C-177and 178/82, Van de Haar and Kaveka de Meern [1984] ECR 1797, para. 11f). It should be noted that, although in general it can be said that competition rules complement free movement rules since the last mentioned provisions apply to State measures and the former to those of private actors, the relationship between both set of rules can also be quite complex For a more detailed analysis of the relationship between competition and free movement question see J. Baquero Cruz, Between Competition and Free Movement: The Economic Constitutional Law of the European Community, Oxford, Hart Publishing 2002, 320 p. (hereafter: ‘J. Baquero Cruz, Between Competition’).


371 This was reflected in the first Commission Report on Competition Policy which stated that “[c]ompetition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency which is the sine qua non for a steady improvement in living standards. Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the consumer”. Commission, “First Report on Competition Policy”, Brussels–Luxemburg 1973, at 11. See also Judgment of 13 July 1966, C-56 and 58/66, Consten Grundig [1966] ECR 418.


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reasons and that, therefore, by orienting the competition system towards market integration, the “efficiency objective” would be simultaneously accomplished. Yet, the market integration goal has not always been fully consistent with efficiency considerations. In some cases, market integration has taken precedence over efficiency factors, having a genuine impact on the interpretation of the competition provisions. This trend was particularly visible in the area of vertical restrictions where, for almost four decades, EU competition law held a particularly strict position.³⁷³

2.2. Economic freedom

The protection of the competitive market structure can be embraced for its positive effects on the society and economy, but can also be valued in itself as a mechanism to sustain the principles of liberal democracy. This is, in essence, the particular vision of competition adopted by the ordoliberal ideology.³⁷⁴

Ordoliberalism played a key role in the adoption of German competition law and, arguably, influenced the drafting and final structure of the EU competition provisions.³⁷⁵ According to the


³⁷⁴ Ordoliberalism is an ideology developed in the 1930s and 1940s by a group of neo-liberals at Freiburg University in Germany. Their line of thoughts, qualified as ordoliberalism, became the main basis for the set of ideas behind the social market economy in Germany. For an analysis of the Ordoliberal thoughts see e.g. W. EUCKEN, 2006 (2-2) “The Competitive Order and its Implementation” Competition Policy International, 219-245, at 238 et seq. W. EUCKEN was an economist, leader of the ordoliberal theory; see also H. GERSCH, K-H PAQUE AND H SCHMIEDING, The Fading Miracle: Four Decades of Market Economy in Germany, Cambridge, Cambridge University Press 1992. 320 p., at 31 et seq; W. MÔSCHEL, “Competition Policy from an Ordo Point of View” in (eds.) A. PEACOCK AND H. WILLGERODT, German Neo-Liberals and the Social Market Economics, Basingstoke, MacMillan 1989. 242 p., at 142 et seq.

³⁷⁵ The influence of Ordoliberalism on the EU competition system is generally uncontroversial. See for example D. GERBER, Law and Competition 49. According to GERBER, the ordoliberal creation of competition law ‘has evolved into the European concept of competition law, and without it [ordoliberalism] the development of the European Community is unimaginable’. See also D. GERBER, “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe”, 1994 (42-1) American Journal of Comparative Law, 25-84; R. O’DONOGHUE AND A.J PADILLA, The Law and Economics of Article 82 EC, Oxford, Oxford University Press 2006, 782 p., at 9; L. GORMSEN LOVDahl, “Article 82 EC: Where are we coming from and where are we going to?”, 2005 (2-2) The Competition Law Review, 5-25; K. CSERES, Competition law 82. For a different opinion see P. AKMAN, “Searching for the Long-lost Soul of Article 82 EC”, 2009 (29-2) Oxford Journal of Legal Studies, 267-303. Traces of ordoliberalism can be found in the Spauk Report which refers to fair competition and states that ‘ensuring that commercial undertakings observe the rules of fair competition is one of the practical measures necessary for the establishment and operation of the common market’. After the presentation of the Spauk Report, the drafting process of the competition rules was subject to negotiations, where some of the key representatives strongly believed in ordoliberalism. During these negotiations the German delegation suggested a different approach to agreements, on the one hand, and monopolies on the other. The French delegates, in contrast, proposed that a unique test for both types of conduct. The German vision was that monopolies and oligopolies were not necessarily incompatible with a system of competition. Therefore, they should not be outright prohibited, but only their abuses should be subject to a control (see Mémo interne, 7 September 1956, Fascicule 5, Council Archives CM3/NEGO/236, Document MAE/Sec. 29/56). The French and the Belgo-Dutch proposals continued treating agreement and monopolies on the same line, the German draft, with its differential approach, was finally proposed by the president of the Common Market group Hans van der Groesen (note of 26 October 1956 by Hans Von der Groeber, Council Archives CM3/NEGO/217, Document MAE468 II/56). Hans van der Groesen confirmed that the debate on the

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ordoliberal thoughts, “competition” should have a constitutional value and be seen as a means to promote fundamental rights and freedoms. In essence, the system must ensure effective competition amongst competitors by protecting the structure of the competitive process. Regulation preventing firms from accumulating excessive private power and from imposing unilateral restraints occupies a central place in this view. This approach is meant to guarantee economic freedom and the opportunities of less powerful and smaller market players.

The vision of the Treaty on the protection of freedom of trade, strengthened by effective competition and non-discrimination was consistent with the ordoliberal need to maintain a liberal market economy and safeguard individual economic freedom. As the ordoliberal concept of competition seemed reconcilable with the approach of the Treaty, it was also considered suitable to accomplish the goal of market integration. Unsurprisingly, the case-law of the European Courts and the decisions of the Commission were initially visibly influenced by ordoliberal reasoning. The objective of preserving competition was frequently oriented towards the protection of the individual economic freedom and to avoid that companies would use their economic capacity to damage the competitive process. Although such preservation of liberty can support the competitive structure of markets (and thus create economic efficiency), this is not a general rule and, in certain cases, it can be difficult to simultaneously pursue both objectives. When competition law aims at deprivation or dispersal of power, it normally attempts to achieve ‘fair’ competition instead of ‘free’ competition. The system can then be used to protect small companies from a dominant firm’s lower pricing policy or to compel a large firm open its resources to smaller firms. Otherwise stated, instead of protecting competition EU competition law was sometimes constructed to protect competitors.

EC competition rules was heavily influenced by German ordoliberalism. It follows that, right from the start, the difference between protecting competitors and protecting competition was imprinted in the Treaty, since harming rival firms by act of unfair competition was distinguished from harming competition. This influence is supported by the structure of the competition rules, which is particularly noticeable in what came to be Article 102 TFEU. See D. HILDEBRAND, The Role of Economic Analysis in the EC Competition Rules, The Netherlands, Kluwer Law International 2002, 596 p., at 11-12 (hereafter: ‘D. HILDEBRAND, The Role of Economic Analysis’).


378 See also A. JONES AND B. SUFRIN, EC COMPETITION 43.
2.3. The new focus on efficiency and consumer welfare

During the first decades of economic integration, the functioning of the competition system was driven by the demands of market integration and the need to preserve economic freedom. Nevertheless, it would be erroneous to assume that the benefits flowing from the competition process were completely overlooked. In fact, the importance of the role of consumers is reflected in the content of the EU antitrust provisions which, *inter alia*, refers to consumers.\(^{379}\)

During the 1990’s the goals of competition law began to change in line with more modern economic considerations. With the “2004 modernization” of EU competition law,\(^ {380}\) not only the enforcement system underwent an entire reform. The modernization plans actually entailed a gradual (but urged)\(^ {381}\) shift from the previous formalistic interpretation of the law, towards a more economic and effect-based approach, which was firstly perceived in the previous decade.\(^ {382}\) Following the modernization process, efficiency and consumer welfare became the central focus of the debate concerning the goals of the EU competition law system.\(^ {383}\)

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\(^{379}\) Particularly relevant for this discussion is the fact that a restrictive agreement may escape prohibition of Article 101 TFEU if it contributes to improving the production or distribution of goods or promoting technical or economic progress while, inter alia, ‘allowing consumers a fair share of the resulting benefit’. Article 102 TFEU, which prohibits abuse of a dominant position by undertakings, contains a (non-exhaustive) list of examples of these abuses, the second of which (Article 102(b)) refers to the limitation of production, markets or technical development to the prejudice of consumers. In 1974 in its ruling in *Continental Can* (Judgment of 21 February 1973, C-67/72, Europenballoage Corp. & Continental Can Co. v Commission* [1973] ECR 1-215, para. 26) the Court of Justice also referred to Article 102(c) and (d) as aiming at practices which cause damage to consumers. In addition, the relevance of consumers is also exemplified in Article 2(1)(b) of the Merger Regulation (ECMR) which states that in examining a merger the Commission shall take into account, *inter alia*, ‘the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition’ (Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1). Exactly the same provision appeared in the original Merger Regulation, (4064/89 [1990] OJ L257/13). Recital 29 of Regulation 139/2004 also mentions a merger’s potential efficiencies countering the effects on competition and ‘in particular the potential harm to consumers’. However, this recital was not present in original Merger Regulation.

\(^{380}\) See infra Chapter 5.


\(^{383}\) In the White Paper on Modernization of 1999 the Commission stated that the focus of competition policy had changed. ‘At the beginning the focus of [the Commission’s] activity was on establishing rules on restrictive practices interfering directly with the goal of market integration […] The Commission has now come to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures’. (White Paper on modernization, Executive Summary, para 8).
The Commission played a key role as leader of the change, and used the modernization process as the context to reshape its policy and proclaim the belief that competition should promote efficiency and consumer welfare.\(^{384}\) This vision was clearly reflected in ‘soft law’ measures adopted by the Commission. For instance, the vertical guidelines state that the protection of competition is the primary objective of EU competition policy, as this enhances consumer welfare and creates an efficient allocation of resources.\(^{385}\) This approach centers, thus, on competition law as a mechanism to protect the competitive market structure, valuing its efficiency effects and leaving behind the inadequate protection of competitors.\(^{386}\) The relevance of the competitive process is also illustrated by the guidelines on Article 81(3) EC (now Article 101(3) TFEU) which describe the objectives of Article 101 TFEU as the protection of competition as a means to enhance consumer welfare and of ensuring an efficient allocation of resources.\(^{387}\) They conclude that by requiring that agreements do not eliminate competition in respect of a substantial part of the product in question, this last condition of Article 101(3) TFEU reflects the fact that the protection of the competitive process prevails over other considerations.\(^{388}\)

The consumer welfare focus has also become a prominent consideration in the jurisprudence of European Courts.\(^{389}\) In 2006, the General Court (formerly the Court of First Instance) delivered two relevant judgments in *Österreichische Postsparkass\(^{390}\) and GlaxoSmithKline\(^{391}\) where it identified


\(^{385}\) This reference was made in the former Verticals Guidelines ([2000] OJ C 291/1, para 7) and later in the 2010 Verticals Guidelines ([2010] OJ C 130/1, para 7).

\(^{386}\) See E. FOX, “What is Harm to Competition? Exclusionary Practices and Anti-competitive Effect”, 2002 (70-2) *Antitrust Law Journal*, 371- 412, at 392. According to E. FOX the new vision ‘protect[s] openness of access to markets, and the right of market actors not to be fenced out by dominant firm strategies that are not based on competitive merits’.

\(^{387}\) According to the Guidelines on the application of Article 81(3) of the EC Treaty para 13 ([2004] OJ C 101/97, (hereafter: ‘the Guidelines on Article 81(3) EC’) ‘the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers’.

\(^{388}\) Guidelines on Article 81(3) EC, para 105. More precisely, the Guidelines state that ‘[u]ltimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process’.

\(^{389}\) It is also noteworthy that in a case dating from 1998 Advocate General Jacobs stressed that ‘the primary purpose of Article [102 TFEU] is to prevent distortion of competition and in particular to safeguard the interests of consumers rather than to protect the position of particular competitors’. Case C–7/97, Oscar Bronner GmbH & Co KG v. Mediaprint [1998] ECR I–7791, para 58 of the Advocate General’s Opinion.

\(^{390}\) CFI 7 June 2006, Cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG v. Commission and Bank für Arbeit und Wirtschaft AG v. Commission* [2006] ECR II-1601, para 115. In *Österreichische Postsparkasse* the General Court declared that ‘the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers. That purpose can be seen in particular from the wording of Article 81 EC. Whilst the prohibition laid down in Article 81(1) EC may be declared inapplicable in the case of cartels which contribute to improving the production or distribution of the goods in question or to promoting technical or economic progress, that possibility, for which provision is made in Article 81(3) EC, is inter alia subject to the condition that a fair share of the resulting benefit is allowed for users of those products. Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods or services’.

the ‘well-being’\textsuperscript{392} or ‘welfare’ of consumers as the objective of competition law. More specifically, in \textit{GlaxoSmithKline} it declared that ‘the objective of the Community competition rules is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question’.\textsuperscript{393} However, on appeal, the Court of Justice took the opportunity to underline that the EU competition system is not strictly designed to enhance consumer welfare, but to protect the competitive process. Accordingly, it rejected the reasoning of the General Court and held that ‘there is nothing in [Article 101] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object’[…], it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, [Article 101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price\textsuperscript{394}.

Although it may appear that there is some tension between the Commission’s modernised view on the objectives of the competition system and the less dynamic position of the European jurisprudence,\textsuperscript{395} these two visions are not necessarily in conflict with one another. In fact, regardless of the nuances of each description, it is difficult to identify an actual contradiction between the Commission’s and the Courts’ views. As observed, the assumption underlying the protection of the competitive process is that it favors allocative efficiency.\textsuperscript{396} The idea is that when such efficiency is maximized, it creates multiple advantages and benefits, one of them being consumer welfare. The current view of the Commission on the goals of EU competition supports this reasoning by proclaiming the need to preserve effective competition as a tool to allocate resources efficiently, but focuses specifically on one of its positive effects \textit{i.e.} consumer welfare. In contrast, the jurisprudence takes a more general approach by centering on the competitive process as such. This view logically implies that, as the Court of Justice confirmed in \textit{GlaxoSmithKline}, the prohibition of a concrete practice (under Article 101 TFEU) will be based on the restriction of competition – as a process –

\textsuperscript{392} See B. \textsc{Baarsma} AND J. \textsc{Theeuwes}, “Publiek belang en marktwerking: Argumenten voor een welvaarts economische aanpak” in (eds.) E. \textsc{Van Damme} AND M. \textsc{Schinkel}, \textit{Marktwerking en Publieke belangen}, Amsterdam, Koninklijke Vereniging voor de Staatshuishoudkunde Peadviezen 2009, 202 p.; at 31, available at http://www.kvsweb.nl/nl/webmanager/userfiles/Peadviezen\%202009(4).pdf


\textsuperscript{394} ECI 6 October 2009, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, \textit{GlaxoSmithKline Services Unlimited v. Commission} [2009] ECR I-9291, para 63. This reasoning of the Court of Justice is at the same time coherent with its approach in the \textit{T-Mobile} case where it ruled that ‘it is not possible on the basis of the wording of [Article 101 TFEU] to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited’. On the contrary, as is ‘apparent from Article 101(1)(a) TFEU’ concerted practices may have an anti-competitive object ‘if they ‘directly or indirectly fix purchase or selling prices or any other trading conditions’. Most importantly, the ECI held that ‘Article 101 TFEU […] is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices’. (ECI 4 June 2009, Case C-008, \textit{T-Mobile Netherlands BV and others v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit}, para 36, 39-40). See also confirming this view ECI 15 March 2007, Case C-95/04 P, \textit{British Airways plc v Commission} [2007] ECR I-2331, para 106-107; ECI 2 April 2009, Case C-202/07 P, \textit{France Télécom SA. v. Commission}, para 104.


\textsuperscript{396} See supra Chapter 1, section 1.
and not on the specific damage to consumers. The key for the (apparently needed) reconciliation of these two perceptions is that the consumer’s interests have never been left out of the ECJ’s picture whereas the benefits of the competitive process and the need to protect it have never been disregarded by the Commission. The only thing the Court has clarified in its recent case-law is that the application of competition law should not be exclusively guided by the consumer welfare objective. As the decisional practice of the Commission illustrates, it shares with the ECJ the view that not only the concrete impact on consumer welfare must be taken into account when assessing a business conduct under competition law.397

That being said, there are certain factors that can help to understand why the Commission formulates the competition policy goals in a way that does not seem entirely consistent with the Courts’ established view. A possible explanation follows from the interpretation of the concept consumer welfare.398 In economic terms, allocative efficiency equals total welfare.399 Consumer welfare, on the other hand, is often defined as consumer surplus. In essence, consumer surplus consist of the difference between the price the consumer is willing to pay for a product and the actual price of the product.400 On the other hand, EU law has not expressly identified ‘consumer welfare’ as ‘consumer surplus’ in the economic sense of this term and it seems correct to argue, that the Commission’s view of the concept ‘consumers welfare’ is broader. In fact, the Commission’s approach goes beyond the short term view of final low(er) prices, by also including long term aspects, such as quality, choice, service, and innovation.401 This broad(er) perception explains why “consumer welfare” and

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397 It is important to stress that in GlaxoSmithKline (Judgment of 6 October 2009, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission [2009] ECR I-2921), on appeal the ECJ did not reject the Commission’s view as regards the restriction of competition. In this case the ECJ actually upheld and underlined the position of the Commission that restrictions on parallel trade, had as their object the restriction of competition. In contrast, the (now) General Court had previously taken a different view and held that the Commission committed an error by characterizing Glaxo’s distribution agreements (which were designed to limit parallel trade by distributors), as restrictive by object only on the basis of their without further reference to their legal and economic context. The General Court found that the Commission, should have considered the particular features of the pharmaceutical sector (where medicine prices were affected by regulation) and that parallel trade might consequently benefit intermediaries (the parallel traders) and not final consumers. According to the Court, final customers might benefit by the restriction on parallel trade, by providing Glaxo with additional resources for investment in R&D of new medicines. The General Court ruled that ‘[i]n this largely unprecedented situation, it cannot be inferred merely from a reading of the terms of that agreement, in its context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement’ (Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission [2006] ECR II-2969, para 138). On appeal, the ECI did not agree with these considerations and stated that in principle, an agreement aimed at prohibiting or limiting parallel trade had as its object the prevention of competition even if such agreement concerns the pharmaceutical sector. In addition, it underlined that an agreement tending to restore national divisions in trade between Member States frustrates the Treaty’s single market objective.


399 The economic concept of total welfare refers to the sum of consumer surplus and producer surplus. This concept does not encompass considerations about how the surplus should be distributed. For an economic analysis of the concept of welfare see L. Kaplow and S. Shavell, Fairness vs. Welfare, Cambridge, Harvard University Press 2006, 544 p., at 18-38.

400 See also Chapter 2, section 2.

“an efficient allocation of resources” are often mentioned together as the goals of competition law in the Commission’s policy statements. The integration of these long term efficiency aspects in the analysis is decisive to approximate the Commission’s view, on the one hand, and the European Courts’ perception, on the other.

Even though the EU concept of consumer welfare is broadly conceived, the specific relevance of the consumer’s interest and the, at times, exclusive focus of the Commission on this goal cannot be overlooked. As briefly pointed out, the important role played by consumers is, in fact, reflected in the structure of Article 101 TFEU. Even if harming consumers is not necessary for the prohibition of Article 101(1) TFEU to apply, the particular impact of an agreement on consumers will be decisive to establish whether the practice is permitted. While Article 101(1) TFEU is thus designed to protect competition thereby prohibiting agreements that restrict competition, Article 101(3) TFEU allows such agreements insofar they create benefits that are passed on to consumers (while not eliminating competition completely). Or put differently, Article 101 TFEU as a whole centres on the protection of the competitive process, which can be partially restricted (but never entirely eradicated) when the agreement produces efficiency that consumers can enjoy. From this point of view, this provision perfectly illustrates the importance of both competition and consumers.

It should be noted that although the interpretation of the term ‘consumers’ in competition law refers to all indirect and direct users, and not just final users, by enforcing the competition rules efficiently and effectively final consumers also obtain great benefits. These advantages have been and are frequently emphasized by the Commission. The Commission’s attitude has in effect led to the suggestion that the competition rules do not operate according to an efficiency standard but exclusively based on the welfare of the final consumer. Nevertheless – and even if European citizens have a great interest in the effective enforcement of the competition rules – it seems more to adequate to welcome the protection of competition as a tool to increase both efficiency and consumer welfare. The pursuit of this “joint objective” (rather than, for instance, a exclusive focus on the protection of competitors or the overriding endeavor to advance in the integration agenda), reflects an important a break with the more inefficient perception of the past and has a crucial

402 This can also be seen in the suggested ‘efficiency defence’ in respect of Article 102 (see further A. JONES AND B. SUFRIN, EC Competition Chapter 12). In the Judgment of 15 March 2007, C- 95/04 P, British Airways plc v Commission, para 86, the ECJ indicated as regards Article 102 TFEU that it had to be determined whether the restriction of could be outweighed by efficiency advantages which also benefited the consumer.

403 Guidelines on the application of Article 81(3) EC, para 84 ([…]direct or indirect users […] including producers that use the products as an input […] In other words […] customers of the parties to the agreement and subsequent purchasers). See also, Guidance on the enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/02, para 19. See also CFI of 21 February 1995, T-29/92, SPO v. Commission [1996] ECR II-289, paras 266-267.

404 The speeches of the former Competition Commissioner M. MONTI are particularly illustrative in this context. See e.g. M. MONTI, SPEECH/03/79, “Competition Enforcement and The Interest of Consumers”, speech delivered at the European Competition Days, 14 February 2004, Athens; M. MONTI, SPEECH/01/340. See also Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, para 3 (hereafter: ‘the 2006 (Commission) Leniency Notice’). On the basis of the Leniency Notice reductions in fines are granted when cartel participants cooperate with the Commission. The Commission justifies this policy on the ground that ‘[t]he interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices’. (Leniency Notice 2006, para 3).

influence on the interpretation and application of the law in cartel cases\textsuperscript{406} as well as on the Commission’s priority setting.

\textbf{2.4. The consideration of “non-efficiency” goals}

The application and interpretation of EU competition law may also serve non-efficiency policy objectives such as employment, social or industrial goals. For example, by permitting a cartel agreement, an industrial decline can be (temporarily) stopped. In Europe, the integration of (non-economic) concerns in the set of goals of the EU competition system has long been a topic of debate because, as examined, in the complicated framework of the EU, the competition rules are seen as a tool to achieve the multiple objectives of the European project.\textsuperscript{407}

Based on the instrumentalisation of the EU competition system, it can indeed be argued that non-economic interests\textsuperscript{408} should necessarily be included in the set of objectives of the system. In fact, the Treaty specifically provides that the implementation of all EU initiatives should take into account certain ‘policy linking’ clauses which aim to preserve certain interests that are relevant across different sectors, such as the protection of the environment,\textsuperscript{409} consumer protection,\textsuperscript{410} employment,\textsuperscript{411} public health,\textsuperscript{412} culture\textsuperscript{413} or economic and social cohesion.\textsuperscript{414} The importance of these policies or values is also highlighted in Article 7 TFEU which explicitly states that ‘[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account’.

Furthermore, the removal of ‘the system of competition policy’ of the list of aspirations of the Union contained in Article 3 TEU (whereas the old Article 3(1)(g) EC listed it as an essential aspect of internal market), have led some authors to make the questionable observation that non-economic or

\begin{footnotesize}
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\item See Chapter 4.
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non-market objectives could gain importance in the application of the EU competition rules.\textsuperscript{415} This argument is, however, not convincing given that competition policy is explicitly mentioned in Article 3(1)(b) TFEU which confirms the well-established link between the system of competition and the internal market.\textsuperscript{416} Furthermore, Protocol 27 on the internal market, stating that the internal market as set out in Article 3 TEU includes a system in which competition is not distorted, corroborates the importance of competition policy.

The content of the competition provisions also indicates that the system is actually confined to economic-related factors. However, it is generally acknowledged that socio-political and public policy elements have been taken into account in past cases in the application and interpretation of the competition rules.\textsuperscript{417} There are two ways to integrate non-economic considerations in EU competition policy.\textsuperscript{418} The first method is to simply decide that the issue in question does not fall within the scope of application of EU competition law.\textsuperscript{419} This can be done, for example, by sheltering a given anti-competitive agreement from the application of the prohibition of Article 101(1) TFEU or by not including an enterprise under the concept of undertaking in the sense of EU law.\textsuperscript{420} The second way is to take into account non-economic considerations in the application of the competition provisions. This can be done, for instance, by considering non-competition objectives in the application of Article 101(1) and Article 101(3) TFEU. There is, in principle, a


\textsuperscript{416} From this perspective it can be affirmed that Article 3(1)(b) TFEU has taken over the function of Article 3(1)(g) EC. See also B. J. DRÜBER, “Het hervormingsverdrag van de EU: stap vooruit of stap achteruit?”, 2007 (5-6) Markt en Mededeling, 131-136, at 131.

\textsuperscript{417} The role of non-economic considerations has been widely accepted as: ‘[p]owers conferred upon the Commission under Article [101](3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end, certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market’ (ECJ 25 October 1977, Case C-26/76, Metro v Commission [1977] ECR 1875, para 21).

\textsuperscript{418} See in general O. ODUDU, The Boundaries 159–174.

\textsuperscript{419} In addition, there are fields, like agriculture, which are directly excluded from the competition rules by the Treaty itself. See (Article 42 TFEU). With respect to the situation of undertakings entrusted with services of general economic interest see Article 106 (2) TFEU).

\textsuperscript{420} Collective bargaining agreements between employer and employees are, under certain conditions, sheltered from EU competition law, from the application of Article 101 TFEU. The ECJ assessed this issue for the first time in the Internal market, stating that the internal market as set out in Article 3 TEU includes a system in which competition is not distorted, corroborates the importance of competition policy.

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wide consensus about the fact that the application of Article 101(1) is purely concerned with economic issues and, therefore, it does not admit any balance of competition and non-competition related goals. In contrast, both the Commission and the ECJ have been relatively favourable to include non-efficiency factors in their interpretation of Article 101(3) TFEU in the past. This appraisal was particularly relevant for the so called “crisis cartels”. This type of agreements involved by definition a limitation or control of the production and, therefore, based on a first evaluation they clearly infringe Article 101(1) TFEU. As shown in the next Chapter, in order to overcome capacity problems or to restructure the industry, such practices have been exempted from the general prohibition of Article 101(1) TFEU by taking into account non-economic considerations – such as the maintenance of employment during an economic crisis – in combination with other decisive efficiency elements.

After the modernization of competition law and the adoption of the more economic approach, non-efficiency considerations are clearly left behind and, now, the competition system is concerned with consumer welfare – in a broad sense – achieved through allocative efficiency. This current view has accentuated the difficulties of pursuing public policy goals and efficiency simultaneously and had led to a more strict approach as regards non-economic goals. Although the EU logically pursues and implements multiple policies, it is generally acknowledged that this should not affect the interpretation and application of the competition rules. This more limited role of non-economic interests has additionally been stressed by the decentralization of competition law enforcement. As NCAs and national courts are entitled to apply the competition provisions as a whole, they are equally confronted with the question whether non-competition objectives should be taken into account and if so, how they can be reconciled with competition goals. The contemporary trends suggest once more that non-efficiency interests should in principle not be pursued in the Member States.

422 An important exception to this principle was the Wouters case where the possibility to adopt a rule of reason was considered. In this case the Court was asked whether a Dutch regulation concerning the legality of multidisciplinary partnerships between members of the Bar amounted to a decision of an association of undertakings within the meaning of Article 101(1) TFEU. After confirming that the regulation amounted to a decision of undertakings (despite the fact that the constitution of the Bar was regulated by public law) the Court found that such decision restricted competition. Nevertheless, the Court held that it did not infringe the prohibition against restrictive agreements because the regulation pursued public interest objectives (Judgment of 19 February 2002, Case C-309/99, Wouters v. Algemene Raad van der Nederlandse Orde van Advocaten [2002] ECR I-1577, para 97). The ECJ applied the Wouters test in the area of sport in the judgment Meca-Medina (Judgment of 18 July 2006, Case C-519/04 P, Meca-Medina and Majcen v. Commission [2006] ECR I-6991).


424 See infra Chapter 4.

425 The reasoning was that without an (industry wide) crisis cartel reducing capacity, smaller companies would exit the market which, in turn, would reduce consumer’s choice and lead to unemployment. Under these conditions, undertakings could operate at inefficient output levels and suffer financial loss. In this sense, by allowing a crisis cartel on efficiency grounds it can be said that the application of Article 101(3) took into account industrial policy objectives. See infra Chapter 4.

426 Supra Chapter 3, section 2.3.

427 In the White Paper on Modernization, the Commission stressed that the purpose of Article 101(3) TFEU is ‘to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations’. (White Paper on Modernization, para 57.) In the Guidelines on Horizontal Agreements, the benefits under the first condition of Article 101(3) are referred to as ‘economic benefits’.
The relationship between industrial policy and competition has been traditionally characterized by complex interaction. The obstacles to find the right balance between (the demands of) competition and competitiveness may give the impression that both policies are not fully reconcilable. More recently, this vision has changed. While in the past competition has often been regarded as an impediment for the creation of powerful competitive companies, nowadays competition is seen as an essential prerequisite for competitiveness and constitutes a solid pillar for industrial policy (rather than as an obstacle). Still, this does not imply that industrial policy goals should be seen as an objective to pursue through the application of the EU competition rules. Even if from a general perspective, the competition regime can contribute to the success of the industry by enhancing its competitiveness, the concrete application of competition law in individual cases should be only guided by the protection of the competitive process.

In accordance with more recent trends, the aspirations of the EU competition law and policy system are more in line with the modern (and more economic) perception of competition. However, the more economic approach towards (the objectives of) competition has, obviously, not replaced the original spirit of the European project, which is reflected in the market integration objective. Instead, the two main aspirations of the competition system, i.e. consumer welfare (in a broad sense) and market integration, seem to have gradually merged. The competition law provisions are, at present, essentially applied and interpreted to ensure that the competitive process in the internal market is safeguarded. Both goals remain imperative in the context EU regime. The only nuance is that the system of competition and the internal market are both oriented to attain the same results: ‘the

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429 In 2004, the Commission issued a Communication (“A pro-active competition policy for a competitive Europe” (COM (2004) 293 final) in which competition was in the center of industrial policy. The Commission affirmed that ‘[t]he goal of a pro-active competition policy is to support the competitive process in the internal market and to induce firms to engage in competitive and dynamically efficiency-enhancing behavior’. The Competition Commissioner in charge elaborated on this in a speech in September 2006 (N. Kroes, SPEECH/06/499, “Industrial policy and competition law & policy”, speech delivered at Fordham University School of Law, September 2006, New York). This view of the relationship between competition policy and industrial policy was also in line with the Lisbon Strategy according to which the EU planned to become the most competitive and dynamic knowledge-based economy in the world. (The Lisbon Strategy was originally launched at the Lisbon European Council in March 2000 and relaunched in February 2005 in the Communication of the Commission - Working together for growth and jobs: A new start for the Lisbon Strategy COM (2005) 24).

creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the final benefit of consumers.\textsuperscript{431}

3. Concluding remarks

This Chapter has shown that the objectives of the European competition law system have clearly evolved over time. This evolution has ultimately led to an undeniable focus on efficiency and consumer welfare. On the other hand, the goal relating market integration will always remain at the very core of the European competition system. Other considerations, such as economic freedom and non-efficiency aspects do no longer play a relevant role in the interpretation and application of the EU competition law provisions.

The analysis of the objectives of the EU competition regime cannot but emphasise that cartels go against the spirit of the system as codified in the Treaties and, subsequently, interpreted by the European Courts and the Commission. Market sharing cartels essentially aim at dividing the market thereby directly thwarting the key goal of market integration. The remaining classic forms of cartels (i.e. price fixing, output limitation and bid rigging) create allocative inefficiency and also have a negative impact on dynamic and productive efficiency. As a result, cartels agreements also contravene the efficiency related objectives which constitute the more recent focus of the EU competition law system. Given the extremely harmful nature of cartels and the fact that they openly attack the essence of the competition law regime, it can thus be concluded that this type of agreements should clearly be prohibited under the relevant substantive provisions contained in Article 101 TFEU. The question whether or not this is the case will be explored in the next Chapter.

CHAPTER 4. Analysing cartel agreements under Article 101 TFEU

Under EU competition law, cartels are typically equated with horizontal\textsuperscript{432} naked restrictions. These two specific characteristics differentiate cartels from other types of anticompetitive behaviour. It is indeed true that cartels, in the broad sense of the word, may be understood as covering both horizontal and vertical practices. Nonetheless, competition authorities widely accept that only horizontal conduct should be included within the category of (hardcore) cartel agreements.\textsuperscript{433} In contrast with the strict approach used for horizontal restrictions, the Commission (currently) accepts that ‘vertical restraints are on average less harmful than horizontal competition restraints’\textsuperscript{434} and, therefore, applies a milder regime in the vertical context. The Commission explains that ‘[i]n horizontal situations the exercise of market power by one company (higher prices for its products) will benefit its competitors. This may provide an incentive to competitors to induce each other in to behaving anti-competitively. In vertical situations the product of the one is the input for the other. This means that the exercise of market power by either the upstream or downstream company would normally hurt the demand for the product of the other. The companies involved in the agreement may therefore have an incentive to prevent the exercise of market power by the other’.\textsuperscript{435} 436 The Commission calls this the self-policing character of vertical restraints.

In addition, it should be noted that competition authorities have become more acquainted with the pro-competitive objectives of several vertical practices, which can also justify this general trend towards a (relatively) more permissive treatment of vertical agreements.\textsuperscript{437} Horizontal cartels, conversely, are commonly identified as “naked restraints”. This characterisation indicates, in essence, that cartels specifically ‘seek to restrict competition without producing any objective

\textsuperscript{432} Horizontal agreements are concluded between actual or potential competitors, that is, undertakings operating at the same level of the production or distribution chain. On the other hand, vertical agreements concern two or more undertakings each of which operates at a different level of the production or distribution chain. See for the definition of vertical agreements e.g. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices ([2010] OJ L 102/1), Article 1(1)(a). As regards the definition of horizontal agreements see e.g. Commission Regulation (EU) No 1217/2010 ([2010] OJ L 335/36), Article 1(1) in fine.


\textsuperscript{434} Communication from the Commission on the application of the Community competition rules to vertical restraints – Follow-up to the Green Paper on vertical restraints, COM (1898) 544 final [1998] OJ C 365/3, Section III, subsection 1. However, as previously explained the recognition of the less damaging nature of vertical practices is rather recent. See supra Chapter 3, section 2.1.


\textsuperscript{436} This “more lenient treatment” can be observed for instance in the application of the ‘de minimis notice’ in vertical cases. While for horizontal agreements the aggregate market share is 10% or less, in vertical cases agreements will be considered to have an inappreciable effect on competition when the market share held by each of the parties is 15% or less (see Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (“De Minimis Notice”) [2014] OJ C 291/01, para 8. Furthermore, in the context of the application of Article 101(3) TFEU, the classification of an agreement as “vertical” frequently also triggers the use of a lower market share threshold than horizontal agreements. See for instance, Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) TFEU to categories of technology transfer agreements (TTBER) [2014] OJ L 93/17, Article 3; Commission, Guidelines on the application of Article 101 TFEU to technology transfer agreements [2014] OJ C 89/3, para 27; ‘[i]n general, agreements between competitors pose a greater risk to competition than agreements between non-competitors’, I. LIANOS, “Collusion In Vertical Relations Under Article 81 EC”, 2008 (45-4) CMLR, 1022-1077, at 1031 (hereafter: ‘I. LIANOS, “Collusion”’).

\textsuperscript{437} ICN Working Group on Cartels, “Defining” 14.
countervailing benefits’. It follows from this perception that cartels are not only prohibited (practically) as a rule under Article 101(1) TFEU, but are also extremely unlikely to be exempted under Article 101(3) TFEU.

On the other hand – and in contrast to other legal systems which specifically contain the words “cartel agreements” as prohibited practices – Article 101 TFEU does not make any methodical – horizontal and/or vertical – delineation between the different types of restrictive conduct falling under its scope of application. In effect, this provision encompasses all forms of anticompetitive collective behavior, ranging from agreements entailing potential competitive benefits, and possibly eligible for exemption under 101(3) TFEU, to completely intolerable restrictions, which are very unlikely to qualify for an exemption. Adopting a systematic interpretation of Article 101 TFEU in practice that fully reflects the harming nature of cartels constitutes is crucial in the context of effective cartel enforcement. If the application of Article 101 TFEU does not illustrate the devastating nature of cartels it will not only be difficult to raise awareness about the damage caused by this conduct, but most importantly, it will be difficult to argue that effective and deterrent sanctions are needed.

The discussion now turns to the analysis of the substantive framework applicable to hardcore cartel agreements, that is: price fixing, market sharing (including bid rigging) and output limitation. It will focus particularly on the question whether – and to what extent – the application and interpretation of Article 101 TFEU by the Commission and the European Courts in cartel cases reflects the overall accepted seriousness of cartel activity and, thus, may serve to demarcate these “horizontal naked agreements” from more tolerable forms of collective behaviour. This examination will also target the question whether the interpretation and application of this provision supports the common view that cartels are so restrictive that they should be generally prohibited under Article 101 TFEU as a whole.

1. The relationship between Article 101(1) and 101(3) TFEU

Article 101 TFEU is principally designed to ensure that each economic operator determines independently the commercial policy that it intends to adopt. This provision is divided in three sections, with Article 101(1) and 101(3) TFEU being the two relevant substantive rules.

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438 M. MONTI, SPEECH/00/295. The perception of cartels as “naked restrictions” is also reflected in the OECD Recommendation which states that its general definition of the term cartel ‘does not include agreements, concerted practices, or arrangements that i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or iii) are authorised in accordance with those laws’. OECD, “Recommendation on Effective Action Against Hardcore Cartels”, C(98)35/FINAL, at 3, available at http://www.oecd.org/dataoecd/39/4/2350130.pdf

439 In addition the term “hardcore” is employed to refer to practices which are typically caught under the main prohibition and are most unlikely to qualify for an exemption. Clauses of an agreements which contain such restrictions are also “black listed” and prevent the application of a block exemption. See also infra section 3 of this chapter.

440 I. LIANOS, “Collusion” 1027.


444 Pursuant Article 101(2) TFEU agreements falling under the prohibition Article 101(1) TFEU shall be automatically void. The ECJ has declared that the automatic nullity of an agreement only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Judgment of the Court of 30 June 1966, C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) [1966] ECR 235.
101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices, which have as their object or effect the prevention, restriction, or distortion of competition within the internal market and which are apt to affect trade between Member States in an appreciable manner.\(^{445}\)

Under EU competition law, the concept “agreements” is not equated with legally binding contracts. In order to establish the existence of an agreement within the meaning of Article 101(1) of TFEU, it is sufficient that the undertakings in question have expressed their joint intention to behave on the market in a specific way.\(^{446}\) The concept of “undertaking” is interpreted as covering ‘every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed’.\(^{447}\) The term “association” encompasses economic and professional organizations and associations of entrepreneurs and is thus, understood in a wide sense. Article 101(1) TFEU applies to associations in so far as their activities or the activities of the undertakings belonging to them produce anti-competitive effects.\(^{448}\) The term ‘decision’ under 101(1) TFEU also covers a wide range of initiatives including the rules of the association in question, decisions binding upon members and recommendations, or any measure which reflects the association’s desire to coordinate the behaviour of its members.\(^{449}\) Finally, the notion of ‘concerted practices’ in Article 101(1) of TFEU has been defined by the ECJ as covering ‘[…] a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition’.\(^{450}\)

Article 101(3) TFEU, on the other hand, provides a legal exception to the principal prohibition of the first section. Pursuant to Article 101(3) TFEU, the prohibition may be declared inapplicable when the agreement, decision by associations of undertakings, or concerted practice fulfil four

\(^{445}\) See infra section 2.2.3 of this Chapter.


\(^{448}\) ECJ Judgment of 29 October 1980, Joined cases 209 to 215 and 218/78, Heintz von Landewyck SARL and others v Commission [1980] ECR 125, para 88). Having regard to the purpose of that provision, the concept of an association of undertakings must be understood as being capable of applying to associations which themselves consist of associations of undertakings (Case T-193/02, Laurent Piau v Commission [2005] ECR II-209, para 69).

\(^{449}\) An act of an association can be regarded as a decision even if it is not binding on the members, at least if the members comply with it. See Judgment of the Court of 27 January 1987, Case 45/85, Verband der Sachversicherer v Commission [1987] ECR 405, paras 26-32.

cumulative conditions. Namely, it must (i) entail efficiency gains (i.e., improve the production or distribution of goods or promote technical or economic progress); (ii) allow consumers a fair share of the benefit; (iii) only contain indispensable restrictions to attain such benefits and (iv) not eliminate competition.

The interaction between Article 101(1) and 101(3) TFEU, and in particular the question how the analysis should be conducted under each part, has long been subject of debate.\footnote{This debate was fundamentally developed prior to the “modernisation and economisation” of EU competition law. In this context, numerous authors generally argued that the Commission had to remodel its approach to agreements under both Article 101(1) and Article 101(3) TFEU by adopting a more economic and less rigid method of assessment. Diverse formulas were suggested in order to clarify and achieve consistency in the relationship the two sections. See e.g. A. JONES, “Analysis of agreements” 744 et seq. See also O. ODUDU, The Boundaries chapters 5-7; O. OKEOGHENI, “A new economic approach to Article 81(1)?”, 2002 (27) ELRev, 100-105; M. PIETRO, “The European Rule of Reason-Crossing the Sea of Doubt”, 2002 (23-8) ECLR, 392-399.} One of the most contentious questions was whether the assessment of an agreement under Article 101(1) TFEU had to, or for that matter could, be conducted by applying a “rule of reason”, equivalent to the analysis carried out in the United States under section 1 of the Sherman Act of 1890.\footnote{Section 1 of the Sherman Act provides that 'every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal' (emphasis added).} Basically, the US “rule of reason” requires an economic assessment of the agreement in question, in order to ascertain its possible effects in the market. In other words, it is necessary to weigh both the pro- and anticompetitive effects of an agreement to establish its overall (anti)competitiveness. The European Courts have, however, made clear that in Article 101(1) TFEU, there is no room for a European equivalent to the US-type “rule of reason”. This position was formalised in the case Métropole Télévision v. Commission, in which the (now) General Court specifically stated that “[i]t is only in the precise framework of [Article 101(3) TFEU] that the pro and anti-competitive aspects of a restriction may be weighed. [Article 101(3) TFEU] would lose much of its effectiveness if such an examination had to be carried out already under Article [101(1)] of the Treaty’. The Court added: ‘[i]t is true that in a number of judgments the Court of Justice and the [General Court] have favoured a more flexible interpretation of the prohibition laid down in Article [101(1)] of the Treaty. Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article [101(1)] of the Treaty’.\footnote{For an examination of the application of the US-style rule of reason see P. AREEDA, “The Rule of Reason - A Catechism on Competition”, 1987 (55-3/4) Antitrust Law Journal, 571-590. For different perspectives as to how the rule of reason could (or should) be applied within Article 101(1) TFEU (prior to the entry into force of Regulation 1/2003) see e.g. S. FORRESTER AND C. NORALL, “The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be applied”, 1984 (21-1) CMLR, 11-51 (hereafter: ‘S. FORRESTER AND C. NORALL, “The Laicization”’); E. STEINDORF, “Article 85 and the Rule of Reason”, 1984 (21) CMLR, 639-646 (hereafter: ‘E. STEINDORF, “Article 85”’); S. KON, “Article 85, para. 3: A Case for Application by National Courts”, 1982 (19) CMLR, 541–561 (hereafter: S. KON, “Article 85”’); L. KYSELEN, “Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law”, 1984 (21) CMLR, 647–668. See against the adoption of a US-style rule of reason in the context of Article 101(1) TFEU R. WHISH AND B. SUFFERIN, “Article 85”; W. WILS, “Rule of Reason”: une regle raisonnable en droit communautaire?”, 1990 (1-2) Cah. dr. Eur., 19-74 and P. MANZINI, “La rule of reason nel diritto comunitario della concorrenza: una analisi giuridico-economica”, 1991 (31-4) Rivista di diritto europeo, 859-882.}
This approach, which is (also) consistent with the bifurcated design of Article 101 TFEU, implies that the overall analysis of agreements under this provision involves two different sub-examinations, which are conducted respectively under Article 101(1) and Article 101(3) TFEU. To establish the (in)compatibility of an agreement with the internal market, it should firstly be examined whether such conduct restricts competition (appreciably), by finding an anticompetitive object or effect. Only when this question is answered in the affirmative, the economic balancing can be conducted under Article 101(3) TFEU. The question whether the agreement objectively produces pro-competitive benefits that outweigh its (previously established) anti-competitive impact, can thus only be assessed in this context.

The logical issue raising in this context is how the analysis of cartel agreements should be conducted under each section of Article 101 TFEU. More precisely, are cartels always considered to restrict competition? To which extent should their anti-competitive effects be analysed and corroborated under Article 101(1) TFEU? Is there some sort of presumption? The next section(s) seek to answer these questions.

2. Cartels under Article 101(1) TFEU: restrictions by object

2.1. Distinguishing object and effect

The prohibition of Article 101(1) TFEU is applicable to agreements that have a restriction of competition as their object, as well as to those that have a restriction of competition as their effect.455 The distinction between the object and effect approach is important because, as indicated by the conjunction “or”, these two requirements are of alternative nature. As early as 1966, the ECJ explained in Société Technique Minière that: ‘[t]he fact that these are not cumulative but alternative requirements […] leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article [101] (1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered’. 456

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455 Article 101(3) TFEU, in contrast, does not distinguish between agreements that restrict competition by object and those that restrict competition by effect. This provision therefore, applies to all agreements that fulfill its four conditions, but in this case the burden shifts to those claiming its applicability, namely undertakings. See Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 20. See also infra section 3 of this chapter.

The substantive approach to agreements under Article 101(1) TFEU is thus a staggered one. The first step consists, in essence, in determining whether an agreement has an anticompetitive object. If it can be confirmed that this is not the case, it should subsequently be assessed, whether the conduct has restrictive effects on competition. As it was set out in Consten and Grundig, this means that there is no need to take into account the concrete or actual effects of an agreement, when the party alleging the infringement has been able to demonstrate that it has as its object the prevention, restriction or distortion of competition.\textsuperscript{457}

The fact that finding a restrictive object suffices to establish an infringement of Article 101(1) TFEU, makes of the object approach an extremely useful instrument for competition authorities. In effect, the EU Commission advances that ‘a full economic analysis of every case would be very costly and might not be justified by gains in identifying market situations […] that were detrimental to competition. In those circumstances, competition policy may have to resort to relatively simple rules of thumb and do without a full economic analysis of every case’.\textsuperscript{458} By qualifying certain agreements as restrictive by object, the EU Commission and Courts can enhance procedural economy by avoiding certain costly proof requirements, such as proof of market power.\textsuperscript{459}

The distinction between object and effect cases has, therefore, significant implications for both enforcers and companies. Once object is found, enforcers do not have “to look further”. Companies found to be engaged in object cases may find it quite hard to adduce (convincing) evidence that their cooperation is nevertheless worthwhile. Yet, it is equally important to keep in mind that by prohibiting cooperation – regardless of whether it is restrictive by object or effect – Article 101(1) TFEU seeks to safeguard competition as a “process” and to promote consumer welfare.\textsuperscript{460} Since both aspects of the prohibition rule have the same objective, this necessarily implies that they also share a common vision on what constitutes a “restriction of competition”. When the ECJ, in Société Technique Minière v Commission, ruled that ‘Article [101(1) TFEU] is based on an assessment of the effects of an agreement from two angles of economic evaluation’,\textsuperscript{461} it indeed confirmed that both the “object” and “effect” approach are designed to identify the same outcome of collusion: a restriction of competition. The key difference between “object” and “effect” thus resides in the method used to determine and establish that competition is restricted.\textsuperscript{462}

\textsuperscript{458} Commission, Green Paper on Vertical Restraints COM (1996) 721 final, para 86.
2.2. Cartel agreements as restrictions by object

2.2.1. The concept of restriction by object

The basic guidelines of the concept “object restriction” were defined in 1966 by the Court of Justice in *Société Technique Minière v Commission*. In this case, the Court established that an agreement is considered to be restrictive by object when the analysis of its clauses ‘reveal[s] the effect on competition to be sufficiently deleterious’. More recently, in the *BIDS* case, the Court explained the concept by referring to the differences between object and effect cases and held that ‘[t]his distinction arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition’.

The intrinsic damaging nature of certain agreements represents thus the main feature of restrictions by object. This aspect was also emphasized by the Commission in its (ex) Article 81(3) EC Guidelines in which it described “restrictions by object” as ‘those that by their very nature have the potential of restricting competition’. It continues stating that ‘these are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1)] to demonstrate any actual effects on the market’. Moreover, in *T-Mobile* the ECJ clarified that this inherent capacity or potential to have a negative impact on competition is sufficient to qualify a practice as having an anti-competitive object. When, in other words, an agreements is capable (having regard to the specific legal and economic context) of resulting in a restriction of competition, it is irrelevant whether the agreement actually results in such anticompetitive outcome.

This discussion shows that the notion of “restrictions by object” is exclusively reserved for agreements which are extremely likely to have a significant negative impact on competition. Because a restriction of competition will be the logical or “most probable” effect of the agreement, there is no need to conduct a fully fledged economic evaluation of the actual conduct of the parties. It would, however, be inappropriate to maintain that *all* agreements which are potentially capable of harming the competitive process, constitute restrictions by object, without the need to consider at all their effects on the market. Although it is clear that when an agreement has as its object the restriction of competition, there is no need to show its actual or concrete effects, this does not mean that they are simply disregarded; on the contrary. As the Court recognised in the seminal case *STM*, in order to establish the damaging nature of an agreement, the object approach necessarily requires

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466 C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 31. See further infra section 2.2.2 of this chapter.
467 C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 31. It should also be taken into account that the object approach entails the risk of being overinclusive or producing the so called false positives. This risk, however, can be counteracted by applying Article 101(3) to agreements producing countervailing effects. See A. JONES, “Analysis of agreements” 761 et seq; O. KOLSTAD, “Object contra”. 5.
taking into account the effect of an agreement, even if such consideration is limited to the finding that effects that are “sufficiently deleterious”. A prohibition constructed upon such a presumption is justified when, based on experience and/or economic analysis, it can be inferred with a high degree of probability that certain agreements have, under normal market conditions, a considerable negative impact on the market and, thus, jeopardize the objectives pursued by the EU competition system. Those invoking the infringement (normally the competition authority) do not have to actually prove any concrete (negative) effects because it is assumed that when the clauses of an agreement are as such designed to restrict competition, the probabilities that it actually does so will be remarkably high. Put differently, a restriction of competition is extremely more likely to occur when a practice aims at effectively doing so, than when the agreement pursues a different (competitive) goal. Consequently, if it can be confirmed that an agreement aims at restricting competition, this will be enough to justify a straightforward prohibition of the agreement under Article 101(1) TFEU.

The vision that the object approach is directly underpinned by a presumption of adverse effects is in fact generally accepted. Nonetheless, there is a certain debate on the question which factors should be taken into account for such a presumption to be taken to exist. The question is thus: which method should be used to effectively establish a restriction by object?

2.2.2. The assessment of a restriction by object

The “object” or “aim” of an agreement is not a substantive requirement that can be determined by referring to the subjective intention of the parties, but a criterion that should be discerned on the basis of the objective features of the agreement. In this connection, since the Société Technique Minière-case of 1966, the European Courts have frequently held that in order to find a restriction by object, regard must be had, inter alia, to the content of the provisions of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part.

468 Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH [1966] ECR 337, para 249. See also B. Lebrun and T. Balthazar, “Definition of Restrictions of Competition by Object: Anything New Since 1966?”, 2011 International Comparative Legal Guide Series - Cartels & Leniency, 16-20, at 17 and S. King, “The object box” 274. S. King notes that ‘it is clear that the effects of an agreement will usually have to be considered, in one form or another, under the object criterion in any event’.

469 This line of reasoning has also been embraced by the Commission, which describes ‘object’ as a ‘presumption […] based on the serious nature of the restriction and on experience showing that restrictions of competition by object are very likely to produce negative effects on the market. Furthermore, the Commission distinguishes the object and effect analysis based on the fact that ‘[i]n the case of restrictions of competition by effect there is no presumption of anticompetitive effects’. See Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, paras 21 and 24. The horizontal cooperation guidelines also reiterate this vision by indicating that the ‘object’ analysis is that applied to ‘agreements […] presumed to have negative market effects’. Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/2, para 18.


471 S. King, “The object box” 292.

472 See also S. King, “The object box” 292.

473 See e.g. GlaxoSmithKline Services Unlimited v. Commission [2009] ECR I-9291, para 58; Judgment of the Court of 6 April 2006, Case C-551/03 P General Motors v Commission [2006] ECR I-3173, para 66; see also C-808, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de...
Accordingly, the anticompetitive “purpose” of an agreement can in principle not be established by using an abstract standard. Instead, it appears that (at least in the Société Technique Minière case) the Court of Justice opts for an individual analysis of whether a given agreement aims at restricting competition which, must be assessed in the legal and economic context of the agreement. Following this reasoning, it can be affirmed that, in essence, the object approach is not designed to invariably cover certain categories of agreement. Theoretically, any agreement can be held to have an anticompetitive object.474 The decisive question is actually whether an objective examination of the agreement – considering its precise background and circumstances – shows that the substantive conditions of Article 101(1) TFEU are satisfied.

It is, indeed, true that establishing the purpose of an agreement necessarily requires an assessment of the “legal and economic context” to establish the presumption of anticompetitive effects. However, very frequently the content of an agreement reveals the existence of such an inherent restriction of competition, that this assessment can be conducted on a fairly summary basis.475

This abridged approach has been reflected in a number of judgements. One of the most representative cases of this trend is Montedipe v Commission. This case concerned an appeal against a Commission decision fining a series of agreements and concerted practices fixing target prices and controlling volume quotas in the polypropylene market.476 The applicant submitted that the Commission should have examined the agreement in relation to its economic context, thereby applying a rule of reason.477 The General Court, in its examination of the object of the agreement, found that ‘the fact that the infringement of Article [101(1)] of the Treaty, in particular subparagraphs (a) and (c), is a clear one necessarily precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement per se of the competition rules’. 478

It is difficult to overlook the practical importance of this verdict. For the first time, the concept of “object” was explained by comparing certain types of agreements (these enumerated in subparagraphs (a) and (c)) with per se infringements under US antitrust law. According to the American per se rule, ‘there are certain agreements or practices which because of their pernicious

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474 See J. FAULL AND A. NIKPAY, The EC Law of Competition 223; S. KING, “The object box” 279, citing K. P. E. LASOK QC’s paper presented to the Law Society on 8 October 2007, “Recent Developments in the Rule of Reason in EC Antitrust Law”: “the Court of Justice in STM and Consten made clear that the analysis is essentially ‘free’ in that no assumptions are made about the (anti)competitive nature of an arrangement. The key question is whether or not taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the prohibition set out in Article 101(1)’.

475 J. FAULL AND A. NIKPAY, The EC Law of Competition 223; see also Case T-168/01, GlaxoSmithKlineServices Unlimited v. Commission [2006] ECR II-2969, para 119. In this case the General Court stated that the analysis of object ‘may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition.’ However, this analysis ‘must, on the other hand, be supplemented, depending on the requirements of the case, where that is not so’.


477 The Commission, on the other hand, disputed the applicant’s analysis of the American and EU case-law on the rule of reason. Yet, it accepted that the application of Article 101(1) requires an examination of the cartel's economic context and its probable or actual effects. In this case that examination is contained in points 2 to 13 and 89 to 94 of the decision. See CFI 10 March 1992, Case T-148/89 Montedipe v Commission [1992] ECR II-1155, para 261.

effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. 479 By making such a comparison, the Court clearly acknowledged that certain agreements will be *automatically* associated with restrictions by object and, therefore, prohibited by Article 101(1) TFEU. Furthermore, since the *per se* approach only applies to agreements with a “lack of redeeming virtues”, the General Court also clarified the scope of application of Article 101(3) TFEU. 480

A comparable interpretation of Article 101(1) TFEU can be found in *European Night Services*. 481 In this case, the General Court noted that when assessing the effects of an agreement under Article 101(1) TFEU, ‘account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, *unless* it is an agreement containing *obvious* restrictions of competition such as price-fixing, market-sharing or the control of outlets. 482 In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article [101](3) of the Treaty, with a view to granting an exemption from the prohibition in Article [101](1).’ 483

In this case, the language of the General Court arguably supports the view that two different paths can be followed when scrutinizing the object of an agreement. First of all, where the anticompetitive consequences of a certain agreement are not immediately apparent, it is necessary to conduct a careful and close analysis of its content in its legal and economic context to be able to build a solid presumption concerning its negative impact. This approach, differs from the second “more abridged assessment” used for the “most obvious restrictions of competition”, 484 which logically also applies to cartels. 485

As these judgements illustrate, the European Courts accept the principle that certain categories of agreements – including practices designed to fix prices, share markets and limit output – have by definition the (almost) invariable effect of restricting competition. When a restriction of competition is the inherent consequence of a certain type of agreements, it is considered that the category in question restricts competition “as such”. Once an agreement is classified as a restriction of a certain type, it can be deduced, based on the premise that similar agreements lead to similar effects, that the agreement has the natural tendency to restrict competition. In essence, the classification of the agreement as falling within a certain category will trigger the presumption of anticompetitive effects. 486

479 The *per se* approach was defined by the US Supreme Court in *Northern Pacific Railway Co v United States* 356 US 1, 5 (1957).

480 See further infra section 3 in this chapter.


484 See also S. KING, “The object box” 288; see for a different opinion A. ANDREANGELI, “from mobile phones to cattle: how the Court of Justice is refraining from the approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty”, 2011 (34-2) World Competition, 215-243, at 234 et seq (hereafter: ‘A. ANDREANGELI, “From Mobile”’).

485 See also S. KING, “The object box” 288; see for a different opinion A. ANDREANGELI, “From Mobile” 234 et seq.

486 See Opinion of Advocate General Trstenjak delivered on 30 June 2009, in *GlaxoSmithKline Services Unlimited v. Commission* [2009] ECR I-9291, para 91. ‘This standardised approach certainly creates legal certainty. However, it is always subject to the proviso that the legal and economic context of the agreement to be examined does not preclude application of this standardised assessment’; see also O. KOLSTAD, “Object contra” 6.
In the analysis of these extremely clear restrictions, the role of the legal and economic context of an agreement will, therefore, be rather limited. The approach of the European Courts, in effect, supports the theory that ‘the inherently anticompetitive object which characterizes the conclusion of certain agreements, more specifically those expressly prohibited under Article [101(1)(a)-(c) TFEU], cannot be altered by an analysis of the economic context in which the agreement is situated’. In other words: an economic analysis cannot override the inescapable reality that some categories of agreements have the (almost) invariable effect of restricting competition. The result is that, in contrast to more ambiguous practices, in cases which are typically seen as involving “obvious” restraints, an examination of the legal and economic context will only be relevant to determine whether such context excluded any possibility of effective competition. For instance, if the national legislation in a Member State has the effect of restricting competition and companies have no margin at all to effectively compete, the infringement of Article 101 TFEU cannot be established (either by object or by effect) even if the agreement contained an “evident” restriction. Consequently, only in very rare occasions (if at all), undertakings involved in such serious restrictions will be able to escape the prohibition of Article 101 TFEU based on an analysis of the agreement’s legal and economic context.

2.2.3. Cartels and appreciability

The previous section has demonstrated that cartels are typically treated as restrictions by object. Having as object the restriction of competition is sufficient to establish an infringement of Article 101(1) TFEU. However, the Court of Justice has further specified that ‘in order to come within the prohibition imposed by Article 101(1) TFEU, the agreement must affect trade between Member States and the free play of competition to an appreciable extent’. This additional criterion constitutes an important limit to the scope of application of Article 101(1) TFEU. The question now is: can cartel participants escape the main prohibition of Article 101 TFEU on the ground that their price fixing, market sharing, or quotas agreements do not have an appreciable impact on competition?

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489 In Joined cases 8 to 11-66, Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission [1967] ECR 93, para 1088, the Court held that ‘[t]he conformity of conduct with Article [101(1)] of the Treaty must be assessed in its economic context. However, even if the applicants’ assertions were well founded, they are not of such a nature as to prove that the economic context excluded any possibility of effective competition’, relying on Judgment of the Court of 8 July 1999, Case C-235/92 P, Montecatini SpA v Commission [1999] ECR I-4539, paras 118 and 127; Joined Cases 209 to 215 and 218/78, Van Landewyck and Others v Commission [1980] ECR 3125, para 153; Judgment of the Court of 10 December 1985, Joined cases 240, 241, 242, 261, 262, 268 and 269/82, Stichting Sigarettenindustrie and others v Commission [1985] ECR 3831, paras 24-29. See also I. SIMONSSON, Legitimacy 117-119. This argumentation is generally known as the “State action defense”; see Judgment of the Court of 9 September 2003, Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato [2003] ECR, I-8055.

The notion of “appreciability” was firstly elucidated by the Court of Justice in Völk v Vervaecke, which concerned a classic restriction by object, namely absolute territorial protection. In this case the Court declared that ‘an agreement falls outside the prohibition in Article [101(1) TFEU] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article [101(1) TFEU]’.

This case made clear that European competition law is not conceived to deal with agreements that have an insignificant effect on competition and are, as such, incapable of thwarting the objectives of the EU competition system. This logic would also apply when the agreement in question consists of a restriction by object: even the most obvious types of restrictions can, in principle, escape the prohibition of Article 101(1) TFEU when their impact on the market is not appreciable.

In order to assess the appreciability of a restriction by object, it is firstly convenient to keep in mind that the Commission and/or NCA alleging the infringement are not required to prove that an object restrain has an actual adverse effect on competition. As examined, under the object approach it is assumed that agreements will (potentially) have this effect. The relevant issue will thus be whether the presumed negative effect has sufficient magnitude to affect competition in a noticeable or appreciable manner. In object cases, the examination of appreciability is generally conducted both by reference to the market position of the parties involved (i.e. their market shares) and the seriousness of the restrictions in question. The logic of this approach implies that when the companies involved in an agreement hold a very weak position in the market, it is reasonable to conclude that the EU competition objectives are not at risk.

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492 Under absolute territorial protection, a single distributor obtains the rights from a manufacturer to market a product in a certain territory, and other distributors are prohibited from selling actively or passively into this territory (see COMMISSION, “Glossary of Terms”. Absolute territorial protection was firstly identified by the case law as a restriction by object in Établissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v Commission [1966] ECR 299.
493 Case 5-69, Franz Völk v S.P.R.L. Ets J. Vervaecke [1969] ECR 295, paras 5-7. In this case the Commission observed that the production of washing machines by Mr. Völk’s undertaking represented 0.08% of the total production of the Common Market and 0.2% of production in the Federal Republic of Germany. In Belgium and Luxemburg (the territory of its exclusive distributor Vervaecke) its market share was 0.6%. Considering the low market shares the Commission admitted that the agreement did not appreciably restrict competition. See also Judgment of the Court of 28 April 1998, Case C-306/96, Iavico International and Iavico AG v Yves Saint Laurent Parfums SA [1998] ECR 1983, para 16. In contrast with these cases, the Court of Justice further clarified in Miller, that the appreciability doctrine has strict limits. In this case, which concerned a territorial restriction by object, the undertaking’s share of the total market in sound recordings in Germany ranged between 5% and 6%. The Court held that this case was far from being comparable to the undertakings concerned in the Völk judgment. In the Court’s view, the undertaking involved was of sufficient importance and its behaviour was, in principle, capable of affecting trade (Judgment of the Court of 1 February 1978, Case 19/77, Miller International Schallplatten GmbH v Commission [1978] ECR 131, para 10). According to J. FAULL AND A. NIKPAY, it follows from an examination of these cases that for vertical agreements, shares below 1% will probably be considered to affect competition in a non-appreciable manner while above 5%, the effect is likely to be appreciable. J. FAULL AND A. NIKPAY, The EC Law of Competition 228.
494 See also A. JONES AND B. SUFRIN, EC Competition 183.
495 See also J. FAULL AND A. NIKPAY, The EC Law of Competition 227-231.
The importance of the appreciability doctrine also led the Commission to clarify this notion in its *de minimis* notice which was first published in 1997.\textsuperscript{497} In this notice, the Commission establishes market share thresholds below which the restriction of competition is normally not appreciable and, therefore, not prohibited under (now) Article 101(1) TFEU.\textsuperscript{498} However, already in 1997 the Commission clearly stated that ‘[w]ith regard to horizontal agreements which have as their object to fix prices or to limit production or sales, or to share markets or sources of supply, the applicability of Article [101](1) [could] not be ruled out even where the aggregate market shares held by all of the participating undertakings remain below the thresholds’.\textsuperscript{499} This view was reiterated in the 2001 version of the notice, which stated that agreements containing *hardcore restrictions* could not benefit from the application of the notice.\textsuperscript{500} The outright exclusion of these restrictions from the scope of the *de minimis* seemed to indicate that in 2001 the Commission’s vision differed from the approach originally adopted by the Court of Justice in the *Völk v Vervaecke* case more than 40 years ago.\textsuperscript{501}

It is true that the early ECJ case-law has found that Article 101(1) TFEU is not applicable to agreements containing hardcore restrictions provided that the agreement ‘has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question’.\textsuperscript{502} However, the evolution of the EU competition law system and the relevant case-law indicates that these cases must not be misconstrued as meaning that the appreciable effect of restrictions of competition ‘by object’ must be measured only by reference to market share thresholds.\textsuperscript{503} In fact, when the Commission made an explicit reservation in the (1997 and 2001) *de minimis* as regards ‘hardcore restrictions’, it was acting consistently with the requirements arising directly from Article 101 TFEU. To elaborate somewhat: the exclusion of

\textsuperscript{497} Commission, Notice on agreements of minor importance, published in [1997] OJ C 372/13 and revised in 2001 ([2001] OJ C 368/13) and 2014 ([2014] OJ C 291/01). It should, however, be noted that the threshold established in the Commission’s notice actually concern a *rebuttable* presumption that under such thresholds a given agreement will not appreciably restrict competition. The Commission can nonetheless, demonstrate otherwise.

\textsuperscript{498} The quantification of what is not likely to be an appreciable restriction of competition is based on market share thresholds. In the 1997 Notice the "de minimis" thresholds were fixed at respectively 5% and 10% market share. In the 2001 revision, the Commission raised "de minimis" thresholds to 10% market share for agreements between competitors and to 15% market share for agreements between non-competitors (Commission, Notice on (de minimis) ([2001] OJ C 368/13) para 7. In the 2014 version the thresholds have not been modified ([2014] OJ C 291/01, para 8).


\textsuperscript{500} See Commission, *de minimis* notice ([2001] OJ C 368/13), para 12. On the horizontal level, the Commission identified the following hardcore restrictions: the fixing of prices, the limitation of output or sales and the allocation of markets or customers. On the vertical level, examples of hardcore restrictions include agreements conferring an exclusive sales territory and protection from sales by others within the territory (absolute territorial protection) or otherwise prohibiting or limiting parallel trade and resale price maintenance. In this context it should be noted that the Commission used the term hardcore to refer to restrictions which are considered remarkably serious and normally do not produce any beneficial effects. Provisions of an agreement that contain hardcore restrictions are also referred to as ‘black clauses’ and also prevent the agreement from benefiting from a block exemption. Furthermore, agreements containing black clauses can only exceptionally be exempted on the basis of an individual assessment (see also *infra* section 3 of this Chapter).

\textsuperscript{501} Nevertheless, it interesting to mention that, until very recently, it was still argued that such an exclusion does not automatically imply that hardcore restrictions may never fall outside the prohibition of Article 101(1) TFEU on the basis of the appreciability criterion. See D. BAILEY, “Presumptions in EU Competition Law”, 2010 (31-9) ECLR, 362-369, at 365; A. JONES AND B. SURIN, *EC Competition* 188; J. GYDER, “Cet obscur objec: Object restrictions in vertical agreements”, 2011 (2-4) *Journal of European Competition Law & Practice*, 327-339, at 330; J. FAULL AND A. NIKPAY, *The EC Law of Competition* 227-231. This observation was mainly defended on the basis of the ECJ judgement in *Völk v Vervaecke*.


\textsuperscript{503} See also opinion of the Advocate General Kokott in Judgment of the Court of 13 December 2012, Case C-226/11, *Expedia Inc. v Autorité de la concurrence and others.*
hardcore restrictions can be seen as a consequence of, on the one hand, the clear difference between object and effect restrictions, and, on the other, of the Commission’s more rigorous policy regarding certain (clauses of) agreements mostly involving harming object restrictions. Following the reasoning “the more serious the restrains, the less likely it is to be insignificant”, an agreement entailing certain competition concerns could eventually be considered to be of minor importance if the market shares are (in some cases significantly) lower than specified in the notice. However, practices with an anti-competitive object, and more precisely cartel agreements which are seen as the most serious violations of EU competition law, can hardly be regarded as infringements with an inappreciable effect. On the contrary, given the great damaging effects of these restrictions, it seems appropriate to presume that firms which enter into cartel agreements always intend to influence competition in an appreciable manner, irrespective of the size of their market shares and turnover.

In practice, it is currently basically inconceivable that the Commission and Courts would allow horizontal cartels to escape the Article 101(1) TFEU prohibition on the basis that they have an insignificant effect on competition. Furthermore, companies are very well aware of the fact that with low combined market shares, their attempts to control the market through market allocation and pricing initiatives will simply fail. Therefore, even if a small market share was relevant element in the analysis of cartel cases, the probabilities to find cartels without joint market power are almost inexistent. In effect, these specific considerations appear to have influenced the general flow of the case law as well as the practice of the Commission. In 2001, the Commission had already adopted a quite radical approach as regards the feasibility of the de minimis defence in cartel cases. It explicitly claimed that ‘if the applicant’s arguments refer[ed] to the [de minimis notice], its arguments [were] ineffective, since hardcore restrictions, that is price-fixing and market-sharing, are always prohibited, regardless of the market shares of the companies concerned’. In 2004, the General Court supported this approach by specifically rejecting the application of the appreciability doctrine in cartel cases.

In the Mannesmannröhren-Werke judgement the Court held that: ‘undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article [101(1) TFEU] by claiming that their agreement should not have an appreciable effect on competition. As the purpose of agreement […] was to share the markets between the members of the [cartel], its existence made sense only if its object were to restrict competition appreciably, i.e. in a manner commercially useful to them; and the Commission has established to the requisite legal standard that the agreement did in fact exist’. 

504 See e.g. A. JONES, “Left behind” 650; See also A. JONES AND B. SUFRIN, EC Competition 186-189.
505 See supra Chapter 2, section 1.
506 See for a similar vision, opinion of the Advocate General Kokott in Judgment of the Court of 13 December 2012, Case C-226/11, Expedia Inc. v Autorité de la concurrence and others, para 50.
507 See supra Chapter 2, section 5.3.
508 See further supra Chapter 2, section 5. See also J. FAULL AND A. NIKPAY, The EC Law of Competition 228.
509 Judgment of the General Court of 16 June 2011, Case T-199/08, Ziegler SA v Commission, ECR [2011] II-3507, para 35. See also CFI 8 July 2004, Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, JFE Engineering Corp. (T-67/00), Nippon Steel Corp. (T-68/00), JFE Steel Corp. (T-71/00) and Sumitomo Metal Industries Ltd (T-78/00) v Commission [2004] ECR II-2501, para 380. In this case the Commission found that ‘pursuant to its Notice on agreements of minor importance the application of Article [101(1) TFEU] cannot be ruled out in cases of horizontal agreements which have as their object, amongst other things, the sharing of markets or sources of supply, even if the market share of the undertaking concerned is minimal’.
In essence, the General Court holds the view that in cartel cases it is allowed to assume that the agreement will have an appreciable effect on competition. Such an assumption is based on the fact that cartel agreements are only rational when, based on the (relevant) market position of the parties, they have the potential to affect competition in a noticeable manner. Although the theoretical possibility of a cartel that has no significant (appreciable) effects on competition as such exists, the presumption of an appreciable negative impact allows to prohibit cartels that were simply badly designed. This interpretation is consistent with the prohibition of cartels that are unsuccessful for other reasons – such as the presence of one or multiple “cheaters” – and that were incapable of effectively raising prices.

In 2013, the ECJ finally confirmed in *Expedia* that an agreement which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition.\(^\text{511}\) This recognition also led the Commission to revise its *de minimis* notice in 2014 in order to reiterate its position by incorporating the Court’s opinion.\(^\text{512}\)

The *Expedia* case confirms that the original perception of the relationship between object restrictions and appreciability, as set out in *Volk*, has evolved considerably, in line with the stricter application of Article 101 TFEU in object cases by the EU Courts and the Commission. Despite such evolution, it would be inappropriate to argue, based on the *Expedia* ruling, that the appreciability requirement is no longer applicable in object restrictions. Agreements must always have an appreciable effect on competition. The only difference is that in the case of restrictions by object, the appreciability condition is presumed. The rationale of such presumption is, as the Court commented in *Expedia*, logically connected to the particular character of restrictions by object, compared to restrictions by effect. In this sense, the Court’s ruling in *Expedia*, is not only in line with its previous line of reasoning – and also with the vision of the Commission – but it is actually entirely based on its settled case law. Based on the preventive nature of competition law and also bearing in mind that cartels do not produce any countervailing benefits,\(^\text{513}\) it is fully appropriate to take the view that the appreciability defence must not be viable in cartel cases.\(^\text{514}\)

### 2.2.4. The definition of the market in cartel cases

The strict application of the appreciability doctrine lead us to the question whether, and (if so) to what extent, companies can make a valid point by arguing that the competition authority claiming the violation did not provide a precise definition of the relevant market.\(^\text{515}\) Said differently: is the competition authority obliged to define the relevant market in (all) cartel cases?

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\(^{512}\) This approach has logically been fully embraced by the Commission in its 2014 version of the *de minimis* notice. Commission, 2014 Notice on agreements of minor importance ([2014] OJ C 291/01), paras 13-14.

\(^{513}\) See *supra* Chapter 2, section 2.

\(^{514}\) I. SIMONSSON, *Legitimacy* 115.

\(^{515}\) The definition of a relevant market is an instrument to identify and define the boundaries of competition between firms. It establishes the framework within which the Commission applies competition policy principles. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved (may) face. Commission, “Glossary”. 104
The market definition tool makes it possible, *inter alia*, to calculate the respective market shares of the undertakings active on the relevant market, which in turn clarifies their market power. In the (extremely improbable case) that a competition authority would accept the appreciability defence, such definition would be useful to verify whether companies only had small or insignificant market power. In addition, a lack of market power can also be relevant in the context of inter State trade, which is the determinant factor to establish the jurisdiction of European (competition) law.\footnote{I. SIMONSSON, *Legitimacy* 115.}

As the General Court held in multiple judgments, ‘the reason for defining the relevant market, [is on the one hand] to determine whether an agreement is liable to affect trade between Member States and, [on the other, to establish whether] it has as its object or effect the prevention, restriction or distortion of competition. Consequently, there is an obligation on the Commission to define the relevant market in a decision applying [101 TFEU] only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market’.\footnote{CFI 19 March 2003, Case T-213/00 CMA CGM a.o. v Commission (FETTCSA) [2003] ECR II-913, para 206; CFI 21 February 1995, T-29/92 SPO a.o. v Commission [1995] ECR II-289, para 74; CFI 15 March 2000, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR a.o. v Commission [2000] ECR II-491, para 1093.}

By engaging in cartel agreements, companies directly fix the terms of their competition parameters. Accordingly, as examined above, they are classically considered as practices which have as their *object* the restriction of competition. Once it has been established that the actual object of an arrangement is to restrict competition by, for instance, agreeing on prices or sharing markets, it is not necessary to define the markets in question provided that (potential) competition on the territories concerned was necessarily restricted. The question whether or not those territories constitute ‘markets’ in the strict sense is irrelevant in this regard.\footnote{T-241/01 SAS v Commission [2005] ECR II-2917, para 99; CFI 19 March 2003, Case T-213/00 CMA CGM a.o. v Commission (FETTCSA) [2003] ECR II-913, para 206; CFI 14 May 1998, T-348/94 Enso Española v Commission [1998] ECR II-1875, para.232.} Therefore, as the General Court declared in the *Mannesmannröhren-Werke* case, even if assuming that ‘the Commission defined the market affected by the infringement […] insufficiently or incorrectly in the present case, that circumstance could not have an impact on the existence of that infringement’.\footnote{T-44/00, Mannesmannrohren-Werke AG v Commission [2004] ECR II-2223, paras 132-133; CFI 11 December 2003, T-61/99, Adriatica di Navigazione Spa [2003] ECR II-5349, para 29.}

It can thus be concluded that the Commission is not required to define the market for the purpose of finding an infringement under Article 101(1) TFEU, but has the duty to establish the scope of the infringement. The definition of the market in a cartel case does not call for a high degree of precision. By describing the product, the undertakings concerned, supply and demand, as well as the geographic scope of the industry, the Commission can examine the market and consider the cartel conduct in its relevant context. Yet, a market definition may still be relevant for the purpose of establishing effect on trade between Member States.\footnote{See infra Chapter 5, section 2.2.2.}
3. The application of Article 101(3) TFEU

The examination above indicates that cartels agreements are as a rule seen as object restrictions and, therefore, automatically violate Article 101(1) TFEU. Other considerations such as the economic context of the agreement or the appreciability criterion have little relevance.

As explained earlier, finding a restriction of competition (by object or effect) under Article 101(1) TFEU is only one step of the analysis. It is well known that agreements that restrict competition may at the same time have pro-competitive effects.\(^{521}\) When the pro-competitive effects of an agreement outweigh its anti-competitive effects, the agreement is seen as pro-competitive as a whole and will, therefore, be compatible with the objectives of the EU competition regime. In order to take into account the net effect of such agreements, the second part of the analysis consists in assessing under Article 101(3) TFEU whether restrictive agreements generate objective economic benefits that outweigh their negative effects.\(^{522}\)

Pursuant to Article 101(3) TFEU, restrictive agreements will escape prohibition of Article 101(1) TFEU when the four cumulative conditions of Article 101(3) are satisfied, that is, (i) if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, provided that (ii) they allow customers a fair share of the resulting benefit, (iii) do not impose restrictions that are not indispensable to attain those objectives and (iv) do not afford the undertakings concerned the possibility of substantially or fully eliminating competition.\(^{523}\) The European Courts have clarified that Article 101(3) TFEU does not exclude a priori certain types of agreements from its scope of application. As a matter of principle all restrictive agreements that fulfil these four conditions are, therefore, can be finally allowed.\(^{524}\) This means that the presumption that “object” agreements have a negative impact on competition is not conclusive.\(^{525}\) Also this type of agreements, and even the infamous hardcore restrictions, can potentially qualify for an exemption. However, the practical vision of the Commission in this area suggests that severe restrictions of competition, are most unlikely to fulfil the Article 101(3) TFEU conditions. This position is further elaborated in its guidelines on the application of (ex) Article 81(3) EC where the Commission maintains that:

‘[a]greements of this nature generally fail (at least) the two first conditions of Article [101](3). They neither create objective economic benefits nor do they benefit consumers. For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher prices without producing any countervailing

\(^{521}\) Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 33. The EU Commission adds that ‘[e]fficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product’.

\(^{522}\) Ibid.

\(^{523}\) According to Article 2 of Regulation 1/2003, the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of this provision. Therefore, the factual arguments and the evidence provided by the undertaking(s) must convince the Commission that the agreement in will produce pro-competitive effects. See also, for example, GlaxoSmithKline Services Unlimited v. Commission [2009] ECR I-9291, paras 93–95.


\(^{525}\) A. JONES, “Analysis of agreements” 761. As this author correctly notes, ‘[a]t first sight this creates an important distinction between object and per se cases’.
value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition’.  

It makes sense that the Commission specifically refers to price fixing cartel agreements to explain its strict approach towards the applicability of Article 101(3) TFEU in hardcore cases. As previously described, horizontal cartels can be differentiated from other types of restrictive activities because of their lack of redeeming virtues. Companies involved in a cartel typically reduce their production while increasing their prices and, thereby, their own financial benefits. It is therefore reasonable that the presence of cartel clause in a certain agreement precludes the application of particular block exemption regulation and, that these “blacklisted” agreements are never individually exempted in practice under Article 101(3) TFEU.

Looking back at the 1980’s it appears, nevertheless, that the Commission was to some extent willing to adopt a more indulgent approach in exceptional cases. That unusual trend is illustrated in a few decisions, where it had to deal with the so called crisis cartels. As the Commission clarified, irrespectively of the existence of a general economic crisis, when overcapacity problems are of a structural nature, market forces alone do not always suffice to remove unnecessary capacity from a market.

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526 Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, paras 46-47. The Commission adds that ‘[a]ny claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded’ (referring to T-29/92 SPO a.o. v Commission [1995] ECR II-289).


529 The Commission explained in its Annual Report on Competition Policy of 1982 that ‘structural overcapacity exists where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term’. Commission, Twelfth Report on Competition Policy, Brussels 1982, para 38. According to the OECD, cyclical overcapacity, on the other hand, ‘is the result of the drop in demand that occurs during a business cycle downturn. In such circumstances, supply and demand can be brought into equilibrium relatively quickly through the normal play of market forces, with the least efficient players leaving the market either by their own choice or as a result of insolvency’. OECD, “Global Forum on Competition, Crisis Cartels” - contribution from Ireland (DAF/COMP/GF/WD(2011)21), 2011. (hereafter: ‘OECD, “Crisis Cartels”’, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2011)20&docLanguage=En

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Economic analysis can be useful in this context to understand the issue of structural overcapacity and why the competitive process cannot always provide an efficient solution. In game theory, the main strategy of the “war of attrition” consists in bringing competitors to withdraw the market through continuous losses. To achieve this objective, companies must be prepared to suffer economic losses themselves. The “game” will frequently be won by the company with greater resources. Taking into account these considerations, it is logical that firms will not always be willing to give up their unutilised capacity because, if their rivals would exit the market, they will be able to increase their production and acquire (the leftover) market share. This situation, therefore, represents a “prisoner's dilemma” in game theory. While from a collective perspective the whole industry could benefit from a reduction of inefficient overcapacity, from an individual point of view firms will not just be willing to be the first to reduce capacity. The preferred strategy would be to wait for other competitors to diminish their own capacity or to leave the market, which in turn would be very beneficial for the remaining firms as they may save the cost of reducing capacity and may be able to increase their market share.

In such circumstances, industrial restructuring agreements specifically designed to reduce obsolete capacity according to a structured plan, can be deemed necessary and even result in pro-competitive benefits. An agreement reducing capacity may, for instance, achieve pro-competitive benefits by effectively removing inefficient capacity from the industry. Furthermore, as explained above, when a capacity-reduction scheme facilitates the exit of certain competitors from the market, the companies remaining on the market will probably increase their production to win market share left by the exiting players. The increased capacity of the remaining players may also lead to economic benefits. Although the precedents in this area are in effect limited, the Commission recognised these beneficial aspects and, consequently, adopted a number of decisions exempting crisis cartels under Article 101(3) TFEU. One of the most representative cases of this exceptional trend was Synthetic Fibres. In its decision the Commission considered that the market forces had failed to achieve the capacity reductions necessary to re-establish an effective competitive structure. Although the agreement to reduce capacity had the object and effect of restricting competition, an agreement to reduce capacity would allow to operate the remaining capacity more intensively and provide the undertakings with an opportunity to develop their particular strengths and specialize. Specialization on products for which they have the best plant and more advanced technology will improve technical efficiency and enable undertakings to develop better-quality products more in tune with the consumer’s requirements. As a consequence, it would be possible to enhance the profitability of each party and restore competitiveness.

530 See Chapter 2, section 5.
531 OECD, “Crisis Cartels”, para 8.
532 OECD, “Crisis Cartels”, para 25. However, a company seeking to justify an agreement under Article 101(3) TFEU is required to demonstrate any pro-competitive benefits. In particular, it should be proved that the agreement in question ensures that inefficient capacity will exit the market.
533 Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, para 68 (“[e]fficiencies in the form of cost reductions can also follow from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilisation”). See also OECD, “Crisis Cartels”, para 29-30.
535 Ibid, para 31.
536 Ibid, paras 34-35.
537 Ibid, paras 35-39. The Commission added that the ‘coordination of plant closures will also make it easier to cushion the social effects of the restructuring by making suitable arrangements for the retraining and redeployment of workers made redundant. It can be concluded then that the agreement contributes to improving production and promoting

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Commission concluded that the conditions of Article 101(3) were satisfied and granted an exemption on this basis.

In accordance with the recent shift towards an economic effect based approach, it is extremely difficult for firms seeking to justify a crisis cartel to succeed with a defence under Article 101(3) TFEU. The viability of such defense has indeed been tested by a number of undertakings which, in the light of the economic crisis and overcapacity problems, had raised their hopes to obtain exemptions for their crisis arrangements. This was in particular the case in Beef Industry Development Society and Barry Brothers (BIDS). The Irish Beef case concerned a joint scheme under which ten principal beef processors in Ireland intended to reduce the total capacity of the industry by 25% within one year. BIDS submitted that the arrangement did not constitute an infringements by object, but should, on the contrary, be analysed in the light of their actual effects on the market. It basically argued that the purpose of those arrangements was not to adversely affect competition or the welfare of consumers, but to rationalise the beef industry in order to make it more competitive by reducing production overcapacity. The ECJ however took a different view and – following a reference to it from the Irish Supreme Court – declared that ‘even supposing it was to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. […] It is only in connection with Article [101](3) that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article [101](1).’

In addition, BIDS argued that the concept of infringement by object should be interpreted narrowly and that only agreements such to fix prices, to limit output or share markets, should fall under that category. The Court observed in response to this and other arguments put forward by BIDS that ‘the arrangements are intended […], essentially, to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability […]. That type of arrangement conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy technical and economic progress. […] Consumers stand to gain from the improvement in production, in that the industry which eventually emerges will be healthier and more competitive and able to offer them better products thanks to greater specialization, whilst in the short term they will continue to enjoy the benefits of competition between the parties. The agreement also ensures that the shake-out of capacity will eliminate the non-viable and obsolete plant that could only have survived at the expense of the profitable plant through external subsidies or loss financing within a group, and will leave the competitive plants and businesses in operation’. See also e.g. Stichting Baksteen [1994] OJ L 131/15, paras 26 and 29. (‘As the capacity closures concern production units that are the least suitable and least efficient because of obsolescence, limited size or outdated technology, production will in future be concentrated in more modern plants which will then be able to operate at higher capacity and productivity levels’); Commission decision of 21 December 1994 (Case IV/34.252 – Philips/Osram) [1994] OJ L 378/37, paras 25-26. See supra Chapter 3.

538 See supra Chapter 3.
540 Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd [2008] ECR I-8637.
541 It is interesting to mention that the Irish government supported the BIDS agreement, which had been concluded with its knowledge.
which it intends to adopt on the common market. Article [101](1) is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition’. 543

The BIDS ruling made clear the view of the ECJ that an agreement consisting mainly of capacity reductions has as its object the restriction of competition within the meaning of Article 101 TFEU. The only question which still had to be answered was whether the arrangement could benefit from an exemption under Article 101(3) TFEU. In this context the Commission decided to intervene as amicus curiae and submit its observations to the Irish court as regards the application of Article 101(3) TFEU. 544 The Commission emphasised that in this type of cases it is be very difficult for parties to succeed with a defence under Article 101(3) TFEU. 545 Since only the competitive process could remove excess capacity from the market, there is generally no need for this type of coordinated action between competitors. Therefore, when companies seek to justify a restructuring agreement based on efficiency considerations, it is essential that they prove the existence of a structural overcapacity problem, which is in fact an extremely rare situation. 546 Accordingly, the Commission concluded that industrial restructuring agreements imposing restrictions on output or entry barriers are very unlikely to fulfil conditions of 101(3) TFEU. 547 548

4. Concluding remarks

This analysis demonstrated that the Commission and the European Courts adopt a clear and strict approach as to how the substantive assessment of cartel agreements must be (and is) conducted under Article 101 TFEU.

In the context of Article 101(1) TFEU, cartels will typically be considered as restrictions by object. As the EU case-law has frequently reiterated, once the object of the practice is established, there is

543 Ibid, paras 33-34.
544 Pursuant to Article 15 of Regulation 1/2003 the Commission may, where ‘the coherent application of Article [101] or Article [102] so requires, submit written observations to the national courts and also, with their permission, make oral observations. The observations of the Commission in this case are available at http://ec.europa.eu/competition/court/antitrust_requests.html
545 This opinion was also firmly stressed in the speech of the (now former) Competition Commissioner N. KROES, in which she referred to the issue of crisis cartels and stated that ‘[t]here may be many temptations in 2009 to cut corners, but encouraging cartelists and others would be guaranteeing disaster. It would drag down recovery, increase consumer harm and create more cartel and cartel cases into the future. No-one wins - today’s softness is tomorrow’s nightmare’. (N. KROES, SPEECH/09/454, “Tackling cartels – a never-ending task”, delivered at the Conference on Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session, October 2009, Brasil).
546 This observation is related to the “indispensability condition” established Article 101(3) TFEU. The Commission, however, accepts that such type of market failure may occur in particular situations relating stable, transparent and symmetric market structures, where giving up capacity is costly for the firms.
547 See observations of the Commission in Beef Industry Development Society Ltd, available at http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html. In relation to the first condition of Article 101(3), the Commission highlighted a number of aspects. First, it acknowledged that this type of agreements can result in economic benefits and stressed that the existence of efficiencies that outweigh the anti-competitive effects of the agreement can only be established on a case-by-case basis. Second, it observed that the benefits for consumers must compensate for the negative consequences deriving from the agreement. The nature of cost-benefits for consumers will also have to be determined case by case. In this analysis, it is essential to take into account the degree of competitive constraint in terms of actual and potential competition and buyer power. Last, the Commission stressed that the indispensability condition is only satisfied where the market forces cannot remedy (structural) over-capacity problems.
548 In January 2011, BIDS decided not to implement the agreement and withdrew its claim to obtain an exemption under Article 101(3) TFEU. See ECN brief 01/2011 available at http://ec.europa.eu/competition/ecn/brief/01_2011/irl_bids.pdf
no need to show the actual anticompetitive effects of the agreement on the market; instead such effects are presumed. In order to establish the existence of a restriction by object it is necessary to take into account the legal and economic context in which the agreement is situated. However, such consideration will be of scarce relevance in the area of cartels. As previously stated, an economic analysis cannot override the inescapable reality that certain categories of agreements have the (almost) invariable effect of restricting competition. Only the so-called state action defence may be in principle a viable argument. Yet, since there are little chances of finding Member State legislation which restricts competition to such extent that undertakings have no margin to compete, this defence will rarely be successful.

The appreciability criterion is one of the essential conditions for an agreement or practice to fall within the scope of application of the EU competition rules. It cannot be denied that such requirement must be fulfilled for cases of restrictions by effect, and also of restrictions by object, including the (un)famous hardcore restrictions. However, this does not mean that the requirements of the appreciability criterion are interpreted in the same way in both cases. When dealing with the most serious infringements, such as cartels, the EU jurisprudence and the Commission seem to have adopted the correct vision that cartel practices are presumed to affect competition in an appreciable manner. Otherwise, the agreement would simply not make sense, economically speaking. A similar (and welcomed) approach has been developed as regards the definition of the market, which should only be conducted if such analysis is necessary to establish the scope of application of the EU competition rules, i.e. to determine that the agreement has an effect on trade among Member States. This examination will not be a precondition to establish a violation of Article 101(1) TFEU.

The inapplicability of Article 101(3) TFEU to classic market sharing, output limitation and price fixing cartel agreements has long been uncontroversial. These types of agreement are as such incapable of satisfying the conditions of Article 101(3) TFEU. In addition, following the modernization and economization of EU competition law, the application of this provision to crisis cartels became extremely difficult to justify. This perspective was also confirmed in the BIDS case, in which the Commission stated its vision that restructuring agreements are highly unlikely to fulfil the conditions of Article 101(3) TFEU.

It can be concluded that, under the EU competition law system, cartels are (as a general rule) always prohibited. The strict approach adopted by the EU Commission and Courts as regards the interpretation and application of Article 101 TFEU in cartel cases reflects, indeed, the special seriousness of this conduct. In this sense, the firm position of Commission and Courts should be welcomed as it sends a clear message to undertakings and raises awareness. When a firm considers the option of participating in such kind of agreements, they are very well aware of the fact that if they do so, and they get caught, the possibilities of succeeding in a defence under Article 101 TFEU as a whole, are nearly inexistent. This consideration, in turn, accentuates even more, on the one hand, the flagrant nature of cartel agreements and, on the other hand, the importance of designing an effective enforcement system capable of detecting and deterring such violations. The enforcement

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549 In addition, this interpretation can also be seen as the result of the difference between effect and object restrictions. Based on this distinction, and on the seriousness of this type of agreements, object restrictions restrict competition (appreciably) by their very nature.

550 See supra Chapter 2.
system as established by Regulation 1/2003 (and its implementing measures) will be subject of study in the next Chapter.
CHAPTER 5. A crucial step towards more effective anti-cartel enforcement: the modernisation reforms

In 2004, the enforcement of EU competition law underwent its most crucial and comprehensive reform since the system emerged. The importance of the changes and reforms was of such magnitude that the adoption of the new legal framework for the enforcement of the EU competition rules was described as ‘the beginning of the end of an era and style of EC competition law enforcement’.\(^{551}\)

Regulation 1/2003 on the implementation of (now) Articles 101 and 102 TFEU – the cornerstone of the Commission’s modernization and decentralization programme\(^{552}\) – abandoned the previous notification regime in favour of a directly applicable exemption system and introduced a profound restructuration in the division of competences between the Commission, the NCA’s and the national courts. At the moment the reforms were proposed, not only the Commission, but also NCAs, scholars and practitioners specialising in competition law, could foresee the drastic impact that such measures would have on the complex field of anti-cartel enforcement.

The growing ineffectiveness of the Commission to perform its obligations under the previous Regulation 17, deemed the whole set of reforms a mandatory requirement to ensure the effective application and enforcement of the EU antitrust provisions. It is generally recognised that modernization and decentralization process has considerably improved the enforcement of the EU competition rules and has remedied the most important deficiencies of the system established under Regulation 17. Moreover, after more than a decade of application, it is clear that the benefits flowing from the modernisation process have gone much further than it was originally predicted. As further examined below, the adoption of Regulation 1/2003 has triggered a process of soft harmonisation among Members States that has led to enhanced consistency and coherence in the EU anti-cartel enforcement system.

Against this background, the main objective of this Chapter is to evaluate the positive effects of the modernization and decentralization reforms on the (anti-)cartel enforcement regime. This Chapter is divided in three main parts. First, in order to assess the general impact of the reform process, it is necessary to recapitulate and assess the context and functioning of the former system in the early years of enforcement. The first part will therefore offer a brief overview of the background of the reform programme, the objectives of the new system and the main changes. This section will enlighten why the reforms were necessary in order to maintain the effectiveness of the system. In the second part, it will be discussed whether the modernisation and decentralisation of EU


\(^{552}\) To elaborate somewhat, the 2004 modernization of EU competition law entailed two fundamentally different aspects: on the one hand, a substantive reform in the interpretation and application of the EU competition inspired by “the more economic approach” (see further supra Chapter 3) and, on the other hand, a whole reform of the enforcement system. The main (but not only) effect of Regulation 1/2003, which is the central piece of the procedural reforms, is the decentralization of the enforcement of the substantive antitrust provisions. In this context, J. S. VENIT interprets the concept of decentralization as ‘the devolution of powers concerning the enforcement of Art. [101] to the national competition authorities and the national courts’ (J. S. VENIT, “Brave” 545).
competition law can be seen as a step towards more efficient and effective cartel enforcement. In the context of this analysis, particular attention will be given to the most important reforms and to the precise benefits stemming from such measures. Finally, the focus will be put on a crucial (but more unexpected) advantage of the reformed system, namely the soft harmonisation process that emerged among Member States. As argued below in more detail, this process of voluntary convergence has a great potential to enhance effective enforcement. The high level of alignment existing among national competition systems will be illustrated by the field of leniency.

1. The former enforcement system of Regulation 17

1.1. Regulation 17 and the background of the reform

Pursuant to Article 103(1) TFEU, the Council is competent to lay down, on a proposal from the Commission and after consulting the European Parliament, the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. This provision further indicates that the regulations or directives shall be designed ‘to ensure compliance with the prohibitions laid down in Article 101(1) TFEU and in Article 102 TFEU’ and ‘to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other’. On the basis of Article 103 TFEU (former Article 87 EEC) the Council adopted Regulation 17 in 1962 which has governed the enforcement of the EU competition rules for more than 40 years.

Regulation 17 established a fairly centralized enforcement system, in which the Commission played the central role. Under this system, NCA’s of the Member States and national courts were competent to apply Articles 101(1) and 102 TFEU, as long as the Commission had not initiated any procedure. The importance of the function of the Commission was fundamentally reflected in the context of Article 101(3) TFEU. Under Regulation 17, only the Commission had the power to declare Article 101(1) TFEU inapplicable to restrictive agreements by granting exemptions pursuant to Article 103(3) TFEU. When parties to an agreement falling under the main prohibition of Article 101(1) TFEU claimed the applicability of 101(3) TFEU, they had to notify the agreement to

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553 Article 103(2)(a)-(b) TFEU.
554 Regulation 17 only governed relations between the Commission and the NCAs. Therefore, cooperation between the Commission and the national courts fell outside the scope of Regulation No 17 (Judgment of the Court of First Instance of 18 September 1996, T-353/94, Postbank NV v Commission [1996] ECR II-921, para 66). However, as the European Courts had repeatedly held, national courts could apply Articles 101 and 102 TFEU by virtue of their direct effect (see e.g. Judgment of the Court of 30 January 1974, Case 127-73, Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior [1974] ECR 51, paras 15-20; Judgment of the Court of 30 April 1986, Joined cases 209 to 213/84, Asjes and Others [1986] ECR 1425, paras 55 and 56.
555 Article 9(3) of Regulation 17. See further infra section 2 of this Chapter.
556 Article 9(1) of Regulation 17. It is interesting to note that before the enforcement system of Regulation 17 entered into force, pursuant to Article 104 TFEU (then Article 88 EEC) national authorities (and not the Commission) were in charge for the application of the competition provisions, including thus Article 101(3) TFEU. Despite this possibility, it was generally accepted that additional national legislation was effectively required in order for NCAs to be competent to enforce EU competition law. See further infra section 2.2 of this Chapter. See also particularly, T. WIBMANN, “Decentralised” 133 ([e]ven the Bundeskartellamt took only three exemption decisions between 1958–62 before the enactment of Regulation 17’); S. BRAMMER, Horizontal aspects of the decentralisation of EU competition law enforcement, K.U. Leuven 2008, 446 p., at 4 of the electronic version of the publication, available at https://lirias.kuleuven.be/bitstream/1979/1881/2/doctoraatbrammer.pdf, hereafter: ‘S. BRAMMER, Horizontal aspects’); C-D. EHLMANN, “The modernization” 539.
the Commission.\(^557\) If an agreement had not been notified, no decision as regards the application of Article 103(3) TFEU could be taken and, consequently, the agreement would be deemed null and void pursuant to Article 101(2) TFEU.\(^558\) In essence: under the previous system, restrictive agreements and practices were prohibited, unless they were specifically permitted by the Commission.

Although the prior notification method and the Commission’s monopoly to apply Article 101(3) TFEU, are not a highly efficient enforcement mechanism – if analysed from a current perspective –, the precise circumstances and background against which Regulation 17 was adopted can shed some light on the reasons leading to the adoption of this model.\(^559\)

As previously explained, until the end of World War II in 1945, the perception that cartel practices could bring benefits to the economy and make the industry stronger was a widespread view in Europe.\(^560\) Against this background of cartel tolerance, the introduction of a supranational prohibition of agreements restricting competition – first set out in Article 65 of the ECSC Treaty and, subsequently, in Article 85 of the EEC Treaty – was a radical innovation, and as such represented one of the first steps towards the creation of an European competition culture.\(^561\) Four years later, when the first supranational enforcement system became a reality under Regulation 17, the national legislative panorama was characterized by a high degree of diversity. While two Member States of the then six EEC Member States, namely Italy and Luxemburg, had not even introduced any provisions on competition in their legislative systems, the substantive competition laws of the remaining EEC Members were remarkably divergent.\(^562\) It should not be surprising that

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\(^{557}\) There were, however, certain categories or agreements which did not require a notification, namely agreements which were covered under a block exemption regulation (which were firstly adopted in 1967, cf. infra) or agreements which fell under the scope of application of Article 4(2) of Regulation 17 (i.e. domestic agreements, vertical agreements, agreements imposing unilateral restrictions on the exercise of industrial property rights, agreements on standards, joint research and development and manufacturing specialization provided the parties’ share for the products concerned is below 15% and their turnover below €200 million). Besides these two exceptions, the application of Article 101(3) TFEU was only possible following a formal notification to the Commission. Furthermore, agreements which were concluded before Regulation 17 entered into force on 13 March 1962, and which had been timely notified (see Article 5 of Regulation 17) enjoyed provisional validity (meaning that they were legally enforceable) until the Commission decided on the application of Article 101(3) TFEU. See e.g. Judgment of the Court of 6 April 1962, Case 13-61, Kleidingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, [1962] ECR 89. See also J. S. VENIT, “Brave” 549.

\(^{558}\) Article 4(1) Regulation 17.

\(^{559}\) See also explaining this background S. BRAMMER, Horizontal aspects 4-5 of the electronic version of the publication; G. MARENCO, “Does a Legal Exception System Require an Amendment of the Treaty?” in C. -D. EHLMANN and L. ATANASIU (eds) European competition law annual 2000: The Modernisation of EC Antitrust Policy, Oxford, Hart Publishing 2000, 678 p., at 145-184; W. WILS, “The reform” 9-11 of the online version of the work. As WILS notes already during the process of drafting of the then Articles 85 and 87 of the EEC Treaty (now Articles 101 and 103 TFEU) and not only at the moment of the adoption of Regulation 17, the option between a centralised authorisation system and a directly applicable exception system had been intensely discussed.

\(^{560}\) See supra Chapter 1, section 2.

\(^{561}\) See also W. WILS, “The reform” 9-10 of the online version of the work; C. -D. EHLMANN, “The modernization” 540 stating that “[a]t this stage, it is appropriate to note that Regulation No. 17/62 corresponded to the needs, but also to the concepts and perspectives, of the early years of the EC. The EC was certainly intended to be a much less centralized system than the ECSC. However, the dominant legal and administrative culture of the EC of the “Six” was still rather centralist. France was clearly the politically dominant Member State. French views heavily influenced EC legislation and administration. French preoccupations about “uniformity” (and not only “coherence” or “consistency”) of the EC’s legal order were pervasive”.

\(^{562}\) See White Paper on modernization, para. 18. ‘Belgium and the Netherlands had opted for a system of controlling abuses which allowed illegal agreements to be penalised only from the date on which the infringement was recorded by the competition authority. Only German and French law were based, like Community law, on the prohibition principle.
in light of this situation, sharing the responsibility to apply Article 101(3) TFEU between Commission and NCAs was seen as a serious risk for the highly needed coherence and consistency of European competition law and policy.\textsuperscript{563}

In these circumstances, the initial choice of a centralised notification and authorisation system was a conscious, understandable and, at that moment, desirable decision. The lack of experience with rules aiming at governing (anti)competitive market behaviour\textsuperscript{564} added to the permissive mentality of the period, absolutely required a centralized enforcement mechanism to start developing a unified European anti-cartel tradition.\textsuperscript{565} Entrusting the Commission with the central task of granting exemptions helped to provide the necessary guidance and legal certainty as to the application of Article 101(3) TFEU. If companies, NCAs or national courts would have been competent to apply Article 101(3) TFEU from the outset, this would most probably have meant that, in practice, the cartel prohibition contained in Article 101(1) TFEU would have been frequently disregarded by allowing such practices under Article 101(3) TFEU.\textsuperscript{566} By granting the Commission the monopoly on Article 101(3) TFEU, the Commission was able to ensure that uniform application of the novel prohibition was not jeopardized.\textsuperscript{567}

\textsuperscript{563} See E. PAULIS, “Coherent Application of EC Competition Rules in a System of Parallel Competencies” in C.-D. EHLMANN and I. ATANASIU (eds.) \textit{European competition law annual 2000: The Modernisation of EC Antitrust Policy}, Oxford, Hart Publishing 2000, 678 p., at 400 (hereafter: ‘E. PAULIS, “Coherent”’). See also C.-D. EHLMANN, “The modernization” 538 and 540. (C.-D. EHLMANN is former Director General of Competition at the European Commission). On multiple occasions C.-D. EHLMANN has expressed his opinion in favour of a (temporary) Commission’s monopoly, see in particular C.-D. EHLMANN, “Implementation of EC Competition Law by National Antitrust Authorities”, 1996 (17-2) \textit{ECLR}, 88–95, at 93-95 (hereafter: ‘C.-D. EHLMANN, “Implementation”’). Nonetheless, he has also pointed out that ‘this position was based on the conviction that the time for change was not yet ripe. This clearly results from the consideration that the movement towards limitation of the Commission’s monopoly could start sooner in the area of vertical restraints, where a convergence of views would be easier to achieve, than in the field of horizontal restrictions of competition. In the forefront of my mind was the sharing the power of exemption with national competition authorities. But a more radical approach, i.e., the recognition of direct effect, was not excluded’ (C.-D. EHLMANN, “The modernization” 538).

\textsuperscript{564} With the exception of the practice developed under the competition rules contained in the ECSC Treaty (\textit{supra} Chapter 1, section 2.3).

\textsuperscript{565} See also E. PAULIS, “Coherent” 400, stating that: ‘[t]his system of enforcement worked well for the initial phase of the Community by creating an EC competition culture and by guaranteeing the coherent application of the EC competition rules’. See also C.-D. EHLMANN, “The modernization” 540; S. BRAMMER, \textit{Horizontal aspects} 5 of the electronic version of the publication; W. WILS, “The reform” 10 of the online version observing that ‘[t]he revolutionary character of Article 85 EEC (now Article 81 EC) pleaded for a centralised notification and authorisation system’. For a more comprehensive discussion, see e.g. W. WILS, \textit{The Optimal Enforcement of EC Antitrust Law}, The Hague, Kluwer Law International 2002, 352 p., at 82-104 (hereafter: ‘W. WILS, The Optimal’).

\textsuperscript{566} W. WILS, “The reform” 10 of the online version of this document.

\textsuperscript{567} Furthermore, W. WILS comments that ‘[t]he choice of a centralised notification system in Regulation No 17 may also have been influenced by some confusion as to the nature of Article 81(3) EC. At the time Regulation No 17 was adopted, it may have been considered that the application of Article 81(3) EC depended or should depend on discretionary political decisions’ (\textit{supra} Chapter 3). W. WILS, “The reform” 10 of the online version of the work. However, with the evolution of the EU competition law system it has become clear that the application of Article 101 TFEU, and more precisely Article 101(3) TFEU should not be guided by political considerations. In this sense WILS also notes that “[t]he notification system also had an educational function, as companies and their lawyers were educated by the Commission through the authorisation process”. See also recital 1 of Regulation No 1/2003.
1.2. The inefficiencies of the system and the need for reform

Although the centralized enforcement system as established by Regulation 17 was an appropriate means to achieve basic enforcement consistency and coherence in the early years of the regime, over time it became clear that the exclusive power of the Commission to enforce Article 101(3) TFEU also gave rise to a number of practical problems and, thus, formed an obstacle for effective enforcement.\textsuperscript{568}

When Regulation 17 came into force, the prohibition of restrictive agreements was indeed a whole innovation. However, after four decades developing a European competition culture, the European institutions had successfully provided the demanded guidance as to the application and interpretation of the EU competition rules.\textsuperscript{569} While this long process of clarification was undoubtedly extremely useful and necessary to show how the (anti)competitiveness analysis of agreements – which requires a careful examination of complex economic facts as well as a delicate balancing exercise of varying and possibly contradictory effects – should be conducted, this (initial) need for clarification is, however, more questionable with respect to cartel practices. The basic prohibition of cartel agreements has always been explicitly included in (now) Article 101(1) TFEU, which specifically enumerates price fixing, market sharing and output limitations as examples of restrictive practices.\textsuperscript{570} Furthermore, at the end of the 1960s, the Commission adopted its first decisions imposing fines in the \textit{Quinine}\textsuperscript{571} and \textit{Aniline Dyes}\textsuperscript{572} cases.\textsuperscript{573} These first decisions prohibiting and sanctioning cartel agreements are of crucial importance because they do not only illustrate the early Commission’s concerns about collusive agreements.\textsuperscript{574} Additionally, the \textit{Quinine} and \textit{Aniline Dyes} cases demonstrate that cartel parties were also very well aware of the illegality of their activities under Article 101 TFEU as a whole.


\textsuperscript{569} These initiatives include block exemption regulations, notices and guidelines, as well as a wide collection of EU jurisprudence and decisional practice of the Commission (see further infra, this section).

\textsuperscript{570} See further Chapter 4.

\textsuperscript{571} Commission Decision of 16 July 1969 (IV/26.623 - \textit{Entente internationale de la quinine}) OJ L 192 of 05/08/1969 p. 5 – 22. In the \textit{International quinine} cartel a series of gentlemen’s agreements among Dutch, German, French and British producers prohibited the French and British parties to manufacture quinine without the approval of the other parties, in exchange for territorial protection of their respective home markets. The Commission found that Article 101(1) TFEU had been infringed and rejected the parties’ argument that the French and British companies were in any event unable to manufacture quinine because of their lack of technical experience.


\textsuperscript{573} In the early 1960s, the Commission also investigated some cartel cases but no fines were imposed. Remarkably, some of these cases were investigated following a notification from companies that mistakenly thought that they might obtain an exemption. See A. RILEY, “Consequences” 15–16; C. HARDING AND J. JOSHUA, \textit{Regulating} 212-213.

\textsuperscript{574} This strict application of the cartel prohibition was also reflected in the Annual Competition Policy Report of 1972, which stressed the need to proceed with special vigour against practices jeopardizing the unity of the Common Market, namely sharing market agreements, practices allocating customers and collective exclusive dealing arrangements. Commission, First Report on Competition Policy, 1973, Brussels-Luxemburg, at 15.
For instance, in *Quinine* the collusive conduct of the firms had triggered negative reactions from clients and antitrust authorities. Therefore, the companies tried to avoid behaving in a way that could attract the attention from law enforcers. In this context, one of the cartel members suggested three options. The first option was to *not* notify their cartel agreement, and assume the risk of being fined. Alternatively, they could end the arrangement. The third possibility was to notify *only* the legal part of the agreement (namely, an export agreement) and ‘to keep secret the gentlemen's [cartel] agreements, because this is precisely the kind of agreements that the EEC prohibits’.

‘Therefore, all necessary steps should be taken to prepare a careful explication of the agreements, or to make any evidence disappear.’

This clearly shows that, that under the system of Regulation 17, companies were willing to notify their agreements only if they believed that there were possibilities of obtaining an exemption. Given the well-know detrimental impact and injurious nature of these agreements on the competitive process and the inherent lack of efficient effects capable of neutralizing their damage, cartel participants had no reasons at all to notify their practices (perhaps with the exception of crisis cartels). When an undertaking considers whether to engage in a cartel or not, it is basically confronted with two clear alternatives: (i) to simply not take part in the agreement and thus escape all risks of being sanctioned, or (ii) to engage in the cartel with the subsequent possibility of being detected and fined. Even if cartel activity is clearly forbidden by the EU competition rules, the considerable profits that firms may obtain (combined with the relative low probabilities of detection) can encourage companies to secretly collude. In light of this, and as the Commission itself acknowledged, the system of notification and authorization set out in Regulation 17, fulfilled a very limited role in the active protection of the competitive process from the most serious infringements. The general dissatisfaction about the effectiveness of the notification and authorization system was primarily related to the Commission’s scarce resources and its incapacity to deal with the notified practices. The intense task of dealing with notifications and requests for exemption completely overwhelmed the Commission, which was no longer able to actively pursue anti-cartel enforcement.

The great number of notifications was, among others, the result of the wide interpretation adopted by the Commission of the concept of restriction of competition. Given the broad scope of

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575 This vision of the companies was specifically underlined in the Commission Decision of 16 July 1969 (IV/26.623 - *Entente internationale de la quinine*) OJ L 192 of 05/08/1969 p. 5 – 22, para 9.
577 See supra Chapter 3 and Chapter 4.
578 See also A. SCHaub, “The Reform” 248.
579 C. D. EHLMERANN, “The modernization” 544. See also the Fourth Report of the Select Committee on European Union of the House of Lords “Reforming EC Procedures”, February 2000, available at [http://www.publications.parliament.uk/pa/ld199900/ldselect/ldeucom/33/3302.htm](http://www.publications.parliament.uk/pa/ld199900/ldselect/ldeucom/33/3302.htm). This document firmly states that ‘dealing with notifications has, however, taken up resources that might better be used in dealing with complaints and investigating "hard core" cartels’.
580 See also C.-D. EHLERMANN, “The modernization” 544.
581 It is submitted that this concept had been largely influenced by ordoliberal thinking. On the ordoliberal interpretation of the competition provisions see supra Chapter 3, section 2.2. See also S. BRAMMER, *Horizontal aspects* 6 of the electronic version of the publication, adding that the wide scope of application of Article 101 TFEU was also partly a consequence of the quite extensively interpretation of the criterion of effect on inter-Member State trade by the European Court of Justice. See also J. S. VENIT, “Brave” 556–558 observing that under certain circumstances, the concept of “effect on trade between Member States” was also applicable to agreements between companies within the same Member State that covered only that Member State. See e.g. Judgment of the Court of 17 October 1972, Case 8-72, Vereeniging van Cementhandelaren v Commission [1972] ECR 977; Judgment of the Court of 16 June 1981, Case 126/80, Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio [1981] ECR 1563; Judgment of the Court of 11 July 1989, Case C-246/86, Belasco v. Commission [1989] ECR 2117; Judgment of the Court of 1 October 1987, Case C-311/85, ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke
application of the main prohibition and the risk that agreements were deemed anticompetitive under Article 101(1) TFEU, firms participating in agreements of some competitive importance had the logical tendency to notify their activities – even if they were completely pro-competitive – just have full certainty. 582 Expectedly, by the beginning of 1963, the Commission was practically drowning in around 34,500 notifications. 583 There is no need to mention that this tremendous workload constituted a crucial obstacle for the efficient and effective anti-cartel enforcement. 584 The general undesirability of this situation was exacerbated by the fact that the assessment of notified agreements seldom revealed (serious) competition concerns, comparable to cartels. 585 In order to prevent a complete crash of the administrative system, the Commission decided to take a series of initiatives to reduce the administrative burden and speed up the handling of notifications. 586

In March 1965, the Council issued Regulation 19/65. 587 This regulation enabled the Commission to adopt block exemption regulations in respect of certain categories of agreements (initially, only certain types of vertical agreements). 588 When an agreement satisfies the conditions specified in a


582 See also J. S. VENT, “Brave” 550. This aspect was also highlighted in the White Paper on modernization ([1999] OJ C132/1, para 24) which states that ‘[t]he ex ante control mechanism inherent in the authorisation system set up by Regulation No 17 resulted in undertakings systematically notifying their restrictive practices to the Commission’. 583 The incapacity of the Commission to cope with the increasing workload has been repeatedly emphasised. See e.g. A. RILEY, “More Radicalism, Please: The Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty”, 1993 (14-3) ECLR, 91-96; P. B. MARSDEN, “Inducing Member State Enforcement of European Competition Law: A Competition Policy Approach to “Antitrust Federalism”, 1997 (18-4) ECLR, 234-241; M. SIRAGUSA, “The Millenium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules”, 1997 (21-3) Fordham International Law Journal, 650-681, at 660-661; C. D. EHLMANN, “The modernization” 541. See also White Paper on modernization ([1999] OJ C132/1) para 25. In this policy document the Commission commented that in 1967, it had 37.450 notifications which had been accumulated during the previous years.

584 In an opinion dating from 1961, the Economic and Social Committee emphasized the risks inherent to the obligatory notification and authorisation system. Particularly, it commented that even if the system could be seen a means to learn about the existence of harmful agreements, at the same time, ‘it risked diverting the Commission from its true mission by overloading it with administrative work that would prevent it from carrying out a serious, in-depth examination of agreements between undertakings and of their real effects’. White Paper on modernization ([1999] OJ C132/1), para 43.

585 A. SCHAUB also pointed out that the notification system delayed the handling of ex officio procedures and complaints. Furthermore, compared to notifications, complaints were a more appropriate source of information to reveal the existence of important competition restrictions. According to his author, notifications showing real competition issues were normally subject of a complaint (A. SCHAUB, “The Reform of Regulation 17/62: The Issues of Compatibility, Effective Enforcement and Legal Certainty” in C. D. EHLMANN and I. ATANASIU (eds) European competition law annual 2000: The Modernisation of EC Antitrust Policy, Oxford, Hart Publishing 2000, 678 p., at 248 (hereafter: ‘A. SCHAUB, “The Reform”’); see also A. RILEY, “Consequences” 14. This was also acknowledged in the modernization White Paper, which stated that in more than 35 years of application of Regulation 17 there were only 9 decisions in which a notified agreement was prohibited without a complaint being lodged against it (White Paper on modernization of the rules implementing Articles 81 and 82 of the EC Treaty’ ([1999] OJ C132/1) para 77). Moreover, since the Commission was able to obtain information about the market though the merger control system, a lack of information of the market conditions was not become an important issue (A. SCHAUB, “The Reform” 248-249).

586 For an elaborated discussion of the measures taken to accelerate the procedures see J. S. VENT, “Slouching” 33-41; C. D. EHLERMANN, “The modernization” 541; S. BRAMMER, Horizontal aspects 6-9 of the electronic version of the publication.

587 Council Regulation 19/65 on the application of (ex) Art. 85(3) to certain categories of agreements and concerted practices ([1965] OJ 36/1) as subsequently amended by Council Regulation 1215/1999 [1999] OJ L148/1. Other Council regulations authorizing the Commission to adopt block exemption regulations are Regulation No. 2821/71 (on horizontal co-operation agreements); Regulation No. 3976/87 (on air transport agreements); Regulation No. 479/92 (on maritime transport consortia) and Regulation No. 1534/91 (on agreements in the insurance sector).

588 Particularly, exclusive distribution and exclusive purchasing agreements and agreements for the licensing of intellectual property.
block exemption regulation, individual notification of that agreement was not necessary: the agreement is automatically valid and enforceable. Although the block exemptions certainly contributed to ease the case-load, the adoption of this instrument did not suffice to completely eliminate the notification burden.\(^{589}\)

Other initiatives taken to ease the workload included the publication of the \textit{de minimis} notice.\(^{590}\) This communication clarifies the conditions under which an agreement can be considered to have a non-appreciable impact on competition and consequently, fall outside the scope of EU competition law. Additionally, the Commission adopted a policy practice to reject the investigation of a case when it considers that the case does not display a “sufficient Community interest”.\(^{591}\)

Finally, the Commission developed an informal instrument known as comfort letters. There were two different types of comfort letters: the exemption-type comfort letter and the negative clearance-type. An exemption-type comfort letter, based on (now) Article 101(3) TFEU, indicated to the notifying parties, national courts and NCA’s that the agreement fulfilled the conditions of Article 101(3) TFEU and thus merited an exemption. However, most of the comfort letters were the negative clearance-type. This type of letter simply confirmed that the Commission found no grounds to intervene under Article 101(1) TFEU.\(^{592}\)

Comfort letters became an efficient instrument under the authorization system. This tool enabled the Commission to be faster processing notifications and to close-up cases in a shorter timespan.\(^{593}\) Progressively, adopting formal exemption decisions became a relatively infrequent practice and the great majority of cases was addressed by means of comfort letters.\(^{594}\) However, it must be pointed

\(^{589}\) The reason underlying the persistence of the problem is, in the words of S. \textit{VENIT}, ‘their complexity and their tendency to put form over economic substance’ (J. \textit{S. VENIT}, “\textit{Brave}” 549). The application of the Block Exemption to relatively simple agreements, such as distribution agreements, is normally not problematic. However, for more complex transactions is more complicated to assess whether the agreement fits into the Block Exemption (J. \textit{S. VENIT}, “\textit{Slouching}” 37). In addition, the first block exemption regulations were more ambiguous in the sense that they did not only contain a black list of prohibited conduct, but also white list clauses and occasionally grey list clauses. Although the revision of the Regulations (see e.g. Regulation 2790/99 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements [1999] OJ L336/21) contributed to reduce the problem, given their limited scope of application (in this case, vertical agreements), they could not offer a definitive solution.

\(^{590}\) The first \textit{de minimis} Notice was published in 1970 [(1970) OJ C64/1], \textit{i.e.} shortly after the ECJ’s judgment in \textit{Völk}. The notice was amended several times. The latest version dates from 2014 [(2014) OJ C 291/01]. See as regards the application of this notice on cartel cases \textit{supra} Chapter 4, section 2.2.3.

\(^{591}\) The legality of this practice was formally recognised by the (then) CFI in \textit{Automec II} (CFI 18 September 1992, Case T-24/90, \textit{Automec Srl v Commission} [1992] ECR II-2223, para 85 \textit{et seq}). On the basis of this case, the Commission can refer to the Community interest to determine the degree of priority to be applied to a given case. In addition, this case confirmed the Commission’s competence to refer complainants to national Courts or NCAs on the ground that the case did not require a Commission’s investigation and could be appraised at a national level. The Commission has formalised this practice in its Notice on the handling of complaints [(2004) OJ C 101/65, para 8).

\(^{592}\) See e.g. A. \textit{SCHAUß}, “\textit{The Reform}” 253-254; S. \textit{Brammer}, \textit{Horizontal aspects} 6 of the electronic version of the publication. According to both authors the frequency of clearance letters was a consequence of the “more economic approach” adopted under Article 101(1) TFEU.

\(^{593}\) From 1988 to 1994, the backlog of pending cases was reduced from 3,451 to 1,052. See Commission, XXVth Report on Competition Policy, 1995 Brussels, p. 346. See also e.g. S. \textit{Brammer}, \textit{Horizontal aspects} 6 of the electronic version of the publication.

\(^{594}\) Formal exemption decisions were, as a result, extremely rare. “In the thirty-seven year history of European Community (or "EC") competition law since the adoption of Regulation 17 in 1962, only 222 specific exemption decisions have been issued. One hundred and thirty-six of these were issued beginning with the adoption of Regulation 17 until the end of 1979. In the ensuing period of nearly twenty years, there were only eighty-six exemption decisions’ (I. \textit{Forrester}, “\textit{Modernization of EC Competition Law}”, 1999 (23-4) \textit{Fordham International Law Journal}, 1028-1088, at 1032 (hereafter: ‘I. \textit{Forrester}, “\textit{Modernization}’)). See also C- D. \textit{Ehlermann}, “The modernization” 541,
out that the legal consequences of these conform letters differed from those of a formal exemption which declared the main prohibition of Article 101 TFEU inapplicable. First, conform letters letters were generally not reasoned or published.\(^595\) Although they could have a positive value in terms of individual legal certainty, their contribution to the general clarification of the EU competition rules was, therefore, rather limited. Second, while formal exemption decisions had effects *erga omnes* for the duration of the decisions (and therefore provided a high level of legal certainty),\(^596\) a negative clearance letter did not have binding effect on NCAs and courts.\(^597\) This situation obviously created significant uncertainty for notifying companies which could see their agreement being prohibited by NCAs, even if they had obtained negative clearance from the Commission.\(^598\)

Despite all efforts to reduce its caseload, the accumulated amount of notifications only kept on growing and the Commission was no longer able to deal with notifications within a reasonable period of time.\(^599\) The ironic consequence of this situation was that companies often modified the

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\(^{595}\) See also A. SCHAUB, “The Reform” 254.

\(^{596}\) *Ibid* 253-254.


\(^{598}\) E. PAULIS, “Coherent” 400. This commentator correctly points out that, in contrast to Article 102 TFEU, Article 101 TFEU contains a prohibition principle and an exemption rule, which in turns leads to a higher risk of conflicting decisions under this provision. The centralised enforcement system established under Regulation 17 was therefore appropriate to reduce the potential risk of such conflicting decisions. However, this does not exclude possible contradictions between prohibition decisions on the one hand, and negative clearance decisions on the other hand, or conflicts between decisions based on EU law and decisions based on national law. See also F. MONTAG, “The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner’s Point of View”, 1998 (22-3) *Fordham International Law Journal*, 819-852, at 826-829; S. BRAMMER, *Horizontal aspects* 6-7 of the electronic version of the publication; S. KINGSTON, “A ‘new division of responsibilities’ in the proposed regulation to modernise the rules implementing Articles 81 and 82 E.C.? A warning call”, 2001 (22-8) *ECLR*, 340-350, at 342 (hereafter: ‘S. KINGSTON, “A new division’’); B. E. HAWK AND N. DENAERI, “The Development of Articles 81 and 82 EC Treaty; Legal Certainty” in C. -D. EHLMANN and I. ATANASIU (eds) *European competition law annual 2000: The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing 2000, 678 p., at 129. Following this line of reasoning it has even been argued that ‘the system failed to achieve one of its primary underlying goals, i.e. providing legal certainty to firms’. J. S. VENIT, “Brave” 550. This author ironically observed that ‘[o]n the contrary, […] agreements with no or little effect on competition and which would almost certainly be eligible for exemption under Article [101(3)] were illegal (and automatically null and void), unless and until they were notified and expressly declared legal by the Commission, which was unable to do so within a reasonable period of time’.

\(^{599}\) It is, however, important to keep in mind that the growing amount of case load can be explained in the light of the accession of new Member States. This was the case of Denmark, Ireland and the United Kingdom in 1973, Greece in 1981 and Spain and Portugal in 1986. Before “the modernisation” took place Austria, Finland and Sweden further enlarged the Community in 1995. As regards the growing workload see also particularly the Commission, XXXvth Report on Competition Policy, 1995 Brussels, at 47. (This Report stressed that ‘[i]n the overall net result of input and output in 1995 leads to an increase of the stock of cases remaining open at the end of the year for the first time since 1988. This increase is however rather modest: more specifically it is less than 12% and, if the number of additional files of the new Member States are not taken into consideration, less than 5%. The actual stock of cases [1178 namely] is still considerably lower than the more than 3000 cases pending at the end of the 1980’s). From 1995 to 1998 there was a stock of roughly 1200 cases. From 1998 the number of pending cases slightly decreased. In 2001, the number of open cases amounted to 841 (Commission, XXXIst Report on Competition Policy, 2001 Brussels, at 375). In this context C. -D. EHLMANN comments that ‘[i]t is true that, during the first years of the 1990s, the existing backlog was substantially reduced. However, the methods used were not all “orthodox”. The remaining cases were and are difficult, and there is no guarantee that a reduced or even eliminated backlog might not increase or reappear in the future’. C.-D.
content of their agreements, or even refused to participate in pro-competitive practices, in order to avoid the administrative inconveniences.\textsuperscript{600} In addition, this unproductive situation prevented the Commission from taking a more proactive position. Being forced to spend its scarce resources on the examination of notifications, pernicious agreements were not only not notified to the Commission, but were simply unprosecuted and unpunished.\textsuperscript{601}

During the first decades of application of Regulation 17 the relative lack of enforcement experience initially justified the difficulties and inefficiencies caused by the system.\textsuperscript{602} However, in the following decades, particularly in the 1980s and in the 1990s, the persistence of problems led to increasing criticism mainly with regard to the high backlog of cases, the length of procedures and the disadvantages of comfort letters.\textsuperscript{603} Although the criticisms regarding the Commission’s monopoly system became more intense during the (beginning of the) 90’s, the Commission was not immediately inclined to renounce to its exclusive competences under (now) Article 101(3) TFEU.\textsuperscript{604} Instead, it tried to (re)activate the (decentralized) application of Article 101(1) TFEU, by adopting a number of measures.\textsuperscript{605} First, in February 1993, the Commission published its Notice on cooperation with national courts\textsuperscript{606} and, a few years later, in October 1997, it adopted its Notice on cooperation with NCAs.\textsuperscript{607} Despite the Commission’s endeavour to share the enforcement burden with the competent authorities of the Member States,\textsuperscript{608} its efforts were seriously undermined by its exemption exclusivity.\textsuperscript{609} The notification regime added to the Commission’s exclusive competence

\textbf{Ehlermann, “The modernization” 547.} For an example of how lengthy procedures could be see Commission Decision of 15 December 1992 (IV/31.400 - Ford Agricultural) [1993] OJ L 20/1 in which the Commission only adopted its decision after 28 years. It should, however, be noted that in this case the length of the procedure is extreme. Usually the Commission was able to adopt a decision after approximately three years. K. Holmes, “The EC White Paper on Modernisation”, 2000 (23-4) \textit{World Competition}, 51–79, at 53 (hereafter: “K. Holmes, “The EC White Paper”).\textsuperscript{600}

J. S. Venit, “Brave” 550-551. According to B. E. Hawk, “System Failure” 983, this situation, was also the result of the wide interpretation of Article 101(1) TFEU by European Commission and Courts.\textsuperscript{601} J. S. Venit described the system set up by Regulation 17 as ‘ill-suited to the aggressive pursuit of a vigorous proactive enforcement agenda J. S. Venit, “Brave” 550).\textsuperscript{602}

See further infra section 2.1 and 2.2 in this Chapter. See also e.g. C- D. Ehlermann, “The modernization” 541.\textsuperscript{603}

S. Brammer, \textit{Horizontal aspects} 8 of the electronic version of the publication; C- D. Ehlermann, “The modernization” 541-542. Interestingly, C- D. Ehlermann notes that while in the beginning this criticism was mainly outside the Commission, progressively it was also voiced within the Commission’s departments, in particular in DG IV itself. One of the factors that also motivated the intense critics was the successful enforcement practice of the Commission under the Merger Regulation. DG IV proved its ability to deal with complex Merger cases and adopt formal and well-motivated decisions in short periods of time. If a similar satisfactory approach was not viable under Regulation 17, this meant that the monopoly of the Commission under (now) Article 101(3) was the cause of the inefficiencies and should therefore be reformed. See further C- D. Ehlermann, “Implementation” 90.\textsuperscript{604}

The \textit{Bundeskartellamt} and the German Government were for a long time strong (but lonely) supporters of a reform to share the Commission’s monopoly. See C- D. Ehlermann, “The modernization” 541-542; C- D. Ehlermann, “Implementation” 90. In contrast, the complete abolition of the notification system was rarely considered. This was exceptionally done by S. Kon, “Article 85”, See for a different opinion E. Steindorf, “Article 85”.\textsuperscript{605}

C- D. Ehlermann, “The modernization” 541; S. Brammer, \textit{Horizontal aspects} 8 of the electronic version of the publication.\textsuperscript{606}

Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty 1993 OJ C 396.\textsuperscript{607}

Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty 1997 OJ C 313/3.\textsuperscript{608}

As regards the common desire and determination of both Commission and NCAs to implement EU antitrust legislation on a decentralised basis see e.g. Commission, 28th Report on Competition Policy, 1998 Brussels, paras 30-31. For a critical assessment of the Commission’s initiatives to decentralise the enforcement of EU competition law see e.g. R. Wesseling, “The Commission Notices”: This author argues that while such initiatives did not fully satisfy the need for reform.\textsuperscript{609}

to apply Article 101(3) TFEU, created an artificial division in the material analysis of agreements under Article 101 TFEU. Unless the Commission was the authority applying Article 101(1) TFEU, this assessment was generally conducted by different enforcement authorities.\textsuperscript{610} Even if NCAs and courts could apply Article 101(1) TFEU, the Commission’s monopoly to grant exemptions marginalized the enforcement role of NCAs and national courts because all agreements falling under Article 101(1) TFEU could (and still can) be allowed under Article 101(3) TFEU.\textsuperscript{611} Undertakings subject to proceeding before NCAs often invoked the applicability of Article 101(3) TFEU, not only with the legitimate end of obtaining an exemption, but often also to shift the jurisdiction exclusively to the Commission and thereby delay the national procedure.\textsuperscript{612} Against this background, it is understandable that NCAs were rather reluctant to exercise their powers under Article 101(1) TFEU, which simultaneously counteracted the Commission’s effort to encourage the decentralisation.\textsuperscript{613 614}

The multiple and persistent impediments to enforce EU competition law effectively under Regulation 17 made clear that there was an urgent need to reform and improve the system. At the end of the 1990’s, there was a broad consensus between the Commission and Member States as regards the Commission’s incapacity to prosecute serious violations.\textsuperscript{615} Furthermore, the expansion


\textsuperscript{611} M. PAULWEBER, “The End” 15-16. The conditions for a decentralised enforcement as enumerated by the Commission in its Notice on Cooperation 1997, illustrate the limits of this instrument: in principle NCA’s should deal with cases when (1) the effects of the case are felt in the territory of the state in question; (2) the case appears unlikely to qualify for an exemption; (3) the authority can deal with the case effectively; and (4) the case is not of special importance for the Community. Notice on cooperation between national competition authorities and the Commission [1997] OJ C 313/3, paras 1-10.

\textsuperscript{612} See further infra section 2.1 and 2.2 of this Chapter. See also in this context, White Paper on modernisation – Corrigendum [1999] OJ C 132/1, para 39. See also M. PAULWEBER, “The End” 15-16 stating that ‘[t]his could have been avoided by interpreting Article 9(3) of Regulation 17 differently’ (citing, R. M. BUXAUMB, “Incomplete Federalism: Jurisdiction over Antitrust Matters in the European Economic Community”, 1964 (52-1) California Law Review, 56-94, at 63-65). According to M. PAULWEBER, the number of “obstructive notifications”, was the best exemplification of the failure of the well-intended attempt to decentralise the enforcement of European competition law. See also infra section 2.1 and 2.2 of this Chapter.

\textsuperscript{613} See also e.g. C.-D. EHLMANN, “The modernization” 541; S. BRAMMER, Horizontal aspects 8 of the electronic version of the publication; A. RILEY “EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1”, 2003 (24-12) ECLR, 657-672, at 661-663 (hereafter: ‘A. RILEY, “Modernisation Part Two”’).

\textsuperscript{614} A difference should be made between NCAs and national courts. While NCA could chose to prosecute agreements only under their national competition systems, given the direct effect of Article 101 TFEU national courts had little to decide as regards the handling of cases under EU competition law. However, this does not mean that they were precisely enthusiastic about the enforcement of the EU rules. In this context M. PAULWEBER indeed underlined that a great majority of national authorities did not use their competence to apply European competition law. ‘Only nine of the 15 Member States gave their competition authorities the authority to apply Articles 81 and 82, and only in five out of these nine States the authorities factually apply European competition law. It has to be seen that some of the Member States that do not directly apply EC competition law legally harmonised their national law according to the European model’. See M. PAULWEBER, “The End” 15.

\textsuperscript{615} See e.g. M. PAULWEBER, “The End” 12; S. BRAMMER, Horizontal aspects 8-9 of the electronic version of the publication.
of the European Union with new Member States with fresh market economies significantly accentuated the non-viability of a centralised enforcement.\textsuperscript{616} Predictably, the more limited experience of such countries with competition systems,\textsuperscript{617} would have contributed to the further congestion of the enforcement regime.\textsuperscript{618} In the view of the urgency to improve the existing procedures, by the end of the 1990’s, the Commission decided to step at the forefront of reform, by proposing a whole set of far-reaching changes.

1.3. The objectives of the reforms and main changes

1.3.1. The objectives of the reform

In April 1999, the Commission published the White Paper on the modernization of EU antitrust enforcement. The White Paper described the practical difficulties concerning the enforcement of competition law and fundamentally served as a starting point for an extensive debate on the options for the reform process.\textsuperscript{619} Following the publication of the White Paper, the Commission published the proposal for a Council Regulation implementing (former) Articles 81 and 82 EC of the Commission of 27 September 2000.\textsuperscript{620} Following this proposal Regulation 1/2003\textsuperscript{621} was finally adopted by the Council on 16 December 2002.

\textsuperscript{616} See also White Paper on modernisation [1999] OJ C132/1, para 10.
\textsuperscript{617} At that moment, certain candidate countries had in fact some experience with rules regulating anticompetitive market behavior of undertakings. The basis for such experience was provided by the Europe Agreements which contained rules on competition. In the words of A.-M. \textsc{Van den Bossche}, ‘[t]he inclusion of competition provisions in the Europe Agreements can be seen as contributing to a number of objectives for association: the establishment of new rules, policies and practices as a basis for integration into the Community; or put differently, providing an appropriate framework for a gradual integration into the Community and support for efforts to develop the economy and to complete the conversion into a market economy’. A.-M. \textsc{Van den Bossche}, “The international dimension of EC competition law: the case of the Europe Agreement” (18-1) 1997 ECLR, 24-37, at 24 (hereafter: ‘A.-M. \textsc{Van den Bossche}, “The international”’).


\textsuperscript{619} White Paper on modernisation [1999] OJ C132/1. See also the Commission’s summary of observations on the White Paper, February 2000, available at \url{http://ec.europa.eu/competition/antitrust/others/wp_on_modernisation/summary_observations.html}. Following the adoption of the White Paper, interested parties were invited to submit comments by 30 September 1999. The European Parliament organised a public hearing on 22 September 1999. It adopted a resolution on 18 January 2000. The Economic and Social Committee adopted an opinion on 8 December 1999. The Commission received and carefully examined submissions from all Member States and more than 100 interested parties, including submissions from EFTA countries, the ESA and the competition authorities from Estonia, Hungary and the Czech Republic.


\textsuperscript{621} 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 [2003] OJ L 1/1. Pursuant Article 45, the Regulation shall apply from 1 May 2007. Article 43(1) states that ‘Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiry of those decisions’. Regulation 1/2003 also replaces the procedural rules governing the application of Articles 101 and 102 TFEU in the transport sector, which were previously included in Regulations 1017/68, No 4056/86 and No 3975/87; (see Regulation 1/2003, recital 36 and Articles 36, 38, 39 and 43(2). In February 2004, Regulation 1/2003 was amended by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries [2004] OJ L68/1.
In its White Paper, the Commission advanced that the need to ensure a balance between effectiveness, on the one hand, and simplification of control, on the other hand, should drive the legislative proposals. To find this balance, the reformed regime should enable the Commission to pursue three central objectives. First, the Commission must be able to (re)focus its activities by combating the most serious restrictions of competition. In this regard, the Commission should adopt a more proactive enforcement role and take the initiative to (actively) pursue infringement. Secondly, centralized prosecution and sanctioning of EU competition law violations was clearly unsustainable, inefficient and ineffective, especially in the view of the enlargement process. The reform of the procedural rules had to allow an effective enforcement decentralisation and remove the obstacles emerging from the Commission’s monopoly in the context of Article 101(3) TFEU. Last, the improved system had to simplify procedures and alleviate the general administrative burden while enhancing legal certainty.

These three objectives of the reform could be considered as the (pre)conditions for the success of the modernisation measures. Yet, it cannot be doubted that the reforms had a far more ambitious and comprehensive objective, namely to allow the Commission and NCAs to improve their position to protect the competitive process.

The Commission put forward five options to attain its objectives. While four of these options involved measures to improve the notification system and the last alternative consisted in a radical switch from the notification system to a directly applicable exception system. As the Commission explained in the White Paper, switching to such a legal exception system would entail two essential modifications. On the one hand, the notification system would have be abolished and, on the other, NCAs and courts would have to be entitled to apply Article 101 in its entirety. The Commission

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622 White Paper on modernisation, paras 43-51.
623 Ibid, paras 43-44.
624 Ibid, para 45.
625 Ibid, para 47. This paragraph continues: ‘Community law could then be implemented by the body that was able to do so most effectively’.
626 See White paper on modernisation, paras 50-51. The Commission added that ‘undertakings also at present enjoy a satisfactory level of legal certainty thanks to the set of clear rules that have been developed and refined through more than 30 years of Commission decision-making practice and Court of Justice case-law and by the many different kinds of general instruments that have been adopted (block exemption regulations, notices and guidelines). Any reform must endeavour to ensure that a reasonable level of legal certainty is maintained for undertakings. This means, on the one hand, that the rules must be defined as clearly as possible so that undertakings can assess their restrictive practices themselves and, on the other, that consistency of application by the various bodies responsible (Commission, national competition authorities and courts) is ensured by appropriate preventive and corrective mechanisms’. In this context it has been argued that conducting a self-assessment of (anti)competitiveness reduces legal certainty. See e.g. D. WOLF, “Comment on the White Paper on the Reform of EC Competition Law” in B. E. HAWK (ed.) International Antitrust Law & Policy: Fordham Corporate Law 1999, Juris Publishing 2000, 700 p., at 307.
627 See supra Chapter 3.
628 Such options involved more precisely: (i) to narrow the interpretation of Article 101(1) so that the number of agreements falling under this prohibition would be reduced, (ii) to share with NCA’s the competence to grant exemptions, (iii) to broaden the scope of application of Article 4(2) of Regulation 17, according to which for certain agreements no prior notification/authorization is required and (iv) last, to simplify the administrative procedures for the adoption of exemptions under Article 101(3). See White paper on modernization, paras 55-68.
629 Ibid, para 69 et seq.
had a clear preference for this last option which in its view was the most appropriate way to pursue the desired objectives.

1.3.2. The main changes of the reform

The replacement of the centralized notification and authorisation system by a directly applicable exemption regime is, without any doubt, the core modification brought about by Regulation 1/2003. Since this regulation is applicable, the Commission, the NCAs and the national courts are competent to apply Articles 101 and 102 TFEU in their entirety, thus including Article 101(3) TFEU. Agreements which fall under the prohibition of Article 101(1) TFEU but fulfil the requirements of Article 101(3) TFEU are not prohibited and are instead directly valid and enforceable. This means that if a procedure is initiated against a company for an infringement of Article 101(1) TFEU, Article 101(3) TFEU can be directly invoked as a defence. On the other hand, agreements caught by Article 101(1) TFEU which do not satisfy the Article 101(3) TFEU conditions will be automatically prohibited (and will thus be null and void), no prior administrative or judicial intervention being required.

Furthermore, the new Regulation also envisages a greater role of Member States’ courts and NCAs in the enforcement of Articles 101 and 102 TFEU. As national courts and NCAs are entitled to fully apply the EU antitrust rules, the presence of multiple enforcers was meant to lead to a wider

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630 This was later confirmed in the Commission’s proposal for a new regulation implementing (ex) Articles 81 and 82 EC, which subsequently lead to the adoption of Regulation 1/2003 by the Council. Article 1 of the Commission’s proposal stated that ‘agreements, decisions or practices that fall under Article 81(1) and do not satisfy the conditions of Article 81(3) are prohibited and void ab initio in accordance with Article 81(1) and 81(2). On the other hand, agreements, decisions and practices that fall under Article 81(1) but do satisfy the conditions of Article 81(3) are valid ab initio, no prior administrative decision to that effect being required’. On the basis of this provision, the Commission directly proposed to simply abolish the notification system. The remaining alternatives to improve the notification system as discussed in the White Paper were no longer debated. See supporting this view S. BRAMMER, Horizontal aspects 10-11 of the electronic version of the publication. BRAMMER also comments that ‘[i]t is understandable that the Commission opted for the fifth alternative and presented this option as the (only) adequate reform proposal. Abolishing the notification procedure seems, at first sight, the most effective way to decrease the caseload after all measures previously introduced in this respect (de minimis rule, block exemptions etc.) still did not sufficiently lower the amount of new cases’; see also R. WESSELING, “The draft”.

631 See also e.g. K. HOLMES, “The EC White Paper” 51 commenting that ‘[t]he agenda of the Commission is clear — the fifth option, which is centred upon abolition of the notification system and direct applicability of the whole of Article 81(3) across the European Union—is the only option which the Commission is considering’; see also S. BRAMMER, Horizontal aspects 10-11 of the electronic version of the publication, pointing out that ‘[t]he Draft Regulation was in fact based on the Proposal which the Commission seemingly had viewed as the preferred option already at the time it drafted the White Paper’. In effect as this author notes, the debate of the four alternatives to improve the notification system also included an examination of the drawbacks and risks of these options and even of considerations why the alternative in question would not be appropriate (see for instance, White Paper, para. 57, 62, 65 and 68). However, as regards the last option, the Commission only emphasized the advantages that such system could entail (see White Paper on modernisation, paras 69-73).


633 See Articles 5 and 6 of Regulation 1/2003.

634 Article 1(2) of Regulation 1/2003.

635 Article 1(1) of Regulation 1/2003. This was in fact also the case under Regulation 17. The legal value of this statement is, therefore, rather declaratory.
application of the law. At the same time, the Regulation includes mechanisms of close cooperation between the Commission and the NCA’s. Particularly, the Commission and the NCAs, jointly created the European Competition Network (hereafter “ECN”) as a platform for coordinated and close cooperation.\(^{636}\)

Next, under the system established by Regulation 1/2003, Member States’ enforcers are also obliged to apply Articles 101 and 102 TFEU in parallel with domestic competition legislation, to all cases affecting trade among Member States.\(^{637}\) This implies that the EU competition rules constitute the common standard for all the European antitrust enforcers to assess the permissibility of (anti-)competitive business behaviour.\(^{638}\) This measure significantly contributes to creating a level playing field.

Last but not least, the new regulation provided the Commission with enhanced investigative instruments, which enable it to perform its enforcement tasks in a more efficient and effective manner.\(^{639}\)

To facilitate the effective working of this new enforcement system as of May 2004, the Commission decided to complement Regulation 1/2003 with a package of six notices and a Commission implementing regulation 773/2004.\(^{640}\) All these measures are known as “the modernisation package”.\(^{641}\)

The entry into force of Regulation 1/2003 in May 2004, at the same time that 10 new Member States formally acceded to the EU, constitutes a milestone for European antitrust enforcement. The reforms introduced by the modernisation package had and still have a profound impact of Article 101 TFEU.\(^{642}\) From the perspective of effective (and efficient) anti-cartel enforcement, the modernised regime constituted a great opportunity and, simultaneously, a complex challenge. While decentralising enforcement and bringing more authorities into the enforcement field can promote wider enforcement, effective anti-cartel enforcement necessarily requires that the prohibition contained in Article 101(1) TFEU is applied and enforced actively and consistently throughout the

\(^{636}\) On the working of the ECN see infra section 2.3 of this Chapter.
\(^{637}\) Article 3 of Regulation 1/2003
\(^{638}\) See also C. GAUER, et al. “Regulation 1/2003” 1.
\(^{639}\) The investigative powers of the Commission will be analysed in Chapter 7.
\(^{642}\) See also J. S. VENIT, “Brave” 545-546.
EU. The question whether such active and consistent anti-cartel enforcement could take place under the current system is further explored in the next (sub)sections. 643

2. The beneficial impact of modernisation on cartel enforcement

Compared to the former regime established by Regulation 17, Regulation 1/2003 and its implementing measures entail a number of important advantages which have significantly contributed to enhance the effectiveness of the anti-cartel enforcement system. 644 Such beneficial impact is visible in the Commission’s enforcement system, on the one hand, and on the NCAs on the other hand.

2.1. The impact on the Commission’s practice: refocusing enforcement on cartels

As observed, Regulation 1/2003 replaced the centralised notification regime by a system based on the full direct application of Articles 101 TFEU (and 102 TFEU). The previous system resulted in an extremely high number of notifications and a consequent backlog of notified agreements. Although the Commission took various initiatives with the hope to alleviate the increasing case load, the number of pending cases remained remarkably high and the Commission could not to react to notifications within a reasonable time-period. 645 In addition, as the notification system absorbed about half of the resources of the Commission, it was unable to deal with not notified agreements, mergers or state aid. 646 This shifting away of resources from the investigation and prosecution of harming competition law violations inevitably led to a distortion of the Commission’s enforcement


646 In this regard W. WILS notes that “[t]he problem could not have been solved by giving more resources to the Directorate-General for Competition. Indeed, if more resources had been available, notifications would have been dealt with more swiftly, and this would have made notification more attractive to industry. Many agreements which fell under Article 81(1) EC and which benefited neither from a block exemption regulation nor from Article 4(2) of Regulation No 17, and which were not unlikely to meet the substantive conditions of Article 81(3) EC, were not notified, notwithstanding the resulting unenforceability’. W. WILS, “The reform” 15 of the online version of the work.
priorities. In this scenario, the Commission had no choice but to adopt a reactive approach. Although the DG Competition was in effect conscious about the importance of tackling damaging un-notified practices such as cartels, given its limited means, it was practically obliged to deal with the agreements that parties had chosen to notify. This situation was well understood by J. S. Venit, who qualified the system set up by Regulation 17 as ‘ill-suited to the aggressive pursuit of a vigorous pro-active enforcement agenda’. If an enforcement regime is structured in a way that the most harming violations remain frequently undetected and unpunished, the system in question will be definition not be appropriate to protect competition. In order to be able to achieve the ultimate goal of the reforms – i.e. to enhance the protection of competition as a process – the Commission had to be allowed to devote at least a considerable part of its resources to investigate agreements which, as such, constitute a direct attack on the competitive process. In line with this reasoning, pursuing secret price-fixing or market-sharing cartels (with an EU dimension), which were never notified to the Commission under the previous notification and authorization system, should be the central enforcement priority.

The modernized system established by Regulation 1/2003 enabled the Commission to correct the inappropriate ranging of priorities. By abolishing the notification in favour of a directly applicable system, the caseload could be effectively eliminated. Since the Commission did no longer have the duty to process cases concerning only minor (or no) competition issues, it could


648 J. S. Venit, “Brave” 550-551. See also A. Schaub, “The Reform” 248-249. In addition, W. Wils (“The reform” 15-16 of the online version) adds that ‘in recent years most notifications were of little or no value for the purpose of clarifying the law, as they did not raise novel questions’. Venit agrees with this vision as he found that ‘the system failed to achieve one of its primary underlying goals, i.e. providing legal certainty to firms’. Furthermore, the notification system had other negative collateral effect. More specifically, as Wils points out ‘[t]he notification system may also have had further negative effects on the culture of the Commission’s Directorate-General for Competition and on the interpretation of Article 81 EC. Indeed, dealing with notifications is a very different type of work from investigating infringements such as secret price cartels. Notification work is unlikely to be a good training for conducting dawn raids, and a service where a large proportion of the work consists of reading notifications is unlikely to attract and retain people naturally suited for (quasi-)criminal investigatory work’.

649 There was (and still is) a general consensus in this respect. See for instance W. Wils, “The reform” 14; M. Monti, Speech/00/295; N. Kroes, “Enforcement”. See also recital 3 of Regulation 1/2003; Commission Staff Working Paper on the functioning of Regulation 1/2003, para 13: ‘[o]ne of the objectives of the modernisation reform was to allow the Commission to better focus its resources on areas where they make a significant contribution to the enforcement of Articles 81 and 82 EC’.

650 In its Staff Working Paper on the functioning of Regulation 1/2003, para 13 the Commission explains that ‘[i]n the run-up to the entry into application of Regulation 1/2003, the Commission had already started to shift the focus of its case-handling priorities from the follow-up of notifications to a more pro-active emphasis on pursuing serious infringements’. The last exemption decisions were adopted as follows: UEFA (Commission Decision of 23 July 2003 (COMP/C.2-37.398 Joint selling of the commercial rights of the UEFA Champions League) [2003] OJ L 291/25) and Air France/Alitalia (Commission Decision of 7 April 2004 (COMPA/38284/D2 – Société Air France/Alitalia Linee Aeree Italiane SpA) [2004] OJ L 362/17. See also e.g. W. Wils, “The reform” 16-18 of the online version of this work; J. S. Venit, “Brave” 546-547 observing that ‘[t]he key drivers of the reform, […] are the Commission’s quest for greater efficiency and its desire to take control of its enforcement agenda in order to focus its limited resources on hardcore infringements – cartels, abuses of dominant positions and hardcore vertical restrictions – while devolving enforcement in other areas to the national competition authorities (“NCAs”) and the national courts. Whilst purely procedural in nature, this tectonic shift also appears to be linked to growing changes in the Commission’s approach to the substance of competition law, which in the author’s view result from a reorientation of approach and priorities largely derived from the Commission’s experience under the Merger Regulation and its increasing interaction with other antitrust authorities’.

651 This was indeed also noted by W. Möschel, “Change of Policy” 499.
focus on its most urgent mission: to adopt a strict anti-cartel enforcement policy.\textsuperscript{652} Moreover, the positive impact of the abolition of the notification system on the correct setting of priorities was further enhanced by the introduction and expansion of the Commission’s inspection powers.\textsuperscript{653}

As a result of the modernisation and decentralisation of EU competition law enforcement, the Commission has been able to leave behind its reactive position and adopt a more proactive approach towards the most serious violations. The greater focus on cartel activity of the Commission is well reflected in the number of decisions that were adopted following the entry into force of Regulation 1/2003. While in the period from 1 January 2000 to 30 April 2004, the Commission adopted 27 decisions imposing fines in cartel cases, in the comparable period from the entry into application of Regulation 1/2003 until 31 March 2009, 34 decisions were adopted.\textsuperscript{654} These ciphers (which correspond to two (relatively) comparable periods of enforcement,\textsuperscript{655} \textit{i.e.} before and after the abolishment of the notification and authorisation system) show that after the modernisation process, the Commission was able promote its anti-cartel enforcement activity. The increasing number of decisions prohibiting and sanctioning cartels of the post-modernisation period, is even more remarkable considering that only 18 decisions were taken during the 1990s.\textsuperscript{656}

The Commission’s enhanced cartel focus is also illustrated by the fact that, regardless of the general higher complexity of cases, its own-initiative procedures now play a greater role.\textsuperscript{657} According to a Commission staff working paper, in the period from 1 May 2004 to 31 March 2009, roughly 50\% of cartel decisions were adopted following \textit{ex officio} investigations not related to leniency information, one third was based on leniency applications and one tenth was triggered by complaints. In contrast, during the 1990s, the Commission’s own-initiative inspections only represented around 15\% of new cases registered, with most procedures being initiated as the result of notifications of agreements.\textsuperscript{658} Moreover, the Commission has been able to focus its resources in identifying highly important sectors of the EU economy which represent an important concern for consumers, and consequently, launch large scale inquiries in such fundamental sectors.\textsuperscript{659}

In addition, the power of making commitments binding, as established by Article 9 of Regulation 1/2003, also reflects the Commission’s enhanced priority-setting. This provision allows the

\begin{footnotesize}
\textsuperscript{652} See also White Paper on modernization, recital 8 and paras 42, 72 and 77. It was argued that if the exemption monopoly was abandoned, there might be a certain risk of incoherence as regards the application of Article 101(3) TFEU. Despite the existence of this risk, stronger enforcement against anti-competitive cartels has a great value for the maintenance of undistorted and effective competition within the market. E. PAULIS, “Coherent” 400. See also S. BRAMMER, \textit{Horizontal aspects} 10 of the electronic version of the publication; W. WILS, “The reform” 16-18 of the online version.

\textsuperscript{653} J. S. VENIT, “Brave” 546. The Commission’s powers of inspection are examined in Chapter 7.

\textsuperscript{654} Commission staff working paper on the functioning of Regulation 1/2003, para 19. As regards the statistics concerning cartel fines see \url{http://ec.europa.eu/competition/cartels/statistics/statistics.pdf}

\textsuperscript{655} Commission Staff Working Paper on the functioning of Regulation 1/2003, para 18. As the Commission acknowledged ‘it is difficult to isolate the impact of the reform from other contemporaneous developments, (e.g. the impact of the expansion of the EU in 2004 and 2007 and developments in the Commission's leniency policy which was initiated in 1996 and reviewed in 2002 and 2006’).

\textsuperscript{656} \textit{Ibid}, para 19. Furthermore, in the period from 1 May 2004 until 31 March 2009 the Commission adopted 27 decisions enforcing Articles 101 and 102 TFEU (final decisions on substance) outside the field of cartels. In contrast, in the period from 1 January 2000 until 30 April 2004, the Commission was only able to adopt 17 prohibition decisions.

\textsuperscript{657} Commission Staff Working Paper on the functioning of Regulation 1/2003, para 16.

\textsuperscript{658} \textit{Ibid}, para 21.

\textsuperscript{659} \textit{Ibid}, para 14-16. See also Chapter 7, section 1. Since the adoption of Regulation 1/2003, the Commission has undertaken multiple inquiries including the media, energy, retail banking and business insurance sectors.
\end{footnotesize}
Commission to bring suspected anti-competitive behaviour to an end by imposing on companies commitments (offered by them) that meets its competition concerns. In this sense, while commitment decisions allow the procedure to be terminated provided that the commitments are respected, this type of decision does not formally establish a violation of the EU competition provisions but only concludes that there are no longer grounds for action by the Commission.\textsuperscript{660}

Since infringements cannot be established on the basis of this rule, the Commission cannot impose sanctions in such procedures. This implies that, as Recital 13 of Regulation 1/2003 explains, commitment decisions are not appropriate where the Commission intends to impose a fine. This is precisely the case in the area of cartels, where the Commission’s fining policy is essential to effectively sanction violations.\textsuperscript{661} The right of the Commission to select the commitment route to deal with potentially anti-competitive behaviour while firmly stating that cartel concerns cannot be addressed through commitments also shows the Commission’s enhanced priority-setting.\textsuperscript{662}

2.2. The impact on NCAs: decentralised wider enforcement of the cartel prohibition within the ECN

2.2.1 The empowerment of NCA to definitely prohibit cartels

It is generally acknowledged that under the centralised system set by Regulation 17, NCAs were not able to contribute in an optimal manner to the enforcement of EU competition rules. The lack of active prosecution of EU competition law infringements including obviously cartel practices, was a common feature of the national enforcement panorama.\textsuperscript{663}


\textsuperscript{662} Since the entry into force of Regulation until March 2009, the Commission adopted 13 decisions under Article 9 (Commission Staff Working Paper on the functioning of Regulation 1/2003, para 22).

\textsuperscript{663} See e.g. A. SCHaub, “The Commission's Position within the Network” in C-D. EHLERMANN AND I. ATANASIU (eds.) European competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., at 238-239 (hereafter: ‘A. SCHaub, “The Commission's Position””). According to this author: ‘[s]ince the notice on cooperation of 1997, NCAs inform the Commission when they take decisions that apply EC competition law. On average, a total of ten decisions applying Community law are made per year by all NCAs combined’. See also W. WILS, “The reform” 18 of the online version. The national reports submitted for the FIDE conference also reflect the infrequent prosecution of competition law violations. The General Rapporteur writes that the general impression from the national reports is that national agencies have had little occasion to apply Articles 101 and 102 TFEU. See D. CATILL, The Modernisation of EU Competition Law Enforcement in the European Union: FIDE 2004 National Reports, Cambridge, Cambridge University Press 2004, 754 p., at 21-629 (national reports), and 633 (opinion of the General Rapporteur).
The Commission’s exclusive power to apply Article 101(3) TFEU combined with Article 9(3) of Regulation 17, were identified as the principal hindrance for effective national enforcement.  

According to Article 9(3), although NCAs had the power to apply Articles 101(1) and 102 TFEU they could only exercise it insofar the Commission had not initiated a procedure under Articles 2, 3 or 6 of the Regulation. This limitation inevitably had a negative effect on the NCAs proceedings. When a national investigation was initiated, the company in question could still notify the practice and argue that it satisfied the conditions of Article 101(3) TFEU. Given the lack of competence of NCAs to apply 101(3) TFEU, the Commission generally had to start a procedure and, as a result, NCAs could no longer proceed with the case.  

Although, in practice, cartel agreements were (almost) never notified, cartel members were inclined to submit a notification when they suspected an upcoming national investigation, simply to gain some time. In this scenario, the possibility of invoking the Article 101(3) TFEU defence not only led to unnecessary delays but also implied that NCAs could not establish the ultimate illegality of cartels. The impossibility to close cases under Article 101 TFEU was logically seen as a disincentive for NCAs which were not particularly eager to apply EU competition law. Furthermore, it is submitted that this situation also had a negative effect on complainants who had the tendency to submit their complaints to the Commission – which was already overloaded with notifications – or to bring their case to the national authority under national competition law as an alternative to EU law.

As observed, under the current enforcement regime, cartel agreements are caught by Article 101(1) TFEU and – as they do not satisfy the conditions of Article 101(3) TFEU – are directly prohibited, no prior administrative or judicial decision or intervention being required. Article 5 of Regulation 1/2003 explicitly empowers NCAs to apply Article 101 as a whole in individual cases. For this purpose, the Regulation lists certain types of decisions that NCAs must be able to adopt.  

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664 See e.g. S. KINGSTON, “A new division” 341. According to KINGSTON these circumstances lead to an extreme centralisation.

665 In its 1997 notice on cooperation with NCAs, the Commission made an attempt to solve, or at least reduce, this issue by stating that ‘it consider[ed] itself justified in not examining as a matter of priority’ such ‘dilatory notifications’. See Commission Notice on cooperation between national competition authorities and the Commission [1997] OJ C313/03, paras 55-57. Nonetheless, this initiative was not easy to implement. See A. SCHAUB, “The Reform” 249. See also W. WILS, “The reform” 18 of the online version of this article; S. KINGSTON, “A new division” 348; T. WIBMANN, “Decentralised” 133-134.

666 The existence of such dilatory notifications was recognised by the Commission in its Notice on cooperation between national competition authorities [1997] OJ C 313/11, see paras 55-56. See also in this regard A. RILEY “EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part One: Regulation 1 and the Notification Burden”, 2003 (24-11) ECLR, 604-615, at 613 (hereafter; ‘A. RILEY, “Modernisation Part One”’).

667 Article 1(1) of Regulation 1/2003. On the contrary, decisions and concerted practices caught by Article 101(1) of the Treaty which satisfy the conditions of Article 101(3) TFEU shall not be prohibited, and are thus directly valid and enforceable, no prior decision to that effect being required (Article 1(2) of Regulation 1/2003).

668 Namely, NCA may take decisions (i) requiring that an infringement to be brought to an end; (ii) ordering interim measures; (iii) accepting commitments; and (iv) imposing fines, periodic penalty payments or any other penalty provided for in their national law. This rule concludes that where, on the basis of the information in their possession, the conditions for prohibition are not met, NCAs may likewise decide that there are no grounds for action on their part. In this sense, the question arises whether the list of NCAs decisions, as set out in Article 5 of Regulation 1/2003, is exhaustive. More precisely, in Tele2 Polska the query was whether a NCA may adopt decisions establishing that a certain behaviour did not constitute an infringement of the EU competition rules. In the Judgment of the Court of 3 May 2011, Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA ((2011) ECR I-3055), (hereafter: ’Tele2 Polska’), this question was answered negatively. As, recital 14 in the preamble to the Regulation states, only the Commission may adopt a decision of a declaratory nature ‘in exceptional cases’. The
Article 101(3) TFEU can always be invoked under Regulation 1/2003 by undertakings as a defence in proceedings conducted by the NCAs (and also the Commission and national courts), there is a fundamental difference with the former regime. NCAs (and national courts) are now also competent to analyse whether a certain satisfies the four cumulative conditions of Article 101(3) TFEU.

The effective abolishment of the Commission’s monopoly in the application of Article 101(3) TFEU and the new competences of NCAs to apply this rule represented crucial improvement in terms of effective cartel enforcement.670 The fact that NCAs no longer depend on the Commission to grant or deny an exemption in the context of Article 101(3) TFEU has led to an increased involvement of the NCAs in the application and enforcement of EU law by eliminating the obstacles deriving from the artificial division in the application of Article 101 TFEU.671

In the specific area of cartels, even if only a very small percentage of notifications were meant to delay the procedure, the NCAs competence to apply Article 101 TFEU as a whole, allows them to quickly asses the (non-)applicability of 101(3) TFEU and, thereby, to definitely and firmly establish the illegality of cartels. In this context, it may still be argued that the reformed regime did not completely eliminate all obstacles for NCAs because, in accordance with Article 11(6) of Regulation 1/2003, the initiation by the Commission of proceedings […] relieves the competition authorities of the Member States of their competence to apply Articles [101] and [102] of the Treaty’. 672 However, this should not be seen as a discouraging factor for NCAs. 673 Under Article 11(3) of the Regulation, NCAs are required to inform the Commission (and possibly other NCAs) before or without delay after commencing the first formal investigative measure in the context of a competition law procedure. As the Commission is immediately informed about all national initiatives, most commonly, the authority that receives a complaint or starts an ex-officio procedure remains in charge of the case. Only at the outset of a procedure (that is, an indicative time period of two months starting from the date of the first information sent to the network), the Commission can initiate proceedings

purpose of such action, according to that recital, is ‘to [clarify] the law and ensur[e] its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice’.


671 See also e.g. W. WILS, “The reform” 18-19 of the online version of this article; S. BRAMMER, Horizontal aspects 41 of the electronic version of the publication.

672 See e.g. A. WILLEM KIST AND M. L. TIENRO CENETELLA, “Coherence and Efficiency in a Decentralised Enforcement of EC Competition Rules: Some Reflections on the White Paper on Modernisation” in C-D. EHLERMANN AND I. ATANASIU (eds.) European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy, Oxford, Hart Publishing, 678 p., at 381; W MÖSCHEL, “Change of Policy” 497 pointed out that ‘[t]he Commission has stressed subsidiarity and decentralization in the application of the law. However, this is more apparent than real, since the Commission reserves a right of evaluation’.

673 See for a similar opinion W. WILS, “The reform” 19 of the online version of this work. For a more critical opinion of this situation see U. BÖGE, “The Commission’s Position within the Network: The Perspective of the NCAs” in C-D. EHLERMANN AND I. ATANASIU (eds.) European competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., at 251 (hereafter: U. BÖGE, “The Commission’s Position”’). This author describes the power of the Commission embodied in Article 11(6) of Regulation 1/2003 as ‘the most far-reaching power that the Commission has reserved for itself”.

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under Article 11(6) after having consulted the authorities concerned and only when it considers that it is better placed to deal with the case. After this initial allocation phase, the Commission will in principle only apply Article 11(6) of the Regulation if one of the specific situations enumerated in the Notice on cooperation within the network arises. Notably, the Commission has confirmed that it will intervene under Article 11(6) of Regulation 1/2003 to resolve disputes within the network when there is a serious risk of incoherence or inconsistency. This instrument has, therefore, been reserved for the most severe risks of incoherent application that also display sufficient Community interest. Still, given the strong commitment of NCAs to solve disputes through consultation and information exchange within the ECN, it can be affirmed that Article 11(6) fundamentally fulfils a subsidiary role.

Furthermore, the Commission has adopted a preventive approach that effectively avoids that NCAs make possible (although improbable) misinterpretations as regards the inapplicability of Article 101(3) TFEU in cartel cases. Following modernisation, it has been emphasised (even more) that, under a general assessment under Article 101 TFEU – and more particularly 101(3) TFEU – cartels are prohibited. In this context, the Commission clarified in its Guidelines on the application of (now) Article 101(3) that this provision can only be applied when its four conditions are fulfilled and that other goals pursued by Treaty provisions can only be taken into account to the extent that they can be integrated in Article 101(3) TFEU. With this declaration, the Commission confirmed that NCAs should not consider the so-called non-competition goals in the application of Article 101 TFEU. Finding that cartels are permissible under Article 101(3) would, not only, fully run counter the system but may undermine the effectiveness of the reforms. If NCAs do not comply with these (non-binding) recommendations, the Commission could exceptionally intervene under Article 11(6). In addition, pursuant to Article 16(2) of Regulation 1/2003 NCAs cannot take a decision which would run counter to an earlier decision by the Commission concerning the same agreement or

674 This obligation to consult the national competition authority already dealing with a case before initiating proceedings was not applicable under Regulation 17.
675 According to para 54 of the Notice, the Commission will in principle only apply Article 11(6) of the Council Regulation when: (a) Network members envisage conflicting decisions in the same case; (b) Network members envisage a decision that is obviously in conflict with consolidated EU case law or with essential standards developed by the Commission; (c) Network member(s) is (are) unduly drawing out proceedings in the case; (d) there is a need to adopt a Commission decision to develop competition policy, in particular when a similar competition issue arises in several Member States or to ensure effective enforcement; (e) the NCA(s) concerned do not object.
677 See Commission Staff Working Paper on the functioning of Regulation 1/2003, para 264. At the time the Commission Staff Working Paper was published, Article 11(6) had never been applied.
678 Guidelines on the application of Article 81(3) of the EC Treaty para 13 [2004] OJ C 101/97, para 42. In addition, the Guidelines also explain that horizontal price-fixing, market sharing and output limitations are considered hardcore restrictions (see further supra Chapter 4, section 2.2, and 3). By issuing these Guidelines and adopting a preventive approach in order to avoid an incorrect interpretation of Article 101(3) TFEU in the context of cartels, the Commission further enhances consistency and coherence in the application of Article 101 TFEU which, in turns, stresses even more the exceptional role of Article 11(6) of Regulation 1/2003.
679 See supra Chapter 3.
680 This vision is for instance further highlighted in the Commissions’ Block Exemption Regulations and other Commission’s policy documents which reiterate that cartels are hardcore restrictions and thus cannot benefit from a block exemption. See also E. PAULIS, “Coherent” 400. E. PAULIS explains that the approach of the new Block Exemptions is no longer to prohibit all restrictions (except those that are clearly exempted), but instead to exempt all restrictions except those that are explicitly prohibited. This new approach focuses on what is prohibited and makes the rules clearer and simpler.
practice. This provision is indeed fully adequate to ensure that the consistent application of the cartel prohibition contained in Article 101 TFEU is ensured.681

Last but not least, the rules contained in Article 5 are also important since they have a harmonising effect as regards the NCAs’ powers to apply Articles 101 and 102 TFEU. From this perspective, if the Commission would decide to close the file on a complaint or not initiate proceedings with respect to a particular case, Article 5 guarantees that NCAs have the basic powers to apply EU competition law.682 Although it has been argued that Regulation 1/2003 gives NCAs some flexibility as to the requirement to take action,683 the content of Article 5 indicates that NCAs are required to open an investigation when the conditions of the prohibition are satisfied.684

Generally speaking, it can be concluded that giving the last word as regards the anti(competitiveness) assessment of a practice to the NCAs has been an extremely valuable development. NCAs can enjoy their full competence and are no longer reluctant to be involved competition law proceedings. On the contrary, NCAs have increasingly become essential and proactive enforcers. This has obviously been reflected in their enforcement practice that, as it is argued below, has further encouraged the fight against cartels.685

2.2.2. The obligation to apply EU competition law to practices which affect trade between Member States

The replacement of the Commission’s exclusive power by a system of legal exemption had an undeniable positive impact on anti-cartel enforcement. Nonetheless, it is also true that this measure, considered in isolation, was not seen as “sufficient” to fully trigger the (decentralised) application

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681 These measures are certainly desirable and necessary in the light if the parallel competences of NCAs and Commission in the application of EU competition law. The special role of the Commission in clarifying the law is also reflected in the exclusive Commission’s power to adopt inapplicability decisions under Article 10 of Regulation 1/2003. See also Opinion of Advocate General Mazák delivered on 7 December 2010 in Case C-375/09, Tele2 Polska [2011] ECR I-3055, para 47, stating that ‘it is clear from a reading of Regulation No 1/2003 that – while the underlying idea is that the Commission and the NCAs have parallel competences and that they should form together a network applying EU competition law in close cooperation – the fact remains that the Commission has an special role in securing an uniform interpretation of the EU competition rules, which distinguishes it from the NCAs’. See further infra Chapter 6.


684 Advocate General Mazák argues that Article 5 is necessary, ‘because of the flexibility allowed to the Commission and the NCAs in deciding whether to open a formal procedure and take a decision on a specific case’. This could limit the protection of the rights of individuals granted by Articles 101(1) and 102 TFEU, especially in cases where, although the infringement of EU competition law is obvious, the case is not sufficiently important from an economic point of view to warrant the individual going to court. In order to reduce that risk, the last sentence of Article 5 requires the NCAs to take action if certain conditions are met’. Opinion of Advocate General Mazák delivered on 7 December 2010 in Tele2 Polska [2011] ECR I-3055, para 32 (footnote 26).


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and enforcement of EU competition law by NCAs. A closer look at Regulation 1/2003 reveals that additional provisions were included to effectively engage all NCAs in anti-cartel enforcement.

Granting NCAs the right to apply Article 101(3) TFEU did not intrinsically imply that they would be far more inclined to apply EU competition law. If a NCA was not explicitly required to apply EU competition law, it was questionable that it would simply do so (instead of applying national law) even if trade between Member States was likely to be affected. Arguably, NCAs found it easier to analyse cases under their more familiar national systems. It follows that, without any additional measures, the abolition of the Commission’s monopoly, could result in a nationalisation of competition law, thereby representing a risk for the whole reform process. This threat was addressed by Article 3 of Regulation 1/2003. This provision, which has been qualified as “the real core of the reform”, regulates the relationship between EU competition law, on the one hand, and national competition law, on the other hand.

Article 3(1) stipulates that if NCAs apply national competition law practices which may affect trade between Member States, they shall also apply Article 101 TFEU to such practices. In other words, under the present system when competition authorities deal with a case involving competition issues affecting trade between Member States, NCAs are no longer able to set aside the EU competition provisions and adopt a decision solely based on their national rules. Article 3 of Regulation 1/2003 established a specific obligation to at least apply the EU competition rules – and thus the EU cartel


687 This aspect was also acknowledged by the Commission in the Explanatory Memorandum preceding the draft Regulation in which it also confirmed the need to regulate the relationship between national and EU competition law. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 143; A. RILEY, “Modernisation Part One” 613. According to RILEY ‘[n]o public official will rationally choose a procedure that places additional evidential and procedural burdens upon his or her case, when another procedure, often word for word the same text, relying on the same case law, and with the same legal effect, is available’). M. SIRAGUSA, “The Commission's Position” 256; W. WILS, “The reform” 49 of the online version of this article.

688 It has been argued that, this way they could reduce their assessment to the impact of the agreement in their respective national markets. Moreover, by doing so, it was possible to avoid any interference by other NCAs, the Commission and the European Courts. M. SIRAGUSA, “The Commission's Position” 256. In this context SCHaub explains that the active enforcement of EU competition law had mostly relied on the Commission because in the cases where EU competition law was applied by NCAs, it was generally in parallel with their national rules, or to complement their national competition provisions when such rules were not applicable to certain sectors. A. SCHaub, “The Commission’s Position” 239.

689 In the context previous to the adoption of Regulation 1/2003 it was commented that ‘[i]f nothing is done, I am afraid that the role of Community law will decrease, and in the next few years the system will be dominated by the application of national laws. M. SIRAGUSA, “Panel Two: Broad Systemic Issues” in C-D. EHLEMMANN AND I. ATANASI (eds.) European competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing, 496 p., at 170 (hereinafter: ‘M. SIRAGUSA, “Panel Two”’). See also stressing this risk e.g. C. GAuER, et al. “Regulation 1/2003” 6; E. PAULIS AND C. GAuER, “La réforme des règles d’application des articles 81 et 82 du Traité”, 2003 (97-11) Journal des tribunaux Droit européen, 65-72, at 67 (hereinafter: ‘E. PAULIS AND C. GAuER, “La réforme”’).

690 M. SIRAGUSA, “The Commission's Position” 256. S. BRAMMER stated that the obligation imposed on NCAs by Article 3(1) of Regulation 1/2003 to apply Articles 81 and 82 EC in all cases where they apply national competition law and trade between Member States may be affected, probably has by far the larger impact on the position of the NCAs compared to the situation prior to 1 May 2004’. S. BRAMMER, Horizontal aspects 41 of the electronic version of the publication. See agreeing on this point K. CSErES, “Comparing” 14. K. CSErES states that ‘[t]he most important legal obligations that stemmed from Regulation 1/2003 for all the Member States were laid down in Article 3’. See also recital 8 of Regulation 1/2003.

691 Concerning the origin of Article 3 of Regulation 1/2003 see E. PAULIS AND C. GAuER, “La réforme” 67-68.
The requirement to apply EU competition law in cases which fulfil the jurisdictional requirement is imperative in the light of the increased competence of NCAs to apply the EU competition rules in full. If NCAs are empowered to apply these provisions, but in fact make no use of their (enhanced) competences, the rationale of the reform process would be undermined. The obligation to apply EU competition law is intended to ensure that these provisions are applied to all cases within their scope of application, that is, in cases capable of affecting trade between Member States. However, the requirement contained in Article 3(1) does not impose an obligation to apply national law in parallel to such cases. The parallel application of national and EU rules is, therefore, optional and depends on the national system at hand. The main benefit of parallel application of EU competition law and national law is that in case the jurisdictional requirement of effect on trade is successfully challenged, infringement decisions of NCAs can still be upheld on the grounds of national competition law.

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692 The current wording of Article 3 of Regulation 1/2003 contrasts with the version of Article 3 of the Commission’s draft regulation which stipulated that ‘[w]here an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws’ (emphasis added). The former version of Article 3 was strongly criticised on the grounds that it ‘[went] beyond what is needed for establishing a common legal basis, and thus it unnecessarily restricts the possibility for the national competition authorities to apply stricter legal standards or criteria for tackling specific enforcement problems’. See U. BOGE, “Panel Two: Broad Systemic Issues” in C-D. EHLMANN AND I. ATANASIU (eds), European competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., at 167 (hereafter: ‘U. BOGE, “Panel Two”’). For a similar opinion see S. BRAMMER, Horizontal aspects 42 of the electronic version of the publication. See also S. BRAMMER, Horizontal aspects 42 of the electronic version of the publication.

693 See recital 8 of Regulation 1/2003. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 152. Interestingly, M. SIRAGUSA observes that ‘[b]y guaranteeing that NCAs and national courts will effectively apply Article 81(3) EC and the rest of Articles 81 and 82 EC, the existence of such an obligation would somehow counterbalance the Commission’s loss of its exclusive power to apply Article 81(3) EC’ (M. SIRAGUSA, “The Commission’s Position” 257). See also M. SIRAGUSA, “Panel Two” 170.

694 According to the Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 152-154, ‘[c]ertain Member States, such as Italy and Luxembourg, have indeed opted for the exclusive application of EC competition law to cases falling within its scope. Most Member States have, however, chosen the possibility to rely on a double legal base, and parallel application of the EC and national rules has become a well-established practice’. Furthermore, a number of national courts have confirmed the principle of parallel application. See e.g. Portuguese cases concerning professional associations for Veterinarians (Case No 8638/06-9, Decision of the Lisbon Appeals Court, 5 July 2007), Dentists (Case No 1372/06-9, Decision of the Lisbon Appeals Court, 19 June 2008) and Medical Doctors (Case No 5352/07-9, Decision of the Lisbon Appeals Court, 22 November 2007). This document also explains that the parallel application of EU competition law has not caused major difficulties. Exceptionally, national agencies were confronted with violations for which a sanction was supposed to have been under national competition law but not under the equivalent EU rules at the relevant point in time. In such instances, sanctioning that beavbour was only possible on the grounds of national competition law, in accordance with the principle nullum crimen sine lege.

695 For instance, in the Portuguese salt cartel case (Case No. 965/06,9TYSB, Decision of the Lisbon Commercial Court, 2 May 2007) a Portuguese Court found that inter Member State trade was not affected and annulled the part of a decision applying Article 101 TFEU. However, the Court upheld the violation of national competition law. Furthermore, it has also been pointed out that in certain Member States the effect on trade criterion has been interpreted more strictly by national courts than by NCAs. See for some examples Commission Staff Working Paper on the functioning of Regulation 1/2003, para 150.

696 The parallel application of EU and national competition law was firstly confirmed in Walt Wilhelm (Judgment of the Court of 13 February 1969, Case 14-68, Walt Wilhelm and others v Bundeskartiellamt [1969] ECR 1, hereafter: Walt Wilhelm)
In addition, as previously pointed out, the new system has set out a framework to reinforce cooperation among NCAs. The obligation to apply the EU competition rules as set out in Article 3(1) should also be understood against the new cooperation possibilities (and particularly Articles 11 to 13), which are activated when the EU competition rules are applied. Pursuant to Article 11(3) of Regulation 1/2003 NCAs have to inform the Commission after commencing the first formal investigative measure under EU or national competition law. According to Article 11(4), they must also inform the Commission about their envisioned decision no later than 30 days before its adoption. These instruments make it easier for the Commission to be informed about the ongoing NCAs’ procedures. If in the Commission’s view the decision of the NCA is in conflict with EU case law, the Commission may relieve NCAs of their power to apply Article 101 (or 102 TFEU) on the basis of Article 11(6).

Wilhelm). This case dealt with the relationship between EU and national law in the context of a cartel investigation, which was simultaneously undertaken by the Bundeskartellamt on the basis of German law and by the Commission under (now) Article 101, pursuant to an investigation under Art. 14 of Regulation No. 17. According to this case which has been frequently reiterated by the EU case-law, NCAs had (and still have) the possibility to apply EU competition law and national competition law apply in parallel, since they consider restrictive practices from different points of view. ‘Whereas Articles [101] and [102 TFEU] regard them in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of considerations peculiar to it and considers restrictive practices only in that context’. See Case 14-68, Wali Wilhelm [1969] ECR 1, para 3. (See also confirming this view e.g. Judgment of the Court of 13 July 2006, Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni Spa, a.o. [2006] ECR I-6619, para 38; Judgment of the Court of 10 July 1980, Joined cases 253/78 and 1 to 3/79, Procureur de la République and others v Bruno Giry and Guerlain SA and others [1980] ECR 2327, para 15; Judgment of the Court of 9 September 2003, Case C-137/00, Milk Marque Ltd and National Farmers' Union [2003] ECR I-7975, para 61. In this context, it has been argued that the ne bis in idem principle could form an obstacle for the parallel application of national and EU competition law. S. BRAMMER, Horizontal aspects 283-284 of the electronic version of the publication. See also opinion of Advocate General L. GEELHOED in Judgment of the Court of 29 June 2006, Case C-308/04 P, SGL Carbon AG v Commission [2006] ECR I-5977. See more generally W. WILS, “The principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis”, 2003 (26-2) World Competition, 131-149 (hereafter: ‘W. WILS, “The principle of Ne Bis’”). Yet, in the Toshiba case the ECJ made very clear that ‘[i]n accordance with settled case-law, EU law and national law on competition [still] apply in parallel. Competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide. That situation has not been changed by the enactment of Regulation No 1/2003’. Judgment of the Court of 14 February 2012, Case C-17/10 Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže, paras 81-82. Obviously this does not mean that the ne bis in idem principle can simply be disregarded in competition cases. As the ECJ held, the application of that principle is subject to the three conditions concerning (i) identity of the facts, (ii) unity of offender and (iii) unity of the legal interest protected (Judgment of the Court of 7 January 2004, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland AS and others [2004] ECR I-12, 338).

Pursuant to Article 11(3) this information may also be made available to the competition authorities of the other Member States. See supra this section. Additionally, it has been argued that Articles 11(6) and 3(1) suggest that, the initiation of proceedings by the Commission relieves NCAs not only of their competence to apply the EU competition rules but also of their competence to apply national competition law in the same case. See e.g. C. GAUER, et al. “Regulation 1/2003” 6; W. WILS, “The principle of Ne Bis” 144; S. BLAKE AND D. SCHNICHELS, “Leniency Following Modernisation: Safeguarding Europe’s Leniency Programmes”, 2004 (25-12) ECLR, 765-770, at 766 (hereafter: ‘S. BLAKE AND D. SCHNICHELS, “Leniency”’); W. WILS, “The reform” 50 of the online version of this article. BRAMMER clarifies in this regard that ‘[t]his would mean that in all cases handled by the Commission, the parallel application of national competition law is entirely excluded and companies are fully protected against multiple proceedings at EU and national level. This would evidently constitute an important advantage for undertakings. It could effectively create a real one-stop shop - similar to that existing under the Merger Regulation - for cartel cases handled by the Commission’. S. BRAMMER, Horizontal aspects 43 of the electronic version of the publication. The ECJ has indeed confirmed in Toshiba that ‘[i]n so far as the national competition authority is not authorised, under the first sentence of Article 11(6) of Regulation No 1/2003, to apply Article 81 EC, where the Commission has opened a proceeding for the adoption of a decision in application of Chapter III of that regulation, the said national authority also loses the possibility of applying provisions of national law prohibiting cartels’. However, it continued: ‘Regulation No 1/2003 does not, however, indicate that the opening of a proceeding by the Commission permanently and definitively removes the national
As reflected in the abundant case-law of the European Courts, the condition regarding effect on trade among Member States is broadly interpreted. In its judgment in *Erste Group Bank AG*, for instance, the Court reiterated that ‘a cartel extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about’. NCAs (and courts) are actually responsible for the selection of the appropriate legal basis to assess undertakings’ (anti)competitive behaviour in individual cases, which should be chosen based on the available information and facts. However, it is important to bear in mind that Article 3(1) is directly applicable and the undertakings concerned can invoke the application of EU competition law and of Regulation 1/2003 by relying on Article 3(1) in proceedings before both NCAs (and courts), including at the judicial review stage.

Article 3(1) of Regulation 1/2003 is essential to ensure the decentralisation of EU competition law enforcement. In the absence of a rule making the application of EU competition law mandatory for NCAs, it is questionable that effective decentralisation could be attained. Moreover, this provision also prevents the so-called renationalisation of EU competition law by impeding that NCAs only apply their more accessible national rules. Compared to the former system, Regulation 1/2003 has promoted a more effective and wider application of the EU antitrust rules, and thus also of the EU cartel prohibition. These benefits were also reflected in practice. In particular, by the end of 2004, the Commission was informed that roughly 200 cases had been assessed under the EU competition law of the European Courts, the condition regarding effect on trade matters’ (emphasis added). The power of the NCAs is restored once the proceedings initiated by the Commission is concluded. Accordingly, the Court concluded that ‘in a situation […], in which the competition authority of a Member State penalises, by the application of national competition law, the anti-competitive effects produced by a cartel in the territory of the said Member State during periods prior to the accession of the latter to the Union, the combined provisions of Articles 11(6) and 3(1) of Regulation No 1/2003 cannot, in respect of those periods, prevent the application of national provisions of competition law’. Case C-17/10, *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže*, not yet reported in ECR, paras 77-80 and 91.

The concept of effect on trade between Member States has often been clarified by the European Courts. Generally speaking, this concept is widely interpreted to cover practices between companies established in the same Member State and only covering such State. See for instance, Case C-8/72, *Cementhandelaren v. Commission*, [1972] ECR 977; Case C-126/80, *Salonia conv. Poidomani and Giglio* [1981] ECR 1563; Case C-246/86, *Belasco v. Commission* [1989] ECR 2117; Case C-311/85, *ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801; Case C-393/92, *Gemeente Almelo and others v. Energiebedrijf IJsselmiij* [1994] ECR I-1477; Case C-7/95, *John Deere v. Commission* [1998] ECR I-3111. See, however, for a more strict interpretation of this concept see Judgment of the Court of 21 January 1999, Joined Cases C-215 & 216/96, *Carlo Bagnasco and others v. Banca Popolare di Novara s.c.a., Cassa di Risparmio di Genova e Imerperia SpA* [1999] ECR I-135. In this case the ECJ held that standard bank conditions established by the Italian Banking Association relating to the provision of guarantees to secure current-account credit facilities were not, taken as a whole, liable to affect trade between Member States. The Commission clarified the concept of ‘effect on trade between Member States’ in its Guidelines on the effect on trade concept ([2004] OJ C 101/81), which also contain numerous references to the EU case law.


701 In case of frequent disregard of Article 3(1) and/or misinterpretation of the effect on trade criterion in a Member State, the Commission may decide to make use of its powers pursuant to Article 258 TFEU. See Commission Staff Working Paper on the functioning of Regulation 1/2003, para 151. See also Judgment of the Court of 9 December 2003, Case C-129/00, *Commission v Italy* [2003] ECR I-14637, para 32, concerning the conditions under which jurisprudence of national courts may amount to a state infringement.

702 See also M. SIRAGUSA, “The Commission's Position” 257. “The reform is based on the assumption that, following its implementation, the application of EC competition law will be effectively decentralised. It is on this understanding that all the provisions contained in Chapters II, III and IV of the draft Regulation have been conceived”.

703 S. BRAMMER, *Horizontal aspects* 43 of the electronic version of the publication.
2.2.3. The convergence rule between national and EU competition law

Article 3(1) of Regulation 1/2003 has successfully contributed to a decentralised, effective and wider application of Article 101 TFEU by the NCAs throughout the EU. Given this more extensive application of EU competition law, and the possible parallel application of national laws by different NCAs, it is of vital importance to minimise the risk of substantive inconsistencies between the national rules of Member States and EU competition law. This risk of inconsistent and incoherent outcomes is, by definition, greater when different substantive provisions are applied.\textsuperscript{706}

The extent to which EU law competition law takes precedence over national law when both sets of rules are applied in parallel, was considered long ago in the landmark ECJ ruling in \textit{Walt Wilhelm v Bundeskartellamt}.\textsuperscript{707} This case concerned a price-fixing cartel which was subject of an investigation, simultaneously undertaken by the \textit{Bundeskartellamt} on the basis of German law, and by the Commission pursuant to former Article 14 of the former Regulation 17. Due to the illegality of cartels, the case did not directly deal with the question whether, and if so, under which circumstances national competition law may lead to a different result than EU competition law: price-fixing cartels were (and are) in effect considered flagrant infringements under both the EU and the German competition law system. Still, the whole analysis of the judgment is mainly based on the principle that, (at least) as regards the main prohibition contained in Article 101 TFEU, ‘conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence’.\textsuperscript{708} Furthermore, the ECJ firmly held that ‘the parallel application of national law can only be allowed in so far as it does not prejudice the legal basis of EC law cases decided’.

\textsuperscript{705} Commission Staff Working Paper on the functioning of Regulation 1/2003, para 148-149: ‘[f]or instance, roughly one half of the enforcement decisions adopted by the Italian competition authority during the reporting period were based on Community law. The French competition authority applied EC competition law in nearly 40\% and the Belgian, Danish and Dutch authorities in around 30\% of all cases dealt with in the antitrust field. In Portugal and Greece this ratio was approximately 25\%, whereas Hungary and Slovenia were close to 20\%. Insofar as certain national competition authorities dealt with lower ratios of cases based on EC competition law, this can be due to a range of factors. Notably, the ratio will be crucially influenced by the priority setting applied by the respective national competition authorities. For instance, an authority that investigates numerous alleged abuses of local scope will have a lower percentage of cases based on EC competition law. For the Member States that joined the EU in 2004 and 2007, and in particular Romania and Bulgaria, the rate of application of Articles 81 and 82 EC is also influenced by the period of applicability of those rules in their territories. Moreover, for some authorities, the overall number of formal enforcement decisions is too small to make meaningful conclusions about the ratio of EC law cases decided’.


\textsuperscript{708} Case 14-68 \textit{Walt Wilhelm} [1969] \textit{ECR} 1, para 6. In the general context of EU law, the primacy principle was established in \textit{Costa} (Judgment of the Court of 15 July 1964, Case 6-64 \textit{Flaminio Costa v E.N.E.L.} [1964] \textit{ECR} 1141). In this case the ECJ held that ‘[i]t follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question’.

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the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules. These solid declarations, underlined that EU law requires that the prohibition contained in Article 101 TFEU is observed (at least) as a minimum standard. These considerations are of essential importance in the field of cartels because, whenever a cartel is capable of affecting trade among Member States the agreement in question must also be prohibited by national competition legislation.

Despite these clear statements, some commentators argued in the context of Regulation 17 that certain aspects concerning the relationship between EU and national competition law were not definitely established. More precisely, they argued that the question whether an agreement that was allowed under EU competition law could be prohibited under the national system remained unanswered. In this regard, some took the view that when Article 101 TFEU and national law applied to the same practice, only the existence of an exemption granted under (now) Article 101(3) TFEU (by a decision or a block exemption), had a binding effect for Member States. Therefore, (only) under these circumstances Member States could not be stricter than the EU law standard.

It follows from this reasoning that the application of national law could have potentially led to

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710 See opinion of Advocate General F. JACOBS in Judgment of the Court of 26 November 1998, Case C-79/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, and others [1998] I-7791: ‘[t]he limits placed by Community law on the divergent application of national law in cases falling within the scope of Articles 85 and 86 remain unclear, and it has even been suggested that, in view of the difficulty in defining such limits coherently, the very principle of concurrent application should be reconsidered’. See also J. S. VENIT, “Brave” 557-558; M. R. MOK, “Zweischranken”-leer”; R. WALZ, “Rethinking”; C. CANENBLEY AND M. ROSENTHAL, “Co-operation” 108. See also discussing this aspect S. BRAMMER, *Horizontal aspects* 47 of the online version of this publication.
711 See for a different vision see J. TEMPLE LANG, “European Community Constitutional Law and the Enforcement of Community Antitrust Law” in B. E. HAWK (ed.) 1993 Proceedings of the Fordham Corporate Law Institute, New York, Juris Publishing 1994, 662 p., at 560-561. Particularly, this author makes a difference between individual exemptions and group exemptions. Under his point of view, even as regards group exemption regulations, the possibility to apply national provisions that were stricter should be analysed case-by-case.
712 See for instance the opinion of Advocate General Tesauro in the Judgment of the Court of 24 October 1995, Case C-266/93 Bundeskartellamt v Volkswagen and VAG Leasing [1995] ECR I-3477, para 51. This case dealt with the issue whether Block Exemption Regulations take precedence over national competition law. In this case the AG took the view that ‘the exemption granted to [the agreements] cannot but prevent the national authorities from ignoring the positive assessment put on them by the Community authorities. Otherwise, not only would a given agreement be treated differently depending on the law of each Member State, thus detracting from the uniform application of Community law, but the full effectiveness of a Community measure […] would also be disregarded’. The ECI, on the other hand, decided that the restrictions at issue were not covered by the Block Exemption Regulations. Therefore it did not have to rule on the above mentioned question. Also the Commission seemed to share Tesauro’s opinion (see in this regard the Commissions observations in the, Joined cases 253/78 and 1 to 3/79 Procureur de la République and others v Bruno Giry and Guerlain SA and others [1980] ECR 2327, para 18. In contrast to the view that Block exemptions and individual exemptions were binding for Member States, the EJC ruled that this was not the case for comfort letters. More precisely, it held that ‘that the fact that the Commission gave the opinion that there was no need for it to take action in respect of the contracts in question under the provisions of Article 85 (1) […] in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally’. See also in this context e.g. J. S. VENIT, “Brave” 557-558; J. GOYDER, *EC Competition* 440-444; A.-M. VAN DEN BOSSCHE, “Harmonisierung des nationalen Wettbewerbsrechts in der Europäischen Union: spontan, auferlegt oder angeregt?” in C. J. H. JANSEN (ed.) *Europäische Dimensionen des Vertragsrechts und des Wettbewerbsrechts*, Münster, Münsterische Juristische Vorträge 2005, at 57-59 (hereafter: ‘A.-M. VAN DEN BOSSCHE, “Harmonisierung”’); L. RITTER AND D. BRAUN, *EC Competition Law, A Practitioner’s Guide*, The Hague, Kluwer Law International 2004, 1208 p., at 91.
713 This would be one of the consequences of the so-called “double barrier” theory. The other consequence is that in order to be completely lawful, an agreement must overcome both the “EU barrier”, (that is, satisfy the legality requirements of the EU competition rules), as well as the national barrier (i.e. be legal according to the domestic competition provisions).
the prohibition of (i) agreements affecting trade that had not been subject to an exemption and (ii) agreements that were not restrictive within the meaning of Article 101(1) TFEU.\footnote{E. O’NEILL AND E. SANDERS, UK competition procedure – The modernised regime, Oxford, Oxford University Press 2007, 763 p., at 89.}

It is true that this issue was less relevant for (anti-)cartel enforcement than for other areas because cartels were (and are) generally prohibited under EU competition law. Therefore, the application of national law could not result in a stricter assessment. Still, this risk was more important if pro-competitive conduct was mistakenly qualified a “naked cartel” within the meaning of Article 101 TFEU\footnote{See supra Chapter 4.} and, as a result, be prohibited and heavily punished under national competition law.\footnote{See for instance in this context T. AHMAD AND A. MISHRA, “How Can One Distinguish Cartels from Legitimate Cross-Licensing Arrangements between Competitors”, January 2012, available at http://ssrn.com/abstract=1981649} This situation could have two main undesirable consequences. First, it would discourage pro-competitive agreements.\footnote{See supra section 1.3 of this chapter.} Second, there is a risk that the foundations of the anti-cartel enforcement regime are undermined if agreements that cannot be considered as naked cartels given their specific features, are prohibited and sanctioned as such.\footnote{For example, if the EU competition rules were applied to a technology transfer agreement involving territorial protection, as if it were a naked/secret cartel, the usefulness of the leniency system for this type of (non-secret) practice, the level and the type of sanctions (which may even consist of imprisonment) and the general fairness of the national system, maybe called into question. This brief example not only illustrates the importance of distinguishing (naked) cartels from other practices, it also shows that anti-cartel enforcement systems are based on the specific nature of such agreements and, therefore, treating other practices as cartels would deprive the system from its essence.} In line with the conclusions of Chapter 2, there are a number of features that are specific to cartels, such as their naked nature, their detrimental effects and their (in)famous secrecy and organisational complexity.\footnote{See supra Chapter 2.} Since these specific characteristics are taken into account (and sometimes even constitute basic elements) to design an effective anti-cartel enforcement system, their effectiveness can be seriously undermined if the system is used against other types of business conduct.

The convergence rule specified in Article 3(2) sentence 1, of Regulation 1/2003 put an end to this discussion by stipulating that national law cannot forbid practices provided that: (i) they do not restrict competition within the meaning of Article 101(1) TFEU or; (ii) they fulfil all the requirements enumerated in Article 101(3) TFEU or; (iii) they are covered by a Block Exemption Regulation. Put differently, when an agreement affects trade between Member States, the application of national competition cannot lead to a more stringent result than Article 101 TFEU.\footnote{It is, however, interesting to recall that in the Commission’s Proposal for a Council Regulation, Article 3 (which also regulated the relationship between national and EU competition law) stated that ‘when an agreement or practice is capable of affecting trade between Member States only Community competition law applie[d]’ (emphasis added). The initially proposed system was, therefore, one of mutual exclusivity in which such conflict rules were not necessary. However, it was argued that ‘[t]he version of Article 3 in the draft regulation goes beyond what is needed for establishing a common legal basis’, and that such article would cause ‘the total displacement of national competition laws in favour of EC competition law’. See the comments of U. BÖGE, “Panel Two” 167 and M. SIRAGUSA, “The Commission’s Position” 257-260 respectively.} It is, however, worth mentioning that this requirement of convergent results does not apply in the context of unilateral conduct falling under Article 102 TFEU.\footnote{See Recital 8 of Regulation 1/2003. This could include rules with a broader scope of application, in the sense that they may allow interventions against abuses below the level of market dominance. Several Member States have made use of this possibility. For instance, Germany, France and Portugal have stricter rules for unilateral conduct. See U. BÖGE AND A. BARDONG, “Article 3 Relationship between Articles 81 and 82 of the Treaty and national competition laws” in G. HIRSCH, F. MONTAG AND F. J. SÁSKER (eds.) Competition law: European Community Practice and}
Regulation 1/2003, Articles 3(1) and 3(2) do not apply in two additional cases. First, in the obviously different legal context of European merger control law. Second, and more relevant for the field of cartel enforcement, when the application of national law predominantly pursues an objective different from that pursued by Articles 101 and 102 TFEU.\textsuperscript{722}

With respect to agreements between undertakings, Article 3(2) of Regulation 1/2003 further elaborated the reasoning of the ECJ in its ruling in \textit{Walt Wilhelmi}, and must thus be seen as a further confirmation of the general supremacy of EU law. While arguably, Article 3(2) could seem obsolete given this long established prevalence of the EU (competition) rules,\textsuperscript{723} \textsuperscript{724}, it effectively dispels all the remaining doubts as to the extent to which Article 101 TFEU must take precedence.\textsuperscript{725} In case of conflict between national competition law and EU competition law, Article 3(2) of Regulation 1/2003 imposes a convergence obligation, that is: agreements prohibited under Article 101 TFEU must also be banned under national competition law and agreements allowed under Article 101 TFEU must also be allowed under the national equivalents.

Overall, the (effect of the) convergence rule specified in Article 3(2) of Regulation 1/2003, combined with the obligation to apply EU competition law contained in Article 3(1), can be considered as a major achievement of the modernization process.\textsuperscript{726} Article 3(2) of Regulation 1/2003 in effect prevents the (decision making bodies of the) Member States from adopting a view materially different from the one that would be adopted under the EU approach. This obligation to follow the EU standard as regards agreements, has effectively minimised the risk of substantive inconsistencies between the application of national laws and the application of the EU competition rules.\textsuperscript{727} In this sense, Article 3(2) constitutes a valuable means to ensure material uniformity, which is an indispensable requirement for the enforcement regime given the more extensive and decentralised application of Article 101 TFEU throughout the EU.

\textsuperscript{722} See Recital 9 of Regulation 1/2003.
\textsuperscript{723} This view is, for instance, emphasised by W. WILS, “The reform” 50 of the online version of this work; see also See also S. BRAMMER, \textit{Horizontal aspects} 47 of the electronic version of the publication.
\textsuperscript{724} See opinion of Advocate General Kokott, delivered on 6 September 2012 in Case C-226/11, \textit{Expedia}.
\textsuperscript{725} In addition, it establishes the possibility for national law to “go further” than Article 102 TFEU and prohibit conduct which would normally be allowed under EU competition law.
\textsuperscript{726} According to the Commission Staff Working Paper on the functioning of Regulation 1/2003, para 159, no major difficulties have been reported with the application of the convergence rule.
\textsuperscript{727} See also A.-M \textsc{van den Bossche}, “De privaatrechtelijke handhaving van Europese mededingingsregels” in A. S. \textsc{Hartkamp} (ed.) \textit{De invloed van het Europese recht op het Nederlands privaatrecht}, Deventer, Kluwer, 2007, 715 p., at 222 (hereafter: ‘A.-M \textsc{van den Bossche}, “De privaatrechtelijke”’).
Finally, from the point of view of substantive convergence, Article 3(2) has two main beneficial consequences. First, it contributes to the establishment of a European level playing field by creating a single European standard to examine agreements. Companies operating at EU level are thus able to plan their market strategy against the legal background provided by the EU system and they will not need to explore the legality of their agreements under each set of national competition rules. This increased certainty, in turn, suggests that companies that decide to engage in cartels will necessarily be aware of the illegality of the conduct across all European jurisdictions. This awareness highlights even more the flagrant nature of cartel infringements. Second, Article 3(2) combined with the enhanced uniformity and coherence, constitutes an additional motivation for national jurisdictions to voluntarily approximate or harmonise their national competition laws. If one takes a closer look to the national competition provisions, it can indeed be observed that the national rules are at present commonly modelled upon the substantive EU competition law standard. This evolution is clearly connected to the parallel application of national and EU competition law and to the need to cooperate in the framework of the ECN. In effect, implementing similar (or even identical) provisions at national level facilitates the parallel application of EU and national competition law as well as the smooth cooperation between competition authorities.

2.2.4. The obligation to designate competition authorities

2.2.4.1. The obligations deriving from Articles 35 and 5 of Regulation 1/2003

The inefficiencies linked to the former enforcement system and the absence of active prosecution of violations of Article 101(1) TFEU were partly the result of the lack of national laws empowering (many) national antitrust authorities to apply EU competition law. In 1999, this was the case in seven Member States. Despite the attempts of the Commission to decentralise the enforcement of the competition rules, complainants were, therefore quite often inclined – if not basically forced – to keep bringing their cases before the Commission rather than to NCAs. Articles 35 and 5 of Regulation 1/2003 offer a solution for this situation.

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728 According to the Commission Staff Working Paper on the functioning of Regulation 1/2003 (para 142) this contribution has also been recognised by stakeholders from the legal and business communities. See also Recital 8 of Regulation 1/2003; U. BOGE AND A. BARDONG, “Article 3” 1537; G. TESAURO, “Some reflections on the Commission’s White Paper on the Modernization of EC Antitrust Policy” in C. -D. EHLERMANN AND I. ATANASIU (eds.) European competition law annual 2000: The Modernisation of EC Antitrust Policy, Oxford, Hart Publishing, 678 p., at 266. In 1999, G. TESAURO expressed his view that the decentralisation process ‘could and should be such as to enable a greater uniformity of application of Community competition law because the very same provisions, and not fifteen different national legislations, would be applied in all Member States’.

729 For a detailed and interesting analysis of this aspect see A.-M. VAN DEN BOSSCHE, “Harmonisierung” 37-69. See also J. S. VENIT, “Brave” 558. This author also notes that, remarkably, ‘the U.S. has not achieved the same level of harmonization, as in the U.S. the states are not precluded from applying their local laws to agreements or practices that are also subject to federal antitrust law’. See also emphasizing the harmonising effect of Articles 3(2) and 16(2) of Regulation No 1/2003 on the national competition systems H. BROKELMANN, “Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The case of Spain and Portugal”, 2006 (29-4) World Competition, 535-554, at 553; E. PAULIS, “Coherent” 404.

730 With respect to the cooperation between competition authorities within the ECN see infra section 2.3 this chapter.

731 The introduction of competition law systems modelled upon the EU regime is particularly remarkable as regards the new Member States”. See K. J. CSERES, “The Impact” 161.

732 See White Paper, para 94. See also A. SCHAUB, “The Commission's Position” 238.

733 This aspect was also recognised by the Commission in the Explanatory Memorandum preceding the draft Regulation. A. SCHAUB, “The Reform” 249.
On the basis of Article 35(1) Member States faced a double obligation. First, they had to designate the competition authorities responsible for the application of Articles 101 and 102 TFEU in such a way that the provisions of Regulation 1/2003 are effectively complied with. On the other hand, Member States had to take the measures necessary to empower those authorities to apply those Articles (before 1 May 2004). This provision should be read in combination with Article 5, which grants NCAs the competence to apply the EU antitrust rules in individual cases by taking certain types of decisions.  

It is important to understand and interpret Articles 35 and 5 of Regulation 1/2003 in the light of the obligation for NCAs to apply the EU competition law provisions, whenever trade among Member States is affected. This obligation implies and presupposes that Member States must, if necessary, adapt their national legislative systems to comply with the demands of the regime of Regulation 1/2003. In absence of provisions requiring the designation and empowerment of NCAs, the effectiveness of Article 3 of Regulation 1/2003, and consequently, of the enforcement of the cartel prohibition, could be jeopardised.

2.2.4.2. The institutional design of NCAs

Regulation 1/2003, does not prescribe generally applicable or common obligations as regards the institutional design of NCAs. Member States enjoy, therefore, considerable freedom to design the structure and organisation of their respective authorities. Pursuant to Article 35, they may allocate different powers and functions to the different national authorities, which may also include courts. The key responsibility imposed on the Member States concerns the general condition of achieving effective compliance with the provisions of Regulation 1/2003.  

Following the modernisation reforms, the Commission noted in its ‘Notice on cooperation within the Network of Competition Authorities’ that the institutional design of NCAs differed considerably. In this policy document three different models were identified. First, one integrated body which investigates cases and takes all types of decisions. Second, a dual (administrative) system in which the functions are divided between two bodies: one responsible for the investigation tasks and another in charge of taking decisions. Third, a so called “judicial” system under which prohibition decisions (imposing fines or not) can only be taken by a court, whereas the competition

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734 In addition, it should be recalled that in the Judgment of the Court in Case C-375/09, Tele2 Polska ([2011] ECR I-3055, para 35, the ECJ clearly stated that this provision is directly effective.

735 See e.g. opinion of AG Mazák in Judgment of the Court of 3 May 2011 in Case C-375/09, Tele2 Polska ([2011] ECR I-3055, para 19.

736 The Notice on cooperation within the ECN (para 2) states that ‘under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law’. See also Judgment of the ECJ of 13 September 2005, Case C-176/03, Commission v Council of the European Union, ECR [2005] I-7879, paras 46-55.

737 See as regards the importance (and consequences) of the national procedural autonomy in the context of private enforcement A.-M VAN DEN BOSSCHE, “De privaatrechtelijke” 239-240. See also C. GAUER, ‘Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?” in C.-D. EHLMANN AND I. ATANASIU (eds.) European competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., 197-201, at 192 (hereafter: ‘C. GAUER, “Does the Effectiveness”’). This last commentator argues that even if ‘the draft regulation does not interfere with the designation of national authorities and does not prescribe a given model […] there is an underlying requirement: all these bodies have to be fully independent’.

738 Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43, para 2. See also Chapter 11, section 1.
authority acts as a prosecutor and brings the case before that court. Some years later, the Commission observed in its 2009 report on the functioning of Regulation 1/2003, as well as in its 2012 ECN report regarding decision making powers, that the enforcement structures of Member States had considerably evolved towards the adoption of more effective enforcement structures. More precisely, it appears that a great majority of Member States has left behind their former dual or judicial systems and moved towards an institutional framework comparable to that of the Commission; that is, a system based on a single administrative authority model, in charge of investigating and deciding cases.

In 2009 this was the case of Bulgaria, Czech Republic, Denmark, France, Germany, Estonia, Greece, Italy, Cyprus, Latvia, Lithuania, Hungary, Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Spain, Sweden, and UK. By the end of 2012 Luxemburg and Malta also adopted this model. Some of the Member States mentioned above replaced their dual administrative authority systems by a model based on (only) one administrative authority, following the modernisation reforms. This was particularly the case of Spain and Estonia. However certain nuances should be made. A number of jurisdictions based on a monist (administrative) system do not have the power to impose fines (or other sanctions) in certain instances. This is often the case when the sanctions are of a criminal nature. In this case, the criminal procedure is logically brought before a court. A number of EU jurisdictions which also follow a judicial system are precisely Austria, Denmark, Estonia, Finland, Ireland and Sweden.

The increasing and accelerated – although obviously not total – process of convergence in the institutional design of competition agencies can be seen as an additional benefit of the wider and (full) decentralised application of the EU competition provisions. Decentralization implies that national authorities enforce the EU competition rules in order to achieve the same objective: the protection of the competitive process, in pursuit of the general European interest. The introduction of the rules laid down in Article 3 of Regulation 1/2003 combined with the cooperation mechanisms for competition authorities, has emphasised and increased the common responsibility of NCAs in the application of the EU competition rules. The frequent interaction and reliability among competition authorities has enhanced the uniform and coherent application of competition law to the extent that, even if not mandatory, the evolution towards additional institutional convergence has also become (more) visible.742


740 Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 191-193. See for more details, ECN decision-making powers report, at 5-9. Furthermore, not all Member States opted from the outset for a single administrative authority. In Belgium, the Competition Authority was an administrative court which did not have a unitary structure. It consisted of two components: the Directorate-General for Competition and the Council of Competition (sensu lato) which, at the same time consisted of the College of Competition Prosecutors; the tribunal – that is the Competition Council “stricto sensu” – and the Registry. Following the VEBIC case, which is next discussed, the model of the Belgian competition authority was modified and now has a single administrative model.

741 See supra Chapter 3. See also Notice on cooperation within the Network [2004] OJ C 101/43, para 1. See also C. GAUER, “Does the Effectiveness” 192.

742 However, the fact that some evolution has occurred does not imply that (significant) institutional variations do not exist. Such institutional differences are obviously capable of influencing the way the EU competition rules are applied and enforced. See also C. GAUER, “Does the Effectiveness” 192.
The spontaneous convergence in the institutional design of NCAs has recently been further boosted by the ECJ in its VEBIC judgment.\textsuperscript{743} This case concerned a preliminary reference made to the ECJ (mainly) on the interpretation of Article 35(1) of Regulation 1/2003 with regard to the involvement of the Belgian competition authorities in the appeal proceedings.\textsuperscript{744} Basically, the Belgian court asked whether Regulation 1/2003 either entitles or requires a NCA to be a party (that is to formulate observations and present arguments) in appeal proceedings against its own decisions.

The ECJ firstly stated that Article 35(1) of the Regulation leaves it to the domestic legal order of each Member State to determine the rules for legal proceedings brought against decisions of the competition authorities. However, it further emphasized that such rules must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities.\textsuperscript{745} The ECJ found that ‘if a [NCA] is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly ‘captive’ to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings’. The mere existence of this risk in a field such as competition law, which involves complex legal and economic assessments, is likely to compromise the exercise of the obligation on NCAs to ensure the effective application of Articles 101 TFEU and 102 TFEU.\textsuperscript{746} In order to ensure the effective application of the competition provisions, an authority should be entitled to participate, as a defendant or respondent, in proceedings before a national court which challenge a decision that the authority itself has taken.\textsuperscript{747} The ECJ concluded that Article 35(1) ‘must be interpreted as precluding national rules which do not allow a national competition authority to participate’ in those proceedings.\textsuperscript{748}

The analysis of the ECJ in the VEBIC cannot but be read in view of the principle of effectiveness in the application of EU competition law.\textsuperscript{749} In effect, Regulation 1/2003 does not interfere with the design of national authorities by prescribing a certain model or organizational structure. Accordingly, the ECJ recognised the institutional independence and procedural autonomy of Member States to design the structure of their competition agencies and determine the procedural rules for proceedings brought against decisions of NCAs. However, the ECJ also showed its eagerness to develop certain EU procedural standards if such autonomy is likely to put at risk the effective application of Articles 101 TFEU and 102 TFEU.\textsuperscript{750}

\textsuperscript{743} Judgment of the Court of 7 December 2010, Case C-439/08, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, IJsbeïerders en Chocoladewerkeren ("VEBIC") VZW, [2010] ECR I-12471.

\textsuperscript{744} The reference for a preliminary ruling made by the “Hof van Beroep te Brussel” and was lodged on 6 October 2008. VZW Vlaamse Federatie van Vereniging van Brood-en Banketbakkers, Ijsbeïerders en Chocoladewerkeren 'VEBIC', the other parties being the Raad voor de Mededinging en de Minister van Economie [2008] OJ C 313/19. For a comment on the decision of the Court of Appeal ("Hof van Beroep") see A.-M. VAN DEN BOSSCHE, “In nood kent men zijn vrienden. In rechtsnood de 234-helplijn naar Luxemburg”, 2009 (5) Revue de droit commercial belge, 480-486.

\textsuperscript{745} Case C-439/08, VEBIC [2010] ECR I-12471, para 57.

\textsuperscript{746} \textit{Ibid}, para 58.

\textsuperscript{747} \textit{Ibid}, para 59.

\textsuperscript{748} \textit{Ibid}, para 64.

\textsuperscript{749} See also A. PERIPOLI, “Can an NCA take part in appeal procedures against its own decisions? The preliminary reference in VEBIC C-439/08”, 2011 (32-8) ECLR, 426-427, at 426.

\textsuperscript{750} Nonetheless, the ECJ left some margin of appreciation for NCAs ‘to gauge the extent to which their intervention is necessary and useful’. Case C-439/08, VEBIC [2010] ECR I-12471, para 60. Interestingly, Advocate Gener Mengozzi also explained in its opinion why the mechanism provided for in Article 15(3) of Regulation 1/2003 would not be appropriate to guarantee the effective application of the EU antitrust rules in appeal proceedings. See AG opinion, paras 50-60.
2.2.4.3. The need to be properly staffed and equipped with the necessary resources

In addition to institutional and procedural aspects, there are other factors which may have an impact on the effectiveness of a given enforcement authority. As stated by I. MAHER, ‘if we are talking about improving quantity and quality of enforcement, we must also address the issue of the public enforcer's resources’.\(^\text{751}\) It can indeed be argued that Article 35, read in combination with Article 5 of Regulation 1/2003, requires Member States not only to appoint and empower NCAs to apply the EU competition rules; NCAs must also have at their disposal a minimum of resources in order to carry out their obligations and make an effective use of their enforcement powers.\(^\text{752}\)

The insufficient staff and financial resources of certain NCAs was indeed a general concern in the context of the modernisation reforms.\(^\text{753}\) These concerns were mostly (and often unfoundedly) made as regards the competition authorities of the new Member States.\(^\text{754,755}\) It would not be correct to deny that some NCAs are better equipped than others. However, it appears that following the adoption of the modernisation measures – and the consequent enhanced cooperation among NCAs

\(^{751}\) The importance of resources in the context of effective antitrust enforcement has been frequently emphasized. See e.g. PANEL TWO – BROAD SYSTEMIC ISSUES (opinion of I. MAHER) in C-D EHLMANN and I. ATANASIU (eds.) European Competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., at 162 (hereafter: ‘PANEL TWO – BROAD SYSTEMIC ISSUES’). According to I. MAHER the buildings, equipment, computing facilities of the agency are all relevant elements for the effectiveness of its investigations. In terms of personnel, what is relevant is not only the professionals, but also the administrative support. Thirdly, the budget: not just the size, but also who controls it’. See also F. CENGIZ, “The European” 14; PANEL TWO – BROAD SYSTEMIC ISSUES (opinion of J. FINOLETON) 180-181. C. GAUER, “Does the Effectiveness” 192.

\(^{752}\) See W. WILS, “The reform” 47 of the online version of this work. More precisely W. WILS specifies that it follows from Articles 35(1), 14 and 20 that Member States must guarantee that NCAs have the necessary resources to be represented in the Advisory Committee, to provide support to the Commission and conduct inspections within their territory. See also A. RILEY, “Modernisation Part Two” 658; S. WILKS, “Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?”, 2005 (18-3) Governance, 431-452, at 441 (hereafter: S. WILKS, “Agency”)


\(^{754}\) See e.g. F. CENGIZ, “The European” 14. F. CENGIZ based this vision on the fact that in Eastern European states, a liberal market economy was a novel process. In line with this reasoning, it was argued that the best equipped NCAs would play a leading role in the context of the ECN, while the weaker NCAs would have a minor role. S. WILKS, “Competition Policy: Challenge and Reform” in H. WALLACE, W. WALLACE AND M. A. POLLACK (eds.) Policy-making in the European Union, Oxford, Oxford University Press 2005, 610 p., at 126-127; S. WILKS, “Agency” 445.

\(^{755}\) It must, indeed, be stressed that the process of accession to the (now) European Union, demanded an appropriate administrative capacity through well-functioning competition authorities. See A.-M. VAN DEN BOSSCHE, “The international” 24-37, pointing out that ‘the inclusion of competition provisions in the Europe Agreements could be seen […] as an appropriate framework for a gradual integration into the Community and support for efforts to develop the economy and to complete the conversion into a market economy’. See also K. CSERES, “Comparing” 20-21. J. HOLSCHER AND J. STEPHAN, “Competition and Antitrust Policy in the Enlarged European Union: A Level Playing Field?”, 2009 (47-4) JCMS, 863–889, at 877. (“We would expect [NCAs in the east] to be inadequately staffed and have insufficient budgets, but quite on the contrary these are ‘re-mandated’ institutions, which are comparatively well endowed and in some cases surprisingly well resourced (this pertains in particular to the Polish agency”).
– Member States have deployed genuine efforts to increase the resources available to their NCAs.\textsuperscript{756} Furthermore, one should bear in mind that the revised EU enforcement system is based on flexible cooperation mechanisms between NCAs and the Commission.\textsuperscript{757} These mechanisms play a significant role guaranteeing that the effective enforcement of the EU competition rules is not obstructed by the lack of resources of a certain NCA.\textsuperscript{758} From this perspective, the ECN constitutes an appropriate means to allocate the resources of NCAs in an efficient manner. Nevertheless, this flexibility should not be seen as an incentive for NCAs to simply not deal with a case due to a lack of resources.\textsuperscript{759} It follows from (the wording of) Article 5 of Regulation 1/2003 (which is directly applicable)\textsuperscript{760} that NCAs are required to open an investigation if, according to the information in their possession, the conditions for prohibition are met. This requirement is essential to ensure that formal procedures are opened and decision are taken in specific cases, specially taking into account the discretion of some NCAs to decide whether to initiate proceedings.\textsuperscript{761,762}

Despite the positive impact of the modernisation process (including the creation of the ECN) on the efficient allocation and handling of cases, it should be acknowledged that limitations as to resources remain a relevant issue in the context of EU competition law enforcement.\textsuperscript{763} This persistent problem could be tackled in the context of cartel enforcement by setting an appropriate prioritisation.\textsuperscript{764} In this regard, the Commission has explicitly stated that it ‘focuses its enforcement resources on cases where it appears likely that an infringement may be found, in particular on cases with the most significant impact on the functioning of competition in the internal market and risk of

\textsuperscript{756} See W. WILS, “The reform” 47 of the online version of this work. As examples of Member States which adopted measures regarding resources WILS cites Luxembourg and Belgium. See also generally e.g. OECD, “Policy Roundtables, Evaluation of the Actions and Resources of the Competition Authorities” 2005, available at http://www.oecd.org/dae/competition/prosecutionandlawenforcement/35910995.pdf
\textsuperscript{757} See further next (sub)section.
\textsuperscript{758} See K. DEKEYSER AND M. JASPERS, “A New Era” 4. W. WILS also refers to the flexibility of the cooperation instruments by explaining that ‘[i]f for instance the Belgian or the Luxembourg competition authorities were not to have sufficient resources to deal with a case for which the relevant geographic market is the Benelux, the case could be dealt with by the Dutch competition authority or by the Commission’. W. WILS, “The reform” 47 of the online version of this work.
\textsuperscript{759} See also on this issue S. BRAMMER, Horizontal aspects 137-138 of the electronic version of this publication.
\textsuperscript{760} Case C-375/09, Tele2 Polska [2011] ECR I-3055, para 35
\textsuperscript{761} See also commenting on this aspect, opinion of Advocate General Mazák delivered on 7 December 2010 in Case C-375/09, Tele2 Polska [2011] ECR I-3055, note 26 referring to G. L. TOSATO AND L. BELLODI, EU Competition 202. Particularly, Advocate General Mazák notes that ‘[such flexibility allowed to the Commission and the NCAs in deciding whether to open a formal procedure and take a decision on a specific case] could limit the protection of the rights of individuals granted by Articles 101(1) and 102 TFEU, especially in cases where, although the infringement of EU competition law is obvious, the case is not sufficiently important from an economic point of view to warrant the individual going to court. In order to reduce that risk, the last sentence of Article 5 requires the NCAs to take action if certain conditions are met’.
\textsuperscript{762} Similar to the EU system, certain jurisdictions (e.g. E. Greece, Finland, Lithuania) also provide for the possibility to reject a complaint due to different priorities or lack of resources. In other jurisdictions (such as Cyprus, Estonia, France Hungary and Italy) complaints may not be rejected on such basis. See for further details ECN Working Group, Cooperation Issues And Due Process Decision-Making Powers, October 2012, at 71-72; available at http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf
\textsuperscript{763} See e.g. Commission Staff Working Paper on the functioning of Regulation 1/2003, para 194; see also F. CENGIZ, “The European” 14, who argues that ‘[i]t should be further investigated whether the NCAs are simply facing serious resource scarcities or whether the jurisdictional scope of EC competition rules proves overbroad under the current interpretation of the “trade between the Member States” test’.
\textsuperscript{764} See more generally W. WILS, “Discretion”
consumer harm’.  

2.3. The creation of the ECN: wider cooperation among European competition authorities

It is difficult to question that the obligation (and consequent empowerment) of NCAs to fully apply Articles 101 and 102 TFEU – as soon as there is an effect on trade between Member States – has considerably increased the NCAs’ involvement in the application of the EU competition rules, and led to a wider and more effective enforcement. However, as examined above, the decentralisation and modernisation process also gave rise to *inter alia* two important challenges. On the one hand, the system of parallel competences within which (now) 29 competition authorities, including the Commission, share the power to apply EU competition law, necessarily demanded case allocation tools.  

On the other hand, the wider application of the EU competition rules by multiple enforcers further emphasized the need to ‘ensure that the [EU] competition rules are applied effectively and consistently’ regardless of which authority deals with a certain case.  

Article 11(1) of Regulation 1/2003 constitutes a key principle to address these challenges. According to this provision, ‘[t]he Commission and the [NCAs] shall apply the [EU] competition rules *in close cooperation*. To this end, Recital 15 sets out that ‘[t]he Commission and the [NCAs] should form together a network of public authorities’ (emphasis added).

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[766] See also emphasising the significance of this challenge e.g. J. FRIDIRIC, “Does the Effectiveness of the EU Network of Competition Authorities Depend on a Certain Degree of Homogeneity within its Membership (With Respect to Status, Structure, Powers, Responsibilities, etc.)?” in C.-D. ELHERMANN and I. ATANASIU (eds.) European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., at 204 (hereafter: ‘J. FRIDIRIC, ‘Does the Effectiveness’’). More precisely, this last author states that the first way for the Commission to ‘ensure that the enforcement of EU law is consistent and predictable’ is ‘by having clear rules concerning the allocation of cases between the Commission and NCAs, and concerning cooperation mechanisms within the network’. See also M. SIRAGUSA, “The Commission’s Position” 261; A. SCHEUB, “Continued focus on reform: Recent developments in EC competition policy” in B. HAWK (ed.) International Antitrust Law & Policy: Fordham Corporate Law 2000, Juris Publishing 2000. 700 p., at 39 (hereafter: A. SCHEUB, “Continued focus”); S. BRAMMER, *Horizontal aspects* 114 of the electronic version of this publication. See for a different (and questionable) opinion, G. TESAURO, “The Relationship between National Competition Authorities and Their Respective Governments in the Context of the Modernisation Initiative” in C.-D. ELHERMANN and I. ATANASIU (eds.) European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003. 496 p., at 269. In this author’s view ‘the goal of securing a coordinated allocation of Community cases between NCAs and the Commission does not seem crucial to the network. I even dare say that, in the light of the past experience, this would probably be the least relevant task of the network. It is sufficient to remember that no case has ever raised a conflict of jurisdiction between NCAs. Accordingly, I assume that most cases would not raise issues of jurisdiction in the future’.


This network, officially known as the “European Competition Network” (the “ECN”), was set up as a forum within which competition authorities discuss and cooperate in the application and enforcement of EU competition law. The ECN members act in the public interest and cooperate closely in order to protect competition in the market, i.e. the wide-ranging goal of the EU competition system. The role of the ECN is logically of vital importance to support the creation and maintenance of the European competition culture. By allowing NCAs to engage in supranational cooperation by further debating about the competition law principles, sharing strategies and jointly shaping decisions, different national traditions effectively become part of a European competition culture. In operational terms, the ECN intends to ensure an efficient division of work among the ECN participants and to promote cooperation between the Commission and NCAs by coordinating and helping each other in investigations and exchanging evidence and other information. Furthermore, the framework provided by the ECN also facilitates discussion and dialogue among the ECN members, not only with respect to specific cases, but also as regards general competition concerns. As a whole, the ECN can thus be seen as a vehicle to enhance an effective and coherent application of the EU competition rules in the decentralised system.

Drawing from previous reflexions on the ECN and on more recent empirical data about its practical functioning, the following subsection is dedicated to analysing the main achievements of the ECN.


Notice on cooperation within the Network [2004] OJ C 101/43, para 1. Hereafter, the “ECN Notice”. It is, however, important to point out that the ECN does not constitute an official legal entity or a recognized EU or international organization. Therefore, the role and functioning of the ECN should be distinguished from the tasks of other organizations in the promotion of competition, such as the OECD and the ICN (infra Chapter 2). See K. Dekeyser and M. Jaspers, “A New Era” 4; D. Gerard, “The ECN” 10 of the online version of this article; S. Brammer, Horizontal aspects 85 of the electronic version of the publication.

See further infra section 2.3.1.2(c).


See ECN Notice, para 3 and in particular, para 43 et seq. See also C. Gauer and M. Jaspers, “The European Competition Network Achievements and Challenges – a case in point: leniency”, EC Competition Policy Newsletter (1) 2006, 8-11, at 8 (hereafter: C. Gauer and M. Jaspers, “The European Competition”); J. Fridiric, “Does the Effectiveness” 204; D. Gerard, “The ECN” 2 of the online version of this article.
2.3.1. The ECN: main governing rules and their application in practice

2.3.1.1. Case allocation and work-sharing in the ECN

Regulation 1/2003 introduced the system of full parallel competences between the Commission and NCAs. This system implies that whenever an agreement affects trade among Member States, all European competition authorities, including the Commission, share the power to apply the EU antitrust provisions.\(^774\) Within this context, it is important to know how the work should be divided between EU competition authorities.\(^775\)

Regulation 1/2003 does not contain any criteria to allocate cases to a specific competition authority.\(^776\) In fact, the only rules concerning jurisdictional aspects are Article 11(6) and, to some extent, Article 13. As previously examined, pursuant to Article 11(6), the Commission retains the discretion to relieve NCAs of the competence to apply the EU competition rules by initiating its own proceedings. Admittedly, this provision eliminates the possibility of parallel proceedings at national and EU level once the Commission initiates its own proceedings. Nevertheless, there is no similar rule at the national level. This means that, at least theoretically,\(^777\) each NCA may investigate an agreement irrespectively of the location of the undertakings, the place where the agreement was concluded or where the effects were felt.\(^778\) The only relevant provision in this respect is Article 13

\(^774\) However, it should be noted that, generally the competence of NCAs to apply the EU competition rules is subject to territorial limitations deriving from the effects doctrine. According to this principle NCAs cannot pursue agreements or practices, which do not affect competition in their national territory (see J. BASEDOW, “Who Will Protect Competition in Europe? From central enforcement to authority networks and private litigation”, 2001 (2) European Business Organization Law Review, 461-468, at 450). Still, it should admitted that with respect to cartels or restrictive agreements affecting more than one national market, given that such cases will inevitably involve cross-border elements, this principle will not automatically reduce the number of authorities which can, in principle, deal with a case (A. MIKROULEA, “Case Allocation in Antitrust and Collaboration between the National Competition Authorities and the European Commission” in J. LIANOS AND I. KOKKORIS (eds.) The Reform of EC Competition Law: New Challenges, The Hague, Kluwer Law International 2009, 624 p., at 57-69 (hereafter: ‘A. MIKROULEA, “Case Allocation”’); S. BRAMMER, “Concurrent jurisdiction under Regulation 1/2003 and the issue of case allocation”, 2005 (42-5) CMLRev, 1383-1424, at 1383 (hereafter: ‘S. BRAMMER, “Concurrent”’). In this context S. BRAMMER also notes that ‘[t]he likelihood of an Art. 81 or 82 case having cross-border effects is naturally quite high, as EC competition law only applies where trade between Member States is affected. This is all the more so since the ECJ ruled in Italian Banks that Art. 81 does not apply to so-called domestic agreements, i.e. agreements that primarily affect consumers in a single Member State’. However, it should be noted that in the field of cartels, is it also consolidated jurisprudence that cartels covering the whole of a Member State are normally capable of affecting trade between Member States. Notably, ‘cartel agreements […] extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about’ (see J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR 1-1577, para 95; Case 8/72 Vereeniging van Cenemthandelaren v Commission [1972] ECR 977, para 29; Judgment of the Court of 11 July 1985, Case 42/84, Remia and others v Commission [1985] ECR 2545, para 22.

\(^775\) A. SCHAUER, “Continued focus” 39. See also S. BRAMMER, “Concurrent” 1383; C. CANENBRLEY AND M. ROSENTHAL, “Co-operation” 108.

\(^776\) In this context S. BRAMMER comments that there were some difficulties to achieve a political consensus concerning the division of competences between the Commission and NCAs. S. BRAMMER, “Concurrent” 1385; see also U. BOGE, “The Commission’s Position” 249. In effect, under the EU Merger Regulation, Council Regulation (EC) No 139/2004, certain transactions with a "Community dimension", fall automatically within the jurisdiction of the European Commission. See for a further analysis A.-M. VAN DEN BOSSCHE, “Wie beoordeelt EU-concentraties? EDF/SEGEBEL: geen verwijzing naar Belgische mededingingsautoriteit, goedkeuring door EU-Commissie”, 2010 (4) Tijdschrift voor Belgische mededinging, 3-21. See also emphasising the importance of reaching a consensus by the ECN members PANEL TWO – BROAD SYSTEMIC ISSUES (comment made by U. BOGE) 167-168.

\(^777\) In order to apply the EU competition rules, NCAs must previously have been empowered by the national instances.

\(^778\) S. BRAMMER, “Concurrent” 1385.
of Regulation 1/2003. This Article establishes the right of NCAs and the Commission to suspend proceedings or reject a complaint, (without further examining the importance of the case), if the case is already being handled or has been handled by another NCA. This possibility plays an important role in the prevention of parallel proceedings, when complaints are lodged simultaneously or successively with various competition authorities. In addition, the fact that Article 13 only establishes a possibility and not an obligation to suspend proceedings, constitutes an additional benefit as this enables NCAs to retain certain margin of appreciation and consider the peculiarities of each case. Although this flexibility is welcomed, still Article 13 does not refer to the criteria that should be considered to appropriately allocate a case.

The work-sharing system is mainly characterised by the flexibility (resulting from the non-binding nature) of its principles. These principles allow to find a suitable, efficient and (generally) consensual solution as regards the allocation of cases among competition authorities. It is therefore reasonable that, from the outset, the Commission was unwilling to adopt any rules creating the right of a certain competition authority to deal with a case. However, it should be kept in mind that, even if parallel investigations and a parallel handling of cases are not immediately excluded, as provided in Recital 18 of Regulation 1/2003, ‘the objective [is] that each case should be handled by a single authority’ (emphasis added). This primary objective is completely in line with the rationale of the modernisation process. The system of allocation of cases should, as a general rule, avoid multiple investigations concerning substantially the same conduct. By doing so, not only

779 It appears that the notion “to have been already dealt with” should not be interpreted restrictively. Accordingly, when a case has already been handled by a NCA, a different NCA may also reject a complaint when the first NCA adopted a negative decision or simply rejected the complaint. It follows that if national rules exist compelling a NCA to assess each case, even if it is being or has been handled with by another NCA, these rules can be are set aside according to Article 13 of Regulation 1/2003. See in this context L. IDOT, “A Necessary Step towards Common Procedural Standards of Implementation for Articles 81 and 82 EC within the Network” in C.-D. ELHERMANN AND I. ATANASIU (eds.) European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 496 p., at 213 commenting on the case of France: ‘[i]n some national systems, complaints can be rejected through a simple informal procedure. On the opposite, the French Competition Council has to examine the admissibility of each referral and to adopt a formal decision, which can be reviewed by the Court of Appeal of Paris. If the complaint is admissible, the Competition Council has no choice and must examine the case’. See also S. BRAMMER, “Concurrent” 1385.

780 See for a similar opinion e.g. A. SCHEUB, “The Commission's Position” 242-243; S. BRAMMER, Horizontal aspects 53 of the electronic version of the publication.

781 A. SCHEUB, “The Commission's Position” 242-243. In this connection A. SCHEUB stressed that if, for instance, ‘a complaint was rejected because the national authority was unable to gather evidence of the infringement, another national authority might wish to carry out its own investigation’. In addition, given the voluntary character of this provision, both positive and negative conflicts of jurisdiction may arise.

782 See also D. GERARD, “The ECN” 15 of the online version of this article; M. SIRAGUSA, “The Commission's Position” 264.

783 See also e.g. A. SCHEUB, “The Commission's Position” 242. As observed below, this lack of binding jurisdictional rules as regards case allocation was one of the main subjects of criticism of the ECN.

784 These authors correctly stated that ‘given the vast variety of situations that fall to be examined under Articles [101] and [102] the objective of effectiveness by complementing each other’s actions cannot always be achieved by following a rule-book’. K. DEKEYSER AND D. DALHEIMER, “Cooperation within the European Competition Network – taking stock after 10 months of practice case”, Paper for the conference Antitrust Reform in Europe: A Year in Practice organized jointly by the International Bar Association (IBA) and the European Commission, March 2005. Brussels, p. 6., available at http://www.int-bar.org/images/downloads/Article%20Kris-Dorothé.pdf. (hereafter: “K. DEKEYSER AND D. DALHEIMER, “Cooperation”). See also criticising this position U. BOGE, “The Commission’s Position” 249: “[t]he Commission refuses to have general criteria for case allocation included in the text of the Regulation, arguing that if amendments to these principles were to become necessary they could only be decided upon with the Council’s consent, thus rendering the system too inflexible. Moreover, the Commission argues that there is a danger that predetermined criteria for case allocation would justify claims by the parties to the respective proceedings”).

785 See also ECN Notice, para 7.
dissipation of work is eliminated and the valuable resources of competition authorities are saved; also the costs for undertakings are reduced when only one authority is dealing with a given case.786

More articulated rules for an efficient division of work are laid down in the ECN Notice. The principles of case allocation contained in the ECN are simply indicative.787 Particularly, in the ECN Notice the Commission takes the view that ‘the allocation of cases between members of the network constitutes a mere division of labour where some authorities abstain from acting’.788 This statement has two main (and connected) implications. First, the rules on case allocation do not influence the competence of competition authorities to initiate the investigation of a case and adopt a decision. This means that ‘each network member retains full discretion in deciding whether or not to investigate a case’.789 Second, the ECN rules on allocation of cases do not create individual rights for the companies involved in, or affected by, an infringement to have a case dealt with by a particular authority.790 This view was specifically endorsed by the (now) General Court in the France Télécom cases.791

The France Télécom cases concerned an application for annulment of a Commission decision to carry out an inspection at France Télécom and its subsidiaries. This inspection had the purpose of finding evidence of a possible infringement of (now) Article 102 TFEU by predatory pricing practices on the market for high-speed internet access in France. Wanadoo (one of the subsidiaries) and France Télécom appealed the inspection decision based, inter alia, on the argument that ‘the Commission infringed the division of powers established by Regulation No 1/2003 […] and failed to fulfil its duty of cooperation in good faith with the NCAs under Article 11(1) of Regulation No 1/2003 and Article 10 EC’. In its judgment in the Court rejected this reasoning and found that ‘Regulation No 1/2003 […] in accordance with the principle of subsidiarity, establishes a wider association of [NCAs]. […] However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation. Furthermore, the regulation does not call into question the general power that the Commission is acknowledged to enjoy by […] Masterfoods. […] The Commission thus retains a leading role in the investigation of infringements’.

786 See A. SCHaub, “Continued focus” 39 S. BRAMMER, “Concurrent” 1383; J. S. Venit, “Brave” 566. Furthermore, this last author rightly points out that ‘[t]he ability of Member States to conduct parallel investigations and/or impose sanctions in, e.g., cartel cases, could effectively destroy the benefits of the highly successful leniency programme’. See in this connection infra section 2.3.1.2(d)(ii) in this Chapter.

787 For a very detailed discussion on the non-binding nature of this document see S. BRAMMER, Horizontal aspects 117 of the electronic version of this publication.

788 ECN Notice, para 31.

789 Ibid, para 5.

790 Ibid, para 31. In the context previous to the publication of the ENC Notice the danger that binding rules for case allocation lead to continuous claims was one of the most commented fears. See in this connection M. Siragusa, “The Commission's Position” 264-265 stating that although ‘parallel procedures, forum shopping, and a lack of legal certainty – both for complainants and undertakings against whom a proceeding is opened – are the main disadvantages […] [i]t seems preferable to sacrifice part of the legal certainty arising from the provision of legally-binding criteria to the advantage gained by reducing the possible claims based on the correct allocation of a case and, therefore, to recommend the adoption of such criteria through a 'soft law' instrument’. Furthermore, as he rightly points out ‘the adoption of non-binding criteria may give clear guidance about which NCA may be considered to be the [well] placed to deal with a specific case. This would benefit NCAs, complainants and undertakings against whom a proceeding is opened’.

The allocation criteria set out in the ECN Notice are based on the concept of the “well placed authority”.\textsuperscript{792} In this connection, the ECN Notice lists three possible case scenarios. More precisely, a case can be dealt by: (i) a single “well placed” NCA, possibly with the assistance of NCAs of other Member States; (ii) several “well placed” NCAs acting in parallel; or (iii) the Commission.\textsuperscript{793}

In essence, one single authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met. First, there must be a “material link” between the respective practice and its domestic territory.\textsuperscript{794} Second, the authority must be capable of effectively bringing to an end the entire infringement.\textsuperscript{795} Third, the agency must be able to gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.\textsuperscript{796} These conditions indeed suggest that the question whether one NCA will deal with a case is intrinsically liked to effectiveness considerations.

In contrast, it may be appropriate that two or three NCAs act in parallel when an agreement has substantial effects on competition, mainly in the respective territories of the respective two or three NCAs, and the action of only one agency does not suffice to bring the entire infringement to an end.

\textsuperscript{792} This concept was “directly” introduced in the ECN Notice. In contrast, in the Explanatory Memorandum published jointly with the Draft Regulation, the Commission suggested that ‘an efficient allocation of cases [should be] based on the principle that cases should be dealt with by the best placed authority’ (emphasis added). This concept was replaced later by the notion of “well placed” authority. Since this last concept is broader than that of “the best placed authority”, this modification adds flexibility to the case allocation system. While the concept of “best placed authority” concerns only a single authority, there can be multiple authorities that are “well placed” to handle a case. This is also confirmed in the ENC Notice. See also A. MIKROULEA, “Case Allocation” 57-59. It is also interesting to note that in the discussion paper published prior to the White Paper on modernisation, the Bundeskartellamt had made a proposal to allocate cases on the basis of the so-called “centre of gravity” test. See Bundeskartellamt, Praxis und Perspektiven der dezentralen Anwendung des EG-Wettbewerbsrechts (1998), at 19 et seq available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege98_Proftag.pdf. See also referring to this concept Monopolkommission, “Problems consequent upon the reform of the European cartel procedures”, 32nd Special Report, 2001, para 42 (available at www.monopolkommission.de/sg_32/text_s32_e.pdf). On the basis of this concept, the centre of gravity of a case would be established by considering not only the effects of the agreement or practice, but also the need to safeguard competition effectively (White Paper on modernisation, para 59). Remarkably, in the Bemim case, the (now) General Court also considered this test (CFI 24 January 1995, Case T-114/92 Bureau Européen des Médias de l’Industrie Musicale v Commission, [1995] ECR II-147, para 93). In this case the Court ruled that, since the rights of the applicant appear to be satisfactorily safeguarded by the French courts, ‘[…] the Commission could therefore properly reject the applicant's complaint on the ground of lack of a Community interest, solely because it had determined that the centre of gravity of the alleged infringements was in France and that the matter had already been brought before the French courts.’ However, the Commission did not accept the centre of gravity concept as it found that ‘is not sufficiently precise to allow notifications to be allocated along clear lines’. See White Paper on modernisation, paras 50-61. See also S. BRAMMER, “Concurrent” 1388; A. MIKROULEA, “Case Allocation”.

\textsuperscript{793} See ECN Notice, para 5 et seq. As noted by D. GERARD, these three possibilities somewhat depart from the aim specified in Recital 18 of Regulation 1/2003. Nonetheless, such options appear necessary in order to guarantee the flexibility of the operation of the ECN. D. GERARD, “The ECN” 15 of the online version of this article. This last commentator adds that ‘each network member retains full discretion in deciding whether or not to investigate a case’ (ECN Notice, para 5).

\textsuperscript{794} More precisely, para 8 of the ECN Notice states that ‘the agreement [must have] substantial direct actual or foreseeable effects on competition within its territory, [must be] implemented within or originates from its territory’. The ECN Joint Statement, para 16, also makes reference to the fact that ‘all participating companies to an agreement or an abusive behaviour have their seat in that Member State’. See also C. GAUER, “Does the Effectiveness” 192, further emphasizing that, given the great responsibility granted to NCAs on the basis of the case allocation system, they will have to be fully independent from the business community but also from national influences. This is a decisive aspect for the credibility of case allocation system.

\textsuperscript{795} In other words, the authority ‘can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately’ (ECN Notice, para 8).

\textsuperscript{796} See ECN Notice, paras 8-9.
and/or to sanction it in an adequate manner. Although companies strongly argued in favour of an automatic exclusion of parallel action, it was indeed inappropriate to exclude this possibility a matter of principle. Parallel action by two or three NCAs can be an efficient instrument deal with competition issues, certainly when they are regional. However, single action of one NCA may still be adequate, even if more than one agency can be considered “well placed”, where the action of a single NCA is sufficient to bring the entire infringement to an end. These alternatives show that the ENC Notice adopts a pragmatic approach to the allocation of cases which allows to maintain and enhance the flexibility of the system.

With respect to the Commission, as a general rule, it is particularly well placed if one or several agreement(s) – including networks of similar agreements or practices – affect competition in more than three Member States (cross-border markets covering more than three Member States or several national markets). This approach is certainly adequate since as rightly stated by A. SCHAUB ‘where parallel action involves more than three NCAs, it is very unlikely that it will be efficient. The Commission should generally deal with these cases’. Furthermore, the Commission is particularly well placed in three additional situations: (i) if the case at hand is closely linked to other EU provisions which may be applied exclusively or more effectively by the Commission; (ii) if the EU interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises; (iii) or to ensure effective enforcement. These allocation criteria are (once again) clearly connected to efficiency/effectiveness reasons, on the one hand, and to the specific role of the Commission in the development of the EU competition policy, on the other hand.

In conformity with the key objective that cases should be dealt with by a single authority as often as possible, as the ECN Notice stresses, it is generally expected that ‘[i]n most instances the authority that receives a complaint or starts an ex-officio procedure will remain in charge of the case’.

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797 ECN Notice, para 12. The Commission’s Notice explains this situation with an illustrative example: ‘[t]wo undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B. In this case, the NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory’. See also A. SCHAUB, “The Commission's Position” 239. This author also adds that ‘[i]n an enlarged Community, it will be neither desirable nor feasible to allocate all cases to the Commission that cannot be dealt with by a single national authority’.

798 See also D. GERARD, “The ECN” 15 of the online version of this article. In my point of view, it is appropriate to allocate the case to the respective authorities when more than one agency are considered “well placed”. However, as an exception, if a single NCA is capable of bringing the infringement to an end on its own (possibly using the cooperation mechanisms provided by the ECN Notice) it may be appropriate for the NCA in question to deal with the case. This could be, for instance, the case when the agreement or practice had substantial effects on one or more territories and the action of one of the authorities suffices to bring the entire infringement to an end. Furthermore, this interpretation is fully in line with recital 18 of Regulation 1/2003.

799 As a way of example, the Commission refers to the case of two undertakings which agree to share markets or fix prices for the whole territory of the EU.


801 ECN Notice, paras 14 -15.

802 See further infra Chapter 6.

803 For an (unfounded) critique on this approach see U. BÖGE, “The Commission’s Position” 250.

804 ECN Notice, para 6.
However, the Notice also foresees the (more exceptional)\textsuperscript{805} possibility to (re)allocate a case when either an authority considered that it was not well placed to act, or when other authorities considered themselves well placed to act.\textsuperscript{806} If re-allocation is considered necessary, network members will endeavour, as often as possible, to re-allocate cases to a single well placed competition authority.\textsuperscript{807}

In practice, there is no official transfer of cases.\textsuperscript{808} Instead, proceedings are suspended or complaints rejected when another authority is dealing or has dealt with the case.\textsuperscript{809} The smooth functioning and efficiency of the process depends on a mechanism for the competition authorities to inform each other about the cases pending before them.\textsuperscript{810} Such mutual provision of information is regulated in Article 11(3) of Regulation 1/2003. On the basis of this provision, a NCA informs the Commission and other NCAs when acting under Articles 101 or 102 TFEU ‘before or without delay after commencing the first investigative measure’.\textsuperscript{811} This obligation is interpreted extensively as including active investigative measures (for instance an inspection or a request for information) and a ‘passive’ reception of information or evidence (such as a leniency application).\textsuperscript{812} This gives other

\textsuperscript{805} The fact that the re-allocation of cases is only foreseen as a ‘subsidiary plan’ and that it will only take place exceptionally illustrates that the Commission expects the work-sharing system to work properly from the initial allocation phase. Still, by introducing an alternative re-allocation system the Commission acknowledges that the system obviously has deficiencies. Since NCAs and undertakings will not be able to predict in an early stage whether the case will be re-allocated, it is logical that the re-allocation of cases may raise concerns.

\textsuperscript{806} ECN Notice, para 6.

\textsuperscript{807} ECN Notice, para 7. With respect to the issue of reallocation, the question whether “reallocation” decisions” should be subject to judicial review has also been discussed (see for a more detailed discussion W. Wils, “The reform” 40, of the online version of this work. Following the Judgment of the France Télécom case (Case T-339/04, France Télécom SA v Commission [2007] ECR II-521) the answer to this question appears rather evident. Given that the allocations principles contained in the notice constitute a mere division of labour, the so-called reallocation decisions simply do not exist. As the Court recalled, only Article 11(6) of Regulation 1/2003 is binding for NCAs in the context of case allocation. This also implies that Regulation 1/2003 in particular, and the modernization reforms as a whole, have not established any grounds to challenge the competence of a competition authority to investigate a certain case. See E. Gippini-Fournier, “The modernization” 74 of the online version of this contribution.

\textsuperscript{808} See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 221.

\textsuperscript{809} Article 13 of Regulation 1/2003.

\textsuperscript{810} See ECN Notice, para 17. In practice, the information is inserted and consequently propagated electronically through a common platform accessible to all ECN members. A. Schaub, “Continued focus” 39.

\textsuperscript{811} In this connection, the question regarding definition of the term “first formal investigative measures” has also been discussed. See e.g. A. Mikroulea, “Case Allocation” 61-62. The ECN Notice (para 17) clarifies that information should be provided to NCAs and the Commission ‘before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation’ (i.e. requests for information, voluntary interviews and inspections). This is done on the basis of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs. Despite the clarifying value of this provision, it is accepted that ‘it is likely that the above mentioned term will not be interpreted uniformly by the NCAs as they act under their own national procedural laws, which may contain different rules with regard to the handling of cases including the opening of new matters, the institution of proceedings, and the conduct of investigations’. The real risk of this situation should however be questioned. Although national procedural law is indeed not harmonised by Regulation 1/2003, it cannot be doubted that Member States authorities endeavor to achieve a uniform interpretation of this provision.

\textsuperscript{812} E. Gippini-Fournier, “The modernization” 71 of the online version of this contribution. As this author comments this flexible interpretation ‘[i]s particularly necessary in leniency cases, where early coordination on case allocation is crucial’. On the other hand, the fact that this communication obligation only exists after having taken a first investigative measure implies that if a national authority receives a complaint which it does not intend to investigate, (for instance, given their enforcement priorities), this information does not have to be communicated within the ECN. This author also comments that ‘[m]ore importantly, Article 11(3) requires NCAs to make an early judgment about the all-important dividing line between purely national cases and cases where the conduct affects trade between Member States’. See also commenting on this aspect A. Mikroulea, “Case Allocation” 62. As this author observes ‘[t]he obligation established by art. 11 para 3 of Regulation 1/2003 to inform the Commission and the right to inform other NCAs of new cases only apply to cases involving the application art. 81 and 82. Therefore, where an NCA erroneously assumes the absence of an appreciable effect on intra-Community trade, no case information would be forwarded to the Network’.
authorities the opportunity to express their interest in handling a given case. The rule contained in Article 11(3) clearly reflects the importance of timing. If information is soon available within the ECN, it will be easier and faster to determine which authority and/or authorities are “well placed” to handle the case. For this reason, communication among NCAs and the Commission often takes place informally in practice, even before formal submissions of information are made. Similarly, the Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) and transmit them copies of the most important documents it has collected.

The rules set out in Article 11(2) and 11(3) of Regulation 1/2003 play an essential role in the flexible and efficient allocation of cases within the network. Particularly, they allow ECN members to detect the existence of multiple procedures and address possible case (re)-allocation issues as soon as possible (i.e. as soon as an authority starts investigating a case). If this type of conflicts arises – which is actually a real possibility given the voluntary nature of Article 13 – “it will be resolved swiftly, normally within a period of two months starting from the date of the first information sent to the network pursuant to [Article 11(2) or (3) of the Regulation]. During this period, competition authorities will endeavour to ‘reach an agreement on a possible reallocation and, where relevant, on the modalities for parallel action’. Normally, the competition authority (or authorities) that is (or are) dealing with a case at the end of the re-allocation period will remain in charge of the case until the completion of the proceedings. A subsequent re-allocation of a case after this allocation period of two months should, therefore, only occur when the facts of the case change materially during the course of the proceedings. This could, for instance, be case if a cartel agreement that was initially thought to be national, turns out to be of a wider scope or vice versa.

In the early years of the system, the system of parallel competences and flexible case allocation was subject to numerous criticisms. The main concerns relate(ed) mostly: (i) the insufficient legal

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813 In this connection, it should be acknowledged that ‘there is some flexibility in the system: if the authority wants to carry out surprise inspections on the spot, the other competition authorities can be informed only after the inspection has been carried out’ (emphasis added). J. FINGLETON, “The Distribution and Attribution of Cases among the Members of the Network: The Perspective of the Commission/NCAs” in C.-D. ELHERMANN AND I. ATANASIU (eds.) European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2004, 464 p., at 334-335; A. MIKROULEA, “Case Allocation” 61-62.

814 As observed, this could be done in parallel with the first agency or solely by the Commission. If no agreement is reached as regards the case allocation bilateral discussions take place between the respective authorities. However, this only happens infrequently. K. DEKEYSER AND M. JASPERS, “A New Era” 5-6.


816 See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 17. Interestingly, at contrast to the obligation of NCAs, Article 11(2) does not make a specific reference as to the timing. Furthermore, at the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case (Article 11(2) of Regulation 1/2003).

817 Although this two-month period begins when the first information is inserted into the Network, given the indicative character of this document, it can be assumed that the time limit is indicative as well. This aspect is also stressed in the ECN Notice, paras 18 and 54. In effect this last paragraph refers to this period of two months as “indicative”. Therefore, it may be (slightly) exceeded. S. BRAMMER, “Concurrent” 1392; A. MIKROULEA, “Case Allocation” 61-62.

818 See also ECN Joint Statement, para 18. The authorities dealing with a case in parallel may designate one of them as a lead authority delegate tasks to this authority, such as the coordination of investigative measures (ECN Notice, paras 13 and 18).

819 It is interesting to note in this regard that certain concerns were expressed in the context previous to the modernisation reforms.
certainty as regards the allocation process resulting from the lack of binding jurisdictional rules,\textsuperscript{822} (ii) the significant impact of a possible reallocation of cases on the legal position of companies, given the considerable – procedural and sanctioning – differences on the national level\textsuperscript{823} and (iii) the tension between parallel proceedings and the \textit{ne bis in idem} principle.\textsuperscript{824}

However, the practical experience of the ECN work-sharing system – as discussed in the Commission’s Report on Regulation 1/2003\textsuperscript{825} – has demonstrated that the initial concerns regarding the functioning of the system have not generally materialised. Discussions regarding case-allocation were required seldom, and actual re-allocation of cases took place even less frequently. Therefore, cases are typically handled during the whole procedure by the competition authority that took the first investigative measure.\textsuperscript{826}

Despite the general positive experience with the allocation of cases within the ECN, it is important to stress that the work-sharing system has played a more relevant role in two different scenarios. Firstly, efficient case (re)allocation became quite important in cartel cases, particularly when a leniency applicant choose to contact (simultaneously or successively) both the Commission and one or multiple NCAs.\textsuperscript{827} In these cases, according to the Commission Staff Working Paper, the Commission and NCAs successfully cooperated at an early stage.\textsuperscript{828} For instance, in the \textit{Flat Glass} cartel\textsuperscript{829} the Commission’s investigation (which started in 2005) was possible because several NCAs had provided information concerning complaints from consumers who suspected the existence of a cartel. In the \textit{Power Transformers case},\textsuperscript{830} the German competition authority dealt with a different,


\textsuperscript{823} See e.g. A. ANDREANGELI, “The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings”, 2006 (31) \textit{ELRev}, 342-363. See also predicting this issue e.g. A. SCHAUB, “Continued focus” 39-41; J. S. VENIT, “Brave” 566.


\textsuperscript{825} The Commission Staff Working Paper on the functioning of Regulation 1/2003 was presented in 2009 by the Commission. In essence, this report concluded that the enforcement regime brought about the modernization measures, and particularly Regulation 1/2003, had generally worked properly.

\textsuperscript{826} Commission Staff Working Paper on the functioning of Regulation 1/2003, para 214. This Commission’s document adds that ‘[a]lso the public consultation has shown that the legal and business community has dropped its initial fears and has only rarely called for more clarity in this respect. Claims for binding case-allocation criteria remain isolated’. See also K. DEKEYSER AND M. JASPERS, “A New Era” 7; D. GERARD, “The ECN” 17 of the online version of this article; J. CPIAU, A. SINCLAIR, I. BREIT, D. DALHEIMER, P. KRENZ, E. RIKKERS AND V. JUKNEVICIUTE, “Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: An update”, 2012 (3) \textit{Concurrences}, n°48166, 78-87, at 82 (hereafter: ‘J. CPIAU et al., “Developments in and around”’); E. GIPPINI-FOURNIER, “The modernization” 74 of the online version of this contribution.

\textsuperscript{827} Commission Staff Working Paper on the functioning of Regulation 1/2003, para 215 et seq.

\textsuperscript{828} Ibid, para 216.


but related case. Secondly, the need for efficient case allocation mechanisms was also illustrated in cases in which complaints were lodged with the Commission and/or one or various NCA(s). In such instances, complaints have frequently been passed on within the network. The Commission Staff Working Paper cites the Deutsche Post cases as relevant examples where both the Commission and the German competition authority received similar complaints in the framework of (now) Article 102 TFEU regarding the same conduct of Deutsche Post AG concerning discounts for pre-sorted mail. Deutsche Post’s practice was based on a provision of the German postal legislation which was the subject of a Commission procedure under Article 106 TFEU. In this case, even if the Commission was drafting a decision under Article 106 TFEU, the Commission’s experts took the view that the investigation of the complaint by the Bundeskartellamt would be the most effective and efficient way to proceed. Both proceedings were successfully concluded by decisions.

Although these cases do not concern cartels, they provide a clear illustration of the well-functioning work-sharing system. In addition, these cases also show how the action of the Commission and that of a NCA can effectively complement each other in practice.

Re-allocation of cases at horizontal level (i.e. among NCAs) is also rather infrequent. During the period from 2004 to 2009, only three cases were reported to the Commission. Such re-allocations of cases generally took place because the locations of the undertakings subject to the investigations were situated in other Member State.

One concern that led to certain discussions within the ECN pertained to the situation in which a complaint was lodged with a NCA which does not completely fit the “well-placed criterion” In this scenario, if investigations have to be conducted in a different Member State, but the complaint is not considered a priority by the NCA that was required to conduct the investigation or by the Commission, then a “negative conflict of allocation” arises. Although, in general, the importance of these issues should not be underestimated, the Commission has clarified this has only occurred in very low number of cases.

Furthermore, while this risk maybe rather significant for other fields

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831 For other non-cartel cases in which the issue of work sharing (between the Commission and NCAs) was addressed see Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 217-219.

832 See Commission Decision of 20 October 2004 on the German postal legislation relating to mail preparation services (COMP/38.745) (not published in the OJ). This case concerned an Article 106(3) TFEU decision. In this decision the Commission established that the German postal law as interpreted in its legislative context by the national regulator, was contrary to Article 106(1) TFEU, read in conjunction with Article 102 TFEU, and asked the German Government to inform the Commission, within two months from the date of notification of the decision, of the measures it had taken to bring this infringement to an end. See also BKA, Decision of 11 February 2005 (B 9-55/03) available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B9-55-03.pdf. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 217.

833 The Commission Staff Working Paper on the functioning of Regulation 1/2003 also comments on other interesting cases in which the issue of work sharing was addressed. Particularly, it refers to the Wanadoo case discussed above. Furthermore, in the iTunes case, regarding on-line delivery of music, a consumer organisation issued a complaint within the (former) Office of Fair Trading, which consequently contacted the Commission. Since the case concerned multiple Member States, the Commission decided to initiate its own proceedings (see Commission, Press Release IP/07/126 of 03.04.2007). Following Apple’s declaration that it would equalise prices for music downloads from iTunes in Europe (Commission Press Release IP/08/22 of 09.01.2008) the case was closed. Other cases involving re-allocation issues from the Commission to NCAs concern an investigation of a triple play offer jointly commercialised by Telefonica and Sogecable. This case was re-allocated to the Spanish competition authority. Other cases concerning investigations of the joint selling of football rights were also successfully re-allocated to the German and the Danish competition authority. Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 218 -219.

834 Two other cases were also re-allocated to the UK OFT; both cases were closed. Commission Staff Working Paper on the functioning of Regulation 1/2003, para 220.

835 However, it recognises that “[s]till, the subject may merit further observation in the practice of the network, with a view to determine if the mechanisms for assistance should be enhanced in order to further improve the ability of national
of enforcement, in the area of cartel enforcement it is (almost) inexistent. Cartels constitute an enforcement priority both on European and on national level. It is therefore extremely improbable that a cartel, regardless of its purely national or cross border character, would not be investigated by the Commission or by a NCA.836

As regards parallel proceedings, only one single case was reported. This case concerned parallel initiatives taken by the Belgian and the German competition authorities, in the light of a European wide price-fixing cartel for the chemical sector which affected Belgium and Germany. Both agencies received a leniency application, investigated the case and imposed fines.837 The Belgian authority, which imposed the second fine, elaborated on the application of the ne bis in idem principle in its decision. First, it underlined that the legal interest of the Belgian competition system is to protect undistorted competition in the Belgian market. Taking into account this objective, it considered that as the fine imposed by the German authority only concerned the effects in the German territory, the Belgian authority had the right to impose a fine to sanction the effects of the cartel in the Belgian territory without violating the ne bis in idem principle.838 Accordingly, the final fines imposed by the Belgian competition authority were calculated by reference to the turnover obtained by the infringing undertakings in the Belgian market.

It appears thus that from the perspective of these competition authorities, the meaning of “legal interest”, as required by the ne bis in idem principle in the context of competition law, is related to the effects of the agreement in question on a relevant product and geographical market.839 Therefore, following this reasoning, the ne bis in idem rule is respected by parallel enforcement by two or more NCAs, as long as they (only) address the anticompetitive effects of a specific agreement in their respective national territories.840

The approach adopted by the Belgian and German competition authorities in this case appears desirable and appropriate. If sanctioning an infringement by two NCAs in parallel would amount to a violation of the ne bis in idem principle, this situation would inevitably lead to under-deterrence, given the common limitation of NCAs to sanction anticompetitive agreements outside their national territories. Since this was the first time that a case was handled in parallel by two different NCAs addressed the application of the ne bis in idem principle, it can be presumed that this case was greatly

836 See supra Chapter 2 and Chapter 4.
839 The ECJ has declared that in order to apply the ne bis in idem principle three conditions must be satisfied. Namely, the condition of identity of facts, unity of offender and unity of the legal interest protected. See, e.g. Joined Cases C-204, 205, 211, 213, 217 and 219/00 P, Aalborg Portland and others v Commission [2004] ECR I-123, para 338.
840 This position has also been reiterated by a number of Commission officials (though in their personal capacity) several times (see, e.g. C. ESTEVA-MOSSO, “A critical view on Chapter 2 – Relationship between EC Competition Law and National Competition Laws” in M. MEROLA AND D. WAELEBROECK (eds.) Towards an optimal enforcement of competition rules in Europe, Brussels, Bruylant 2010, 502 p., at 459-461; E. PAULIS AND C. GAUER, “Ne bis in Idem rule and the EC regulation 1/2003”, 2005 (1) Concurrences, 32-40.
841 This interpretation is also coherent with the competences of NCAs which can normally not sanction anticompetitive behaviour beyond the limits of their respective domestic territories.
discussed within the ECN framework. One can, therefore, assume that (at least) the involved competition authorities and the Commission share this same point of view about the interpretation of the ne bis in idem principle in parallel proceedings.

In view of the above, it appears that, in contrast to the initial fears, the system of division of work established within the ECN framework has been functioning quite effectively: ECN members are very much capable of cooperating and allocating cases in an efficient manner. As a general rule, cases are typically handled by the competition authority that is requested to act, or does so on its own initiative in the first place. Consequently, case-allocation only seldom becomes an object of dispute within the ECN framework. Reallocation of cases from one authority to another seems to have been rather exceptional and, when necessary, this type of conflict has been smoothly resolved. In addition, parallel proceedings by different NCAs were almost always avoided, with only one exception reported in a period of five years.

The good functioning of the network is inevitably connected to the undeniable endeavour of NCAs and the Commission to achieve consensual solutions and commonly agree on the allocation of precise cases. Given the lack of binding rules on jurisdiction, it is obvious that without such willingness to solve case-allocation issues, parallel proceedings would be difficult (if not impossible) to avoid. Such readiness, good will and mutual trust, are not only illustrated by the fact that ‘[w]ork sharing between the enforcers in the network has generally been unproblematic’. As discussed above, it appears that while there is no obligation to do so, in practice, network members frequently contact one another even before cases are officially reported to the network. This was notably so in cartel cases triggered by parallel complaints or leniency applications regarding the same agreement. Since the insertion of the case in the ECN database does not constitute a precondition to initiate the allocation process, such early and anticipatory approach is certainly welcomed: if necessary, the re-allocation of cases should take place at the earliest stage possible. All members of the ECN have not only shown their willingness to cooperate and find suitable solutions; they also seem to be particularly vigilant and prepared to act if it appears that another member of the network is better placed to handle a case, and are willing to reach a common position. This efficient functioning, in turn, ensures that duplication of efforts is avoided, and that the resources of all European competition authorities are used in an optimal manner. In addition, the fact that the system is flexible and consensual also constitutes a sign that ECN members are willing to solve case allocation disputes by means of dialogue. This general harmony among the ECN members further supports their collective spirit of cooperation.

Regardless of the (relatively unexpected) overall success and well-functioning work sharing system, the general absence of complex legal disputes does not imply, in itself, that all cooperation mechanisms of the ECN are completely unproblematic or, in the words of D. GERARD, that ‘the system has reached its full maturity or even a sufficient level of stability’. Arguably, some uncertainty remains in certain areas, with a notable focus on parallel enforcement. The question

842 This view has also been confirmed in academic studies. See Report on the enforcement by NCAs and the ECN in M. MEROLA AND D. WAELBROECK (eds.) Towards an Optimal Enforcement of Competition Rules in Europe, Brussels, Bruylant 2010, 502 p., at 332-333. See also D. GERARD, “The ECN” 17 of the online version of this article.
844 See for a similar opinion A. MIKROULEA, “Case Allocation” 61-62.
845 See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 224.
846 D. GERARD, “The ECN” 17 of the online version of this article.
whether such uncertainty has the potential to undermine the ECN working and, in so doing, constitute a serious obstacle for the effective enforcement is examined next.

2.3.1.2. Further promoting cooperation by exchanging information and providing assistance for investigations

a. Exchange and use of information in evidence within the ECN

(i) The general rules

Already in 1999, in the White Paper preceding the modernisation reforms, the Commission expressed its view that one of the essential conditions for the proper functioning of the ECN is that ‘an authority considering a case, whether at Community or national level, must be in a position to pass a file on it to another authority, including any confidential information that might be used in procedures for infringement of the Community competition rules’.\(^{847}\) Article 12 of Regulation 1/2003 is clearly inspired by this early declaration.

Article 12(1) stipulates that, for the purpose of applying the EU antitrust provisions, the Commission and the NCAs have the power to (i) provide one another with information, including confidential information and (ii) use such information as evidence. The possibility to share and use information in evidence within the ECN constitutes an indispensable instrument to enhance cooperation between all the European competition authorities.\(^{848}\) This vision is also stated in the ECN Notice, which describes Article 12 as ‘a key element of the functioning of the network’ and as a ‘precondition for efficient and effective allocation and handling of cases’.\(^{849}\)

The emphasis on the crucial role of Article 12 is not really surprising. Under the former enforcement system of Regulation 17, only vertical transmission of information – \textit{i.e.} between the Commission and the NCAs – was possible. More precisely, pursuant to Article 10(1) of Regulation 17, the Commission was required to transmit to the NCAs ‘a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles [101 and 102 TFEU] or of obtaining negative clearance or a decision in application of Article [101(3) TFEU]’.\(^{850}\) However, the ECJ


\(^{849}\) ECN Notice, para 26.\(^{850}\) Regulation 17 also contained rules regarding exchange of information. For instance, Article 10(2) specified that the competent authorities had the right to express their views about the way that they receive documents. Pursuant to Article 11, NCAs had to receive copies of the requests for information sent to the undertakings located in their Member State. The Commission was also required to consult the relevant national authority if it had planned to conduct an inspection (within the meaning of Article 14) in the respective Member State. In addition, the Commission was also competent to require national authorities to take certain initiatives. See for instance, Article 11(1) – which allowed the Commission to obtain all necessary information from the governments and the NCAs. In the same line, Article 13 empowered the Commission to compel the competent authorities to carry out inspections on its behalf. With the publication of the first cooperation notice (\textit{supra}) the Commission sought to widen the scope of information exchange (see in particular, para
clarified in the *Spanish Banks* case that the information received by national authorities from the Commission on the basis of Regulation 17 could not be used by NCAs in an autonomous manner to establish the existence of violations of the national or EU competition rules. The reason for this interpretation is that the information acquired by the Commission using its (former) investigative powers could only be used for the purpose(s) of the (Commission’s) relevant investigation. Consequently, information exchanges (from the Commission to NCAs) had mainly a supporting role for the enforcement of the EU antitrust rules by the Commission. Furthermore, Regulation 17 did not contain any provisions at all concerning horizontal information exchanges among NCAs. Such exchanges could, therefore, only be conducted on the basis of bilateral agreements and specific national rules. It is, therefore, not surprising that this type of exchanges only took place infrequently.

One of the most important and innovating features of Article 12(1) is that information may be exchanged vertically and horizontally. Accordingly, NCAs and the Commission may share information on the one hand and, on the other hand, information may also be exchanged between and amongst NCAs. As such, this provision constitutes an unusual rule as it regulates the exchange of information and its use in evidence for all the members of the ECN in the same manner. By setting all European competition authorities at the same enforcement level, Article 12(1) creates a knowledge platform which is equally accessible for all the ECN members. In this sense, this provision undoubtedly enhances the effective enforcement of the EU antitrust rules.

It is, however, important to make a (fairly) relevant nuance. As stated above, Article 12 (only) empowers EU competition authorities to exchange and use information in evidence, without

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852 See Article 20 of Regulation 17.

853 This interpretation follows from the fact that the previous ‘Regulation No 17/62 does not govern proceedings conducted by the competent authorities in the Member States, even where such proceedings are for the implementation of Articles [101(1) and 106 TFEU].’ C-67/91, *Dirección General de Defensa de la Competencia y Asociación Española de Banca Privada and others*, [1992] ECR I-4785, para 33.


856 The Commission has in effect a more prominent role in the European enforcement context, and more precisely in the context of Regulation 1/2003. This role is for instance illustrated by Article 11(6) which relieves NCAs from their competence to apply the EU antitrust provisions if the Commission initiates proceedings. See further infra Chapter 6, section 3. See also S. Brammer, *Horizontal aspects* 177 of the electronic version of this publication; J. Nowag, “Due Process” 112 (this author underlines that Article 11 of Regulation 1/2003 mainly covers vertical matters, while Article 12 also covers horizontal questions).
compelling them to do so. This means that on the grounds of this provision, NCAs have the discretion to decide whether they will adhere to a request of information made on the basis of this Article. The possibility contained in Article 12(1) has, therefore, a different scope of application than the rules contained in Article 11(2)-(6) of Regulation 1/2003, which, in effect, establishes certain obligations regarding the vertical exchange of information. The obligatory nature of these rules stresses and reinforces the leading position of the Commission within the network platform.

(ii) The competence to exchange information

Pursuant to Article 12(1), European competition authorities – including the Commission – are endowed with two main competencies. First, this provision empowers the Commission and the NCAs to exchange information among themselves. In practice, this right of the ECN members to exchange and share information has, for different reasons, been given a rather broad interpretation. Once it is established that ‘the exchange occurs for the purpose of applying Articles 101 and 102 TFEU’, the competence of ECN members to exchange information is not further affected or limited by the (criminal or administrative) nature of the proceedings, nor by the fact that sanctions could be imposed on individuals. This follows from the fact that, although the Commission is only competent to impose fines on undertakings in order to enforce the EU antitrust provisions, in the Member States criminal sanctions may be imposed to enforce the EU competition rules. In addition, Article 12 does not appear to set any limit concerning the type of information which may be exchanged among competition authorities. This vision is not only clearly supported by a useful informative value for the Member States, which have made use of this possibility.

857 See K. DEKEYSER AND F. POLVERINO, “The ECN and the Model Leniency Programme” in I. LIANOS AND I. KOKKORIS (eds.) The Reform of EC Competition Law: New Challenges, The Hague, Kluwer Law International 2009, 624 p., at 508–509 (hereafter: ‘K. DEKEYSER AND F. POLVERINO, “The ECN”’); J. NOWAG, “Due Process” 107-108; S. BRAMMER, Horizontal aspects 177 of the electronic version of this publication. It has been questioned whether such discretion could be outbalanced by the duty of loyal cooperation enshrined in Article 3(a) TEU; K. DEKEYSER AND E. DE SMIJTER, “The Exchange of Evidence Within the ECN”, 2005 (32-2) Legal Issues of Economic Integration, 161-174, at 164-165 (hereafter: ‘K. DEKEYSER AND E. DE SMIJTER, “The Exchange”’); J. FAULL AND A. NIKPAY, The EC Law of Competition 141-142). Nevertheless, this approach should be interpreted with certain caution. While in certain cases the duty of loyal cooperation may indeed require a compulsory exchange of information, requiring an absolute or unlimited obligation to exchange information on the basis of Article 12 of Regulation 1/2003 seems rather extreme. By establishing such an absolute duty, the flexibility of the coordination system established by the ECN could be undermined and even jeopardize the effectiveness of the enforcement system. This could be for instance the case of Leniency information which is crucial to safeguard the effectiveness of the anti-cartel enforcement system would be exchanged and used without any carefulness. (It should, however, be noted that different rules are applicable to information exchange in the context of the Leniency Programme. This aspect will be assessed in the next (sub)section). See for a similar opinion K. DEKEYSER AND F. POLVERINO, “The ECN” 509; S. BRAMMER, Horizontal aspects 177 of the electronic version of this publication.

858 See for a different vision D. REICHELT, “To What Extent does the Co-operation within the European Competition Network Protect the Rights of Undertakings?”, 2005 (42-3) CMLR, 745-782, at 754-755 (hereafter: ‘D. REICHELT, “To What Extent”’). For the implications of this distinction see infra section 2.3.1.2(a)(iii) and (iv) of this Chapter.

859 See further infra Chapter 6, section 3.

860 See also K. DEKEYSER AND E. DE SMIJTER, “The Exchange” 163-164.

861 See supra sections 2.2.1, 2.2.2 and 2.2.3 of this Chapter. In this connection it should be recalled that although Regulation 1/2003 only governs the application of Articles 101 and 102 TFEU, Member States may under this Regulation implement national legislation prohibiting unfair trading practices. Therefore, the clarification made in Article 12 has a useful informative value for the Member States, which have made use of this possibility.

862 However, the use of such information in evidence is restricted by the second and the third sections of Article 12 of Regulation 1/2001. See infra section 2.3.1.2(a)(iv) of this Chapter.

863 See Regulation 1/2003, recital 8 and Article 5.

864 Nevertheless, as stated by S. MARTINEZ LAGE AND H. BROKELMANN ‘[i]nasmuch as the exchange of information governed by Article 12 […] concerns the application of Community law, it cannot be interpreted in a way that runs counter to the general principles of Community law’. S. MARTINEZ LAGE AND H. BROKELMANN, “The Possible Consequences of a Relatively Broad Scope for Exchange of Confidential Information on National Procedural Law and
by the wording of Article 12 itself, which confirms that the data exchanged may include confidential information. Article 28 of Regulation 1/2003 regarding professional secrecy also appears consistent with this position. In effect, this provision explicitly states that the limitations imposed by this Article are ‘[w]ithout prejudice to the exchange […] of information’.\(^{865}\) Accordingly, the information exchanged may encompass, for instance, general information concerning specific sectors – regardless of whether such information is in the possession of NCA, or whether it is publicly accessible but is difficult to obtain by other NCAs – but may also concern confidential documentation owned by undertakings.\(^{866}\)\(^{867}\) Since the right to exchange evidence flows directly from Regulation 1/2003 (and also bearing in mind the primacy of EU law over national law), information may be exchanged within the ECN even if national rules stipulate the contrary.\(^{868}\) As long as the information has been lawfully collected by the transmitting authority, the legality of the exchange of such information cannot be challenged.\(^{869}\) The same applies for the use of information in evidence, which is only restricted by the conditions imposed by Article 12(2)-(3) of Regulation 1/2003.\(^{870}\)

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\(^{865}\) See for a similar view J. NOWAG, “Due Process” 113-114. However, the broad scope of the possibilities to exchange information as governed by Article 12(1) has also been criticised on the basis of the argument that Article 12 (supposedly) constitutes the general legal foundation of information exchanges within the network and, other provisions also involving information exchange (more precisely Articles 11, 13 and 22 of Regulation 1/2003) would establish the presice conditions of each (type of) exchange. This is particularly the vision of D. REICHEL (‘To What Extent” 754-755). However, this interpretation does not appear correct. As above commented, Article 12(1) covers a very specific situation, more precisely the right to exchange information horizontally as well as vertically. Therefore, Articles 11-13 and 22 all allowing information exchange, govern different situations. This position is also shared by K. DEKEYSER, “The importance of cooperation between competition authorities in the new regime of decentralized application of EC competition law”, Presentation 2004, Luxembourg, Charts 8-9, available at http://www.concurrence.public.lu/actualites/conferences/2004/05/conference_concurrence/dekeyser.pdf; J. NOWAG, “Due Process” 105-127, at 114-115.

\(^{866}\) See ECN Notice, para 27. See also Explanatory Memorandum, p. 21; Commission, Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012, para 57, available at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf. In this policy document the Commission acknowledges that “[t]he request can refer to any kind of information: documents, statements, digital information. It is normally not necessary for the Commission to verify, assess and decide on the confidentiality of information before transferring it to another competition authority. The confidential nature of the information does not constitute an obstacle to its transmission to another Network member, with the exception of the specific rules and conditions applying to the treatment of information related to leniency applications’.

\(^{867}\) Nevertheless, it is important to note that, as the Commission argued in its Antitrust Manual of Procedures (para 58), ‘where a risk exists that a Member State competition authority could not guarantee that commercially sensitive information is not used by another “arm of the State” for purposes other than the enforcement of Articles 101 and 102 TFEU, the Commission would need to take the necessary safeguarding measures respecting the ruling of the Court in the SEP case’. In the SEP case, the ECI indeed established a special procedure aimed at protecting sensitive information from undertakings. In this case the applicant’s main supplier, Gasunie, was jointly controlled by the Dutch State and represented by officials of the same Ministry (the Ministry of Economic Affairs). The Dutch officials had legitimately consulted the contract transmitted by the Commission and received certain business secrets. The ECI ruled that the Dutch authorities could not be required to disregard the information in question, if it fell to them to determine the commercial policy of Gasunie. In these circumstances, the ECI ruled that ‘if [the Commission] wishes to transmit a document to the competent national authorities, notwithstanding the claim that […] that document is of a confidential nature with respect to those authorities, [the Commission is required] to adopt a properly reasoned decision amenable to judicial review by means of an action for annulment’ (ECJ 17 November 1993, C-36/92, Samenwerkende Elektriciteits-Productiebedrijven (SEP) NV v Commission [1994] ECR I-1911, paras 39-40). For a deeper analysis of this ruling see C. BOLZE, 1996 Régime communautaire de l’entreprise, Revue trimestrielle de droit commercial et de droit économique, 380-386; G. W. VAN DER KLIS, 1995 SEW, 610-613.

\(^{868}\) See Regulation 1/2003, recital 16. See also e.g. J. NOWAG, “Due Process” 113.

\(^{869}\) See also K. DEKEYSER AND E. DE SMJTER, “The Exchange” 163-164.

\(^{870}\) The limitations regarding use of information in evidence will be discussed below.
With respect to the question whether the information was legally gathered, the Commission has pointed out that this aspect should be determined according to the national rules that are applicable to the NCA gathering the information (i.e. the transmitting authority).\textsuperscript{871} Furthermore, the ECN Notice adds that ‘[w]hen transmitting information the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested’.\textsuperscript{872} This statement suggests that when the information has not been collected in accordance with the national procedural rules, it may still be transmitted. In this context it is appropriate to make a nuance. If a NCA collects the information in a way that is from the outset contrary to the national rules regarding the collection of evidence, and the illegality of this conduct can be established before the evidence is transmitted, the evidence cannot be transmitted to the receiving NCA in question. However, as the ECN notice appears to indicate that if there is a dispute about the legality of the collection after the evidence has been transmitted of evidence, the receiving authority must establish the consequences that such (illegal) action will have in the national proceedings. This reasoning is in line with the principle of national procedural autonomy endorsed in Regulation 1/2003.\textsuperscript{873}

(iii) The use of information in evidence

The principle of free circulation of information and intelligence contained in Article 12(1) is, as a rule, also applicable to the use of such information as evidence. Therefore, EU competition authorities have a general right to use the information they received to prove a potential violation of the EU competition rules. Nevertheless, this general right is limited by the second and third section of Article 12 of Regulation 1/2003 which ensure certain procedural guarantees for undertakings and natural persons involved in competition law proceedings.

(iv) Restrictions with regard to the use of information in evidence

The subject matter of the investigation

The first restriction imposed by Article 12(2) is that the information exchanged may only be used in evidence ‘in respect of the subject-matter for which it was collected by the transmitting authority’ (emphasis added).\textsuperscript{874} Put differently, the information cannot be used for purposes different from those stated in the order or decision requesting the fact-finding measure, regardless of whether the decision has been issued by the Commission or a NCA.\textsuperscript{875} In turn, this implies that, the original

\textsuperscript{871} ECN Notice, para 27. See also commenting on this aspect J. NOWAG, “Due Process” 113. This author describes this as ‘as a form of a country of origin principle’. S. BRAMMER, Horizontal aspects 186 of the electronic version of this publication; K. DEKEYSER AND D. DALHEIMER, “Cooperation” 11-12.

\textsuperscript{872} ECN Notice, para 27.

\textsuperscript{873} See also J. NOWAG, “Due Process” 113. For a differing view see D. REICHELT, “To What Extent” 751–752.

\textsuperscript{874} It should however be noted that Article 12(2) again mentions that the exchange must occur for the purpose of applying Articles 101 and 102 TFEU. Although this could be seen by some as an additional requirement as regards the use of information, since this requirement is also mentioned in Article 12(1) (supra), it appears that not only the use of information, but also the initial exchange of information must be done for the purpose of applying the EU antitrust rules.\textsuperscript{875} The requirement regarding the “subject matter” of the investigation was confirmed by the ECJ with regard to Article 20 of former Regulation 17. See Judgment of the Court of 17 October 1989, Case 85/87, Dow Benelux NV v Commission [1989] ECR 3137, paras 17-18. (Particularly, the ECJ stated that ‘it does indeed follow from Article 20(1) and Article 14(3) of Regulation No 17 that information obtained during investigations must not be used for purposes other than those indicated in the order or decision under which the [Commission’s] investigation is carried out. … [T]hat
decision ordering the investigatory measures (which normally specifies the scope of the investigation) will be essential to determine the (legality of the) use of the information that was received in evidence. Accordingly, when a NCA intends to use evidence received in the course of an investigation which had been conducted in another Member State, the receiving authority should evaluate the legality of each piece of evidence on the basis of the law applicable in the Member State where it was collected. Therefore, information gathered during an investigation concerning a certain product cannot be used in evidence during proceedings concerning a different product.

A contrario, it can be deduced that if the proceedings of the receiving authority and the investigation of the transmitting authority concern the same product and agreement (or practice), the undertakings subject to the proceedings are not the same by definition. Therefore, if the transmitting authority finds evidence involving a new company in a suspected infringement, the receiving NCA will be able to (legally) use the information in its own proceedings. In addition, it should be noted that, even if the collected information does not relate the subject matter of the investigation, the members of the ECN are not completely prevented from using the information obtained through the mechanisms of the Network. This "unrelated" information (that is, information not concerning the subject matter of the investigation) may be taken into account as circumstantial evidence, and can consequently be used to justify the initiation of a new investigation concerning a different subject matter.

requirement is intended to protect the rights of the defence of undertakings, [which] would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof). However, in order to understand the "subject matter" requirement properly it should be taken into account that, in contrast to Regulation 17, Regulation 1/2003 also governs the horizontal exchange of information. It is, therefore, reasonable and desirable to limit the use of information by the receiving NCA to the purpose of the subject matter of the investigation for which it was requested, regardless of the investigation was ordered by the Commission or by a NCA. In this sense, this requirement can be considered as a codification of the ruling of the ECJ in the Dow Benelux case. See also commenting on this aspect e.g. C. GAUER, “Due process in the face of divergent national procedures and sanctions”, Discussion Paper for the IBA conference “Antitrust Reform in Europe: A Year in Practice”, March 2005, Brussels, at 12, available at http://www.ibanet.org/Conferences/05_conf_antitrust_reform_in_Eu_A_year_in_Practice_papers.aspx; C. SWAAK AND M. MOLLICA, “Clementie en de modernisering van de EG-mededingingsregels”, 2005 (8) Markt & Mededinging, 36-44, at 40 (hereafter: ‘C. SWAAK AND M. MOLLICA, “Clementie”).

In this regard, an analogy can be drawn with the Commission’s obligations in the context of its own investigations. If the Commission intends to conduct an investigation on the basis of Articles 18(2) and (3), 20(3) and 21(2) of Regulation 1/2003, according to settled case-law it will have to define the subject matter of such investigation. See Judgment of the Court of 21 September 1989, Joined cases 46/87 and 227/88, Hoechst AG v Commission, [1989] ECR 2859, para 41: ‘[t]he Commission's obligation to specify the subject matter and purpose of the investigation constitutes a fundamental guarantee of the rights of the defence of the undertakings concerned. It follows that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation. Although the Commission is not required to communicate to the addressee of a decision ordering an investigation all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate'. See also elaborating on this subject E. GIPPINI-FOURNIER, “The modernization” 82 of the online version of this contribution.

The words of S. BRAMMER are quite illustrative in this sense. This author states that the receiving authority must apply a sort of “country of origin” principle in relation to each piece of evidence. S. BRAMMER, Horizontal aspects 180 of the electronic version of this publication.


See Case C-67/9, Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others, [1992] ECR I-4785, paras 38-39. In this case the ECJ in effect confirmed its approach taken in Dow Benelux. In this case the ECJ also added that "[t]he Member States are not required to ignore the information disclosed to them and thereby undergo — to echo the expression used by the Commission and the national court — acute amnesia".
Furthermore, it is also important to stress that on the grounds of Article 12(2) of Regulation 1/2003, the information in question can be used in evidence in national competition proceedings. Nevertheless, this can only be done if two conditions are cumulatively fulfilled. Firstly, national law must be applied in parallel to EU competition law. This condition is clearly linked with the fact that Regulation 1/2003 only governs the enforcement of the EU antitrust provisions (and not that of the national competition provisions). Still, given the possibility to apply national law in parallel to EU competition law as established in Article 3(1) of Regulation 1/2003, it is indeed desirable that the information sharing mechanisms contained in Regulation 1/2003 (and further specified in the Network Notice) can be used to support the application and enforcement of national competition law. This condition plays an important role when the requirement regarding the (appreciable) effect on trade is incorrectly established by national authorities. If the investigation of a case is opened on the basis of both the EU and the national competition provisions (because the practice presumably affects trade among Member States), and subsequently it appears that this is not the case, the information obtained through the ECN can be used by NCAs to justify (only) the initiation of the national proceedings. Conversely, the use of the information acquired through the ECN mechanisms as (direct) evidence to prove the violation will not be legitimate.

The second condition established in Article 12(2) is that the application of national competition law cannot lead to a different outcome than the application of EU law. While this condition constitutes an important requirement in the field of Article 102 TFEU, in the area of Article 101 TFEU and, particularly, in the area of cartel enforcement, it is clear that it has no additional relevance. As previously enlightened, Article 3(2) of Regulation 1/2003 establishes a convergence obligation in the context of Article 101 TFEU. Since the application of EU and national competition law (in parallel) will, in any instance, lead to the same result (namely, the prohibition of cartel agreements), NCAs will have the power to share information and use it in evidence on the basis of Article 12 of Regulation 1/2003.

The penalties imposed on natural persons

The use of information exchanged pursuant to the first section of Article 12 is further restricted by Article 12(3) regarding the sanctions that NCAs may impose on natural persons.

When a NCA intends to impose a sanction on an individual, Article 12(3) of Regulation 1/2003 stipulates that the evidence obtained by NCAs through the Network can only be used in two alternative situations. First, when the national legal system of the transmitting NCA foresees

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880 This appraisal is in line with the reasoning developed by the ECJ in Spanish Banks commented above. See also C. SWAAK AND M. MOLLICA, “Leniency applicants to face modernisation of EC competition law”, 2005 (26-9) ECLR, 507-517, at 512; M. BLOOM, “Exchange of Confidential Information among Members of the EU Network of Competition Authorities: Possible consequences of a relatively broad scope for exchange of confidential information on national procedural law and antitrust sanctions” in C.-D. ELHERMANN AND I. ATANASIU (eds.) European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities. Oxford, Hart Publishing 2003, 550 p., at 394; S. BRAMMER, Horizontal aspects of the electronic version of this publication.

881 See supra section 2.2.3 of this Chapter.

882 Ibid. Still, even if the convergence rule does not exist as regards abuse of dominance, the application of Article 12(2) of Regulation 1/2003 undoubtedly contributes to ensuring a higher degree of convergence in this field. Given that Member States may adopt more strict national laws, by establishing that information cannot be exchanged if the application of national competition law leads to a different outcome (than the application of EU law), this provision ensures that undertakings are not punished for conduct which cannot be punished on the basis of EU competition law on the basis of evidence obtained within the ENC framework.
sanctions for violations of Articles 101 and 102 TFEU of a similar kind as the sanction the receiving NCA plans to impose. In subsidiary order – that is, if the national systems of the transmitting and receiving NCA, do not provide for equivalent sanctions – the receiving NCA could use the evidence to impose sanctions on natural persons only ‘if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as the law of the receiving authority’. 883

The restrictions imposed by Article 12(3) can, as a whole, be seen as an additional confirmation of the generally broad scope of the possibility to exchange and use information on the basis of Article 12(1) of Regulation 1/2003, when proceedings concern undertakings. If information is exchanged on the grounds of Article 12(1) – and the information is used in respect of the subject-matter for which it was collected – it is not desirable to set any additional limits to the use in evidence of such information when the receiving NCA can only impose sanctions on companies. 884 This principle of free circulation and use of information within the ECN, should be seen as a consequence of the uniformity existing in national competition systems as regards the sanctions which can be imposed on undertakings. 885 It is a fact that all national competition enforcement systems include financial penalties for undertakings that have infringed the EU competition law provisions. On the other hand, it should also be admitted that depending on the jurisdiction, the level of fines can vary (considerably) and, thereby, also their judicial qualification under the respective national system (administrative, criminal…). Still, under the current regime, the existing divergences among the national enforcement systems are not considered of sufficient magnitude to jeopardise the protection of the rights of defence of the companies involved, when information is exchanged and used in evidence on the basis of Article 12(1) of Regulation 1/2003. In this sense, Article 12(3) in effect indicates that, as far as proceedings against undertakings are concerned, Regulation 1/2003 assumes a sufficient degree of equivalence of the rights of defence in the different enforcement systems of Member States. 886 It also follows from such recognition that the peculiarities and varying enforcement standards of the different enforcement systems are also (implicitly) recognized and accepted in Regulation 1/2003 with regard to undertakings. 887

883 Article 12(2) of Regulation 1/2003, second indent.
884 See also Regulation 1/2003, recital 16: ‘[w]hen the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems’).
885 See further infra Chapter 11, section 2.
886 See Regulation 1/2003, recital 16. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 240; PANEL TWO – BROAD SYSTEMIC ISSUES (comment made by C. GAUER 157). This author points out that – although some consider that the varying severity in sanctions from one Member State to another is against the principle of equality of treatment – such differences should not be a problem in the current enforcement system. These differences already existed under Regulation 17 and in this respect the system has always worked well.
887 Within this background D. GERARD, comments that ‘[s]uch presumption is certainly consistent with the stated ambition to enable the “free movement of evidences” in antitrust matters, through the ECN, and yet it is no less problematic for it appears to exclude any possibility on the part of the receiving authority to oppose or condition the recognition of information obtained abroad as evidence in domestic proceedings, even for reasons of public policy. In effect, it conveniently evacuates at once all issues resulting from the remaining diversity among the national antitrust enforcement frameworks’. D. GERARD, “The ECN” 19 of the online version of this article. However, such recognition does not imply that the different enforcement standards existing in the Member States do not give rise to any issues at all. Now that the system has been working for a decade, the remaining divergences may rather be seen as a matter of equality (i.e. given that the same provisions are being applied in all Member States, it appears appropriate to apply them and enforcement in a consistent manner throughout the EU). See for a similar vision PANEL TWO – BROAD SYSTEMIC ISSUES (comment made by C. GAUER 157. In this respect, achieving more convergence (although not necessarily through harmonisation) appears to be one of the crucial challenges under the current enforcement system.
The acceptance of a sufficient degree of equivalence in the different national enforcement systems as regards sanctions against undertakings, and the respective level of protection of the rights of defence, appear, in principle, relatively unproblematic. Nevertheless, this question becomes more intricate when sanctions can be imposed on natural persons.

As is well known, Article 5 of Regulation 1/2003 offers Member States the possibility to adopt other types of penalties, including sanctions for individuals, even if a number of Member States and the Commission itself only have the power to impose pecuniary sanctions on undertakings for violations of the antitrust provisions.\(^{888}\) This possibility has been used by a (growing) number of Member States that have the power to impose different sort of sanctions for violations of the EU (or national) antitrust rules.

Prison sentences for competition law violations can be imposed on individuals in Austria (for bid rigging), Cyprus, Czech Republic, Estonia, France, Germany (for bid rigging), Greece, Ireland, Hungary (for bid rigging), Norway, Poland (for bid rigging), Romania, Slovakia, Slovenia and the UK. Additionally, a high number of NCAs also have the competence to impose personal fines. For instance, individuals in Germany may be sanctioned with fines up to €1 million for anti-competitive conduct. In the Netherlands, natural persons who have exercised de facto leadership with regard to anti-competitive conduct may face fines of up to €450,000. In France, the Competition Authority can impose fines of up to €75,000. In Ireland, individuals may not only be imprisoned (up to ten years for taking part in a cartel agreement) but they also face a maximum fine of €4 million. Furthermore, in the UK, imprisonment and unlimited fines are also combined with disqualification of individuals who participate in cartels.\(^{889}\)

This brief comment not only illustrates the increasing trend to adopt stricter and more personal sanctions in the Member States. It also shows that penalties for natural persons involved in an infringement of the (EU) antitrust rules, and more specifically in a cartel agreement, can significantly vary from Member State to Member State.\(^{890}\) This wide assortment of sanctions ranges from fines for individuals, to director or manager disqualification and even custodial penalties. Since, as a general rule, the level of protection of the rights of defence is intrinsically linked to the severity of the penalty, the existing divergence in sanctions within the ECN may create problems in terms of rights of defence.\(^{891}\) A key issue would, for instance, arise if information which is collected on the

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\(^{889}\) The trend to criminalise the enforcement EU (and national) competition law will be discussed in Chapter 12 and 13, section 1.1.

\(^{890}\) This aspect was also acknowledged in Regulation 1/2003, recital 16.

\(^{891}\) See also expressing these concerns e.g. PANEL TWO – BROAD SYSTEMIC ISSUES (comment made by C. GAUER 157): ‘[f]or me, this is the only point that might be really delicate, because in legal systems where sanctions applicable to individuals are available the level of legal protection for the defendants must be higher’). D. REICHELT also share this concerns as regards the rights of defence of the parties involved in a competition law procedure. More precisely he argues that ‘the presumption of equivalent national procedural safeguards based on the mere existence of sanctions of a similar kind […] is obviously unjustified. It is simply incomprehensible as to how this type of sanction could reveal the extent of procedural safeguards. Although the principle standards of the national enforcement systems are comparable, the details of the procedural laws still differ significantly’. D. REICHELT, “To What Extent” 777.
basis of the Commission’s investigative powers is subsequently exchanged and used in evidence on the basis of Article 12(1) of Regulation 1/2003 in a Member State, to punish the individuals responsible for the infringement.

Article 12(3) is designed to prevent this type of situation. By stipulating that information can only be used in evidence only if both the authority that transmits the information and the one receiving it are empowered to apply the same type of sanctions, Regulation 1/2003 offers a sufficient level of protection of the rights of defence.

One may wonder, however, what is the meaning of the term “sanction of a similar kind”. Article 12(3) of Regulation 1/2003 only draws a clear distinction between custodial and non-custodial sanctions, regardless of the qualification of the sanction in question under the national legal system. It is logical that custodial sanctions, given their severe nature, are differentiated from other types of penalties. Still, the concept of “non-custodial sanctions” (which comprises fines for individuals as well as disciplinary actions), seems too broad to constitute the relevant criterion to qualify a sanction as being of “a similar kind”, in the meaning of Article 12(3) first indent. Doing

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892 As it will be examined in Chapter 7, the Commission has far reaching investigative powers. The wide scope of application of such investigative competences is also linked to the fact that only companies can be punished by the Commission for EU competition law infringements.

893 See also W. Wils, “Is Criminalization” 307-308. W. Wils not only maintains that this situation may indeed be problematic as the rights of defense of individuals may be weakened. Additionally, he comments that even if the Irish and United Kingdom (where individuals can be sent to prison) courts probably would have refused the use of evidence collected by the Commission, on the other hand, the risk of evidence collected by the Commission being subsequently used in Ireland or the United Kingdom to send individuals to prison, could have led the EU courts or legislators to raise the level of the rights of defence in proceedings by the Commission to the same level at that applying to criminal investigations in Ireland or the United Kingdom. If this were the case, as Wils rightly points out, this could seriously endanger the effectiveness of the Commission’s investigations.

894 See para 28(c) of the Network Notice. See also PANEL TWO – BROAD SYSTEMIC ISSUES, comment made by C. Gauer 157. C. Gauer comments on the solution proposed in the draft regulation. Article 12(2) of the draft Regulation reads as follows: ‘[i]nformation provided under paragraph 1 may be used only for the purpose of applying Community competition law. Only financial penalties may be imposed on the basis of information provided’. C. Gauer observed that ‘with a provision in this sense in the new regulation the system could stand as it is’. On the other hand it should be admitted that by recognising that sanctions can indeed vary depending on the Member State and not completely excluding the possibility to use the information obtained through the ECN from the outset, the final version of Article 12 enhances cooperation within the ECN and allows for a more effective enforcement of the antitrust provisions.

895 See Regulation 1/2003, Article 12(3). In general, the term “custodial sanction” can be defined as any sanction involving a deprivation of freedom of movement, for instance, placing an individual in a closed residential setting which is not home, regardless whether he is allowed to leave the premises during the day or during weekends.

896 In this regard, it should be pointed out that some confusion existed as regards the general qualification of a sanction as criminal. For instance, it has been argued that all sanctions imposed on individuals for EU competition law infringements are of criminal law nature (see J. Nowag, “Due Process” 116, submitting that ‘Article 12(3) limits the use of information as evidence in criminal cases against individuals’ (emphasis added). This vision is, however, not accurate. Article 12(3) simply limits the use of the information exchanged as regards sanctions imposed on individuals. Although it is true that sanctions imposed on natural persons may often be qualified as criminal in certain Member States, not all types of sanctions imposed on individuals are of criminal nature. Reasonably, depending on the national legal system, pecuniary fines imposed on natural persons may also be of administrative nature. In addition, it is important to add that the confusion as regards the criminal nature of sanctions has been clarified by the ECHR and EU Courts (ECJ 5 June 2012, Case C-489/10, Criminal proceedings against Łukasz Marcin Bonda (Reference for a preliminary ruling: Sąd Najwyższy – Poland), para 37. According to that case-law, three criteria are relevant in this respect. ‘The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur’. See also, inter alia, Judgment of the ECtHR of 8 June 1976 in the case of Engel and Others Publications Series A no. 22, paras 80-82. For an interesting analysis of the characteristics of classic criminal sanctions see W. Wils, “Is Criminalization” 268-271. The qualification of a sanction as “criminal” or “administrative” under national law is, however, without prejudice of the wider meaning of “criminal” in the European Convention of Human Rights.
so would imply that a NCA which is competent to impose personal financial fines, would be able to collect evidence and transmit it to a NCA that has the power to impose a disciplinary sanction.

Disciplinary sanctions, such as director or manager disqualification, do not belong to the category of custodial sanctions. However, it is difficult to overlook the special character of this type of penalties. Disciplinary measures involve a deprivation of the personal freedom of the individual in question. To be precise, the person sanctioned will not be able to exercise his/her professional position during a certain period of time. Therefore, the consequences linked to this type of sanctions also constitute a strong moral deterrent and will probably have negative repercussions on the (professional) reputation of the person concerned. The fact that disciplinary sanctions involve a restriction of the personal freedom not only suggests that this sort of sanction is substantially closer to custodial sanctions than to financial sanctions. Given their specific character, disciplinary measures should not be classified in the same category or group as financial sanctions. It appears more appropriate to consider them as an independent category of sanctions in the context of Article 12(3). As a consequence, if a NCA is planning on imposing a sanction based on the information received pursuant to Article 12(1), and the sanction consists in a disqualification measure, it is necessary, according to Article 12(3) first indent, that this same sanction is available under the enforcement system of the transmitting NCA. Or, in other words: both NCAs should be able to “do the same”.

If the legal systems of the transmitting and the receiving authority do not foresee similar types of sanctions, according to this reasoning, it is likely that the procedural rights for individuals will also

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897 In this regard S. FORRESTER rightly comments that ‘[t]he knowledge by directors [or executives of companies that have engaged in cartels] that they risk losing their jobs would serve as a threat, whilst being easier to enforce than criminal sanctions’. In effect, the mere fact of having this knowledge can have a strong deterrent effect. See I. S. FORRESTER, “Searches Beneath the Cherry Tree in the Garden: European Thoughts on How to Enhance the Task of Uncovering and Thereby Deterring Cartels” in C.-D. EHLMERANN AND I. ATANASIU (eds.) European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Oxford, Hart Publishing 2007, 694 p., at 190 (hereafter: ‘I. S. FORRESTER, “Searches Beneath”’).

898 See for a similar opinion I. S. FORRESTER, “Searches Beneath” 190. Interestingly, this author speaks of professional disqualification of directors as ‘a complement or an alternative to criminal sanctions’. This statement suggests that according to this author, disciplinary measures should be considered as an independent category of sanctions. See also S. BRAMMER, Horizontal aspects 183-184 of the electronic version of this publication. (In this regards BRAMMER rightly points out that ‘[e]ven though the Network Notice apparently differentiates only between […] “sanctions which result in custody and other types of sanctions such as fines […] and other personal sanctions”, one may consider that a third category of penalties exists which is not similar to any of the two first-mentioned categories. These would be disciplinary measures such as the disqualification of company directors (This cartel law sanction is possible, for instance, in the UK under the Company Directors Disqualification Act 1986,) or the suspension of certain civil rights’. S. BRAMMER, Horizontal aspects 183 of the electronic version of this publication).

899 This position has, however, not been shared by all. For instance, B. PERRIN groups Member States according to the type of sanction (custodial or not custodial) they can impose. Hereinafter, he deduces that any information exchanged between the States which have the competence to impose custodial sanctions ‘is likely to be admissible since each of these Member States have sanctions of a “similar kind” (i.e. imprisonment).’ In contrast, any information exchanged between Member States which cannot impose custodial sanctions is likely to be admissible since each of these Member States have sanctions of a “similar kind” (i.e. non-custodial). Still, according to PERRIN’s reasoning, “any information transferred from [Member States having the competence to impose custodial sanctions] to another Member State is only admissible if it has been collected with the “same level of protection of the rights of defence””. Finally he adds that ‘any information transferred from a Member State [which cannot impose custodial sanctions] to [the other group of Member States] is inadmissible to impose custodial sanctions’. See B. PERRIN, “Challenges” 554-555. This vision does, however, not appear correct. Since a high level of protection of the rights of defense will be granted in the Member States which include custodial sanctions, it is logical that Member States such as Ireland, which can impose custodial sentences, can transmit admissible evidence to Member States which can only impose fines. The key question in this regard is whether the right of defense are equally protected under both systems.
considerably diverge. Also, in this instance, Regulation 1/2003 foresees a solution which is designed
with two different purposes. First, to avoid that the use of evidence against individuals is completely
precluded and, second, to guarantee that the rights of defense of natural persons remain fully
protected. To this effect, the second indent of Article 12(3) requires that, in order to impose sanctions
on individuals, the transmitting authority must collect the information in a way which respects the
same level of protection of the rights of defence of natural persons, as offered by the national rules
of the receiving authority.\footnote{See para 28 (c) of the Network Notice.}

Even if the two requirements mentioned above could, theoretically, guarantee an equivalent level of
protection of the rights of defence of individuals, (regardless in which Member State the information
has been collected and used), Article 12(3) of Regulation 1/2003 goes one step further and offers
additional protection for natural persons when the information collected via the network can be used
to impose \textit{custodial sanctions}. In this scenario, even if the same level of protection of the rights
of defence is offered in both systems, a natural person can be imprisoned on the basis of the evidence
collected by a NCA of a different Member State only if the conditions established in Article 12(3)
first indent are satisfied; particularly, when custodial sanctions can be imposed on the basis of both,
the legal system of the transmitting authority, and the legal system of the receiving authority.

The justification of this exceptional treatment of the exchange and use of information when such
information can be used to imprison individuals, can again be found in the ultimate goal of Article
12(3), \textit{i.e.} to guarantee a uniform level of protection of the rights of defence of natural persons. Such
protection becomes imperative when individuals, who are found accountable for an infringement of
the EU antitrust provisions, may face the most severe kind of sanctions.\footnote{As to the question whether the equal protection of the rights of defense should be analysed in general on the grounds of the procedural guarantees offered by the legal system of the transmitting NCA, or a case specific evaluation should be conducted, Article 12(3), second indent as well as paragraph 28 of the Network Notice appear to indicate that an analysis of the case at hand is necessary. Accordingly, even if in theory the legal system of the transmitting authority offers a high level of protection of the rights of defense, it should be scrutinized how such rules have been applied during the investigation and the collection of evidence. This is indeed a difficult exercise, certainly for the receiving authority which must be well informed about the level of judicial protection offered by the system of the transmitting authority. See also commenting on this aspect S. BRAMMER, Horizontal aspects 185 of the electronic version of this publication.} Given the serious nature of the sanction, it can indeed be presumed that a system which does not provide for this same type of punishment will seldom (if at all) offer the same level of protection of the rights of defence as the laws of a Member State which provides for imprisonment. Furthermore, attempting to analyse whether an equal level of protection of the rights of defence is offered by both systems, when only one system provides for custodial sanctions, may often lead to an extremely complex and unproductive exercise. As mentioned above, generally, the analysis will probably conclude that the level of protection of the rights of defence is not equivalent\footnote{The fact that custodial sanctions are the most serious punishment available under national competition enforcement systems can not only be deduced from the nature of the sanction itself, but also from the special treatment provided for such sanctions under Regulation 1/2003. Indeed, as commented above, this Regulation only distinguishes between custodial sanctions on the one hand and non-custodial sanctions, on the other. In addition, Regulation 1/2003 foresees exceptional rules for the exchange of information within the Network when an individual can be imprisoned on the basis of the information collected in a different Member State.} Spending time and resources on

\footnote{A. WILLEM KIST, “Exchange” 361. This author elaborated on this aspect by comparing the draft of the current Article 12, to the situation preceding Regulation 1/2003 with respect to information exchange. In this context, he pointed out that before transmitting information to another Member State, the Dutch competition authority had to conduct “extensive research into the legislation of the Member State” to determine the level of judicial protection. Furthermore, according to B. PERRIN (“Challenges” 556), “[t]his inquiry was not limited to statutory language, and the Director-General of the...
conducting such assessment may, therefore, not only undermine the effectiveness of the investigation in question, but could also compromise the efficient working of the ECN. In these circumstances, in order to guarantee an equivalent degree of protection of the rights of defence of natural persons, requiring that the transmitting authority can also impose this type of sanctions appears, in principle, a suitable solution.

In general, the set of conditions established in Article 12(3) as regards information exchanged – on the basis of Article 12(1) – which can be used against natural persons, is meant to ensure the coexistence of the different types of sanctions available in the Member States, while the rights of defence of individuals remain safeguarded.\footnote{NMa also considered the practical application of such protections (citing A. WILLEM KIST, “Exchange” 357). This is a resource intensive and time-consuming assessment for NCAs to make. It will also likely result in litigation after the NCA has made its own conclusion, either before the exchange of information actually takes place, at the moment that it is admitted as evidence in national proceedings, or in subsequent or parallel proceedings before the ECJ or ECHR’}.\footnote{For a critical view on the presumption of equivalent national procedural safeguards, based on the existence of sanctions of a similar kind see e.g. D. REICHEL, “To What Extent” 777.} The fact that information can freely circulate among the Member States, could turn out to be problematic if the information received can also be used in each Member State without any kind of limitation. Such issues would particularly arise – at a national as well as at the EU level – when the information is used in evidence to (seek to) impose sanctions on individuals, and more specifically, prison sentences. Article 12(3) is designed to prevent this undesirable situation by accommodating all the different types of sanctions within the decentralised enforcement system.

Nevertheless, it is also important to note that, even if the information collected cannot be used to impose custodial sanctions when the transmitting authority does not foresee this possibility, Article 12 of Regulation 1/2003 still allows the transmission of information.\footnote{See supra section 2.3.1.2(a)(ii) of this Chapter.} Therefore, if following the transmission of information, the receiving authority suspects that an infringement of the EU antitrust rules has been committed, it can start its own investigation and gather the relevant information which will allow to establish the infringement. This information may, subsequently, be used in evidence to impose custodial sanctions on individuals. This possibility can be seen as an instrument to improve
the detection of violations of the EU antitrust rules and, hereby, enhance the effective enforcement of the antitrust provisions by NCAs.  

The mechanisms offered by Article 12 of Regulation 1/2003 can undoubtedly be proclaimed as one of the cornerstones of the modernisation reforms, which are crucial to efficiently exploit the different dimensions of the Network. In effect, the competition agency that discovered the relevant information or evidence will not necessarily have to play the decisive role in bringing the violation of the competition rules to an end, if it is not well placed to do so. Instead, it can transfer the relevant information to an authority that is in a better position to accurately estimate the scope of the violation and sanction the infringement. Given the ever growing complexity that undertakings are showing to coordinate their behaviour in the market with the objective of setting higher prices, this possibility can also be seen as an additional and necessary step to match the efforts made by cartelists to conclude their illegal agreements.

Although Article 12 of Regulation 1/2003 has been proclaimed – and is – as an essential precondition for case allocation, this provision also fulfils other significant roles within the decentralised enforcement system. The multiple functionalities of this provision are discussed by the Commission in its Staff Working Paper. According to this document, in the period from 2004 to 2009 information exchanges conducted on the basis of Article 12 have taken place to and from the Commission and between NCAs. Such exchanges usually aimed at (i) passing information in order to (re)allocate a case to a certain agency; (ii) enabling the authorities receiving information to better visualise a suspected infringement and conduct an inspection and, last but not least; (iii) transferring the information collected by an NCA on behalf of a NCA to the requesting NCA in the context of inspections.

907 W. WILS notes in this context that this possibility could discourage individuals, as well as the undertakings wanting to protect these individuals, to cooperate with the investigations of the Commission under the EU and national Leniency programmes. The Network Notice handled this issue by establishing that information provided under a leniency programme, to the Commission or a NCA, will not be transmitted to a different competition authority except if the receiving authority commits itself not to use this information (or any other information obtained following that information), to impose sanctions on the leniency applicant or on any of its employees or former employees (Network Notice, paras 37-42. See further infra section 2.3.1.2(d)(ii)). Still, it has been submitted that the (almost) unlimited exchange of information within the network, combined with the possibility to impose custodial sanctions may put at risk the effectiveness of the enforcement of the cartel prohibition when leniency applications are scarce. See W. WILS, “Is Criminalization” 308-310.

908 It is interesting to mention that at the time the Commission Staff Working Paper on the functioning of Regulation 1/2003 was published, there was not much information as regards the application of the conditions provided by Article 12(3) of Regulation 1/2003 and the use of information in evidence to impose sanctions on individuals. Particularly, the Commission Staff Working Paper (para 244) comments that “[n]o network member has reported any particular case where it had to carry out an analysis of the conditions of Article 12(3) in view of using information received from another network member, nor where it abstained from requesting potentially relevant information, nor where it was unable to use in evidence information relevant to a case for the imposition of custodial sanctions received from another network member’. However, (it continues), ‘the question has arisen whether the restriction to use of information for the imposition of custodial sanctions where the law of the transmitting authority does not foresee this type of sanctions, is too far-reaching and constitutes an obstacle to effective enforcement’ (paras 244-245).

909 See also K. DEKEYSER AND M. JASBERS, “A New Era” 6.

910 See supra Chapter 2.

911 These exchanges normally occur at a very early stage of an investigation (prior to inspections) and are highly confidential. Commission Staff Working Paper on the functioning of Regulation 1/2003, para 242.

The first experience with the application of the modernisation Regulation – as described in the Commission Staff Working Paper – shows that the majority of cases in which information was exchanged on the basis of Article 12 related to the Article 22 inspections scenario. Together with the possibility to exchange information and using it as evidence on the basis of Article 12, Article 22 constitutes a key instrument to promote cooperation within the ECN.

b. Providing administrative assistance within the ECN

Article 22(1) of Regulation 1/2003 establishes the competence of NCAs to carry out any inspection or other fact-finding measure in its own territory (such as request for information or conducting interviews) on behalf and for the account of a different competition authority, which wishes to establish a violation of Article 101 (or 102) TFEU.

The information collected by the “requested authority” can be exchanged and used in accordance with the rules of Article 12 of Regulation 1/2003. This implies that the same rules (and safeguards) are applied to the transmission and exchange of documents, regardless of whether the transmitting authority had the information in question or it acquired it following a request of a different NCA made on the basis of Article 22.

Given the free spirit of cooperation that constitutes the very foundation of the ECN, it is unlikely that a NCA would simply decline a request for assistance. It is however important to stress that, as the wording of Article 22 indicates, it is for the NCA that is requested to conduct an inspection or provide administrative assistance, to decide whether it will comply with the request. Or, put otherwise, a NCA has full discretion to make a decision in this regard. Despite this margin of discretion, reasonably, once a NCA decides to cooperate in fact-finding measures, there is an obligation to transmit the information that has been collected.

In addition, the officials of the investigative authority of the Member States who are responsible for conducting these inspections or providing the requested assistance, must exercise their investigatory powers in accordance with their national law. The national rules of the Member State in whose territory the inspection takes place, will, therefore, be decisive to establish whether the information or evidence was legally gathered.

914 See K. DEKEYSER AND D. DALHEIMER, “Cooperation” 11. See also S. BRAMMER, Horizontal aspects 177-178 of the electronic version of this publication.
915 However, NCAs only can decide to cooperate to the extent that they are competent to provide assistance and conduct investigative measures under their respective national systems.
917 Or in the words of K. DEKEYSER AND D. DALHEIMER (“Cooperation” 11); ‘the investigating authority can only act on the basis of its investigatory powers, as provided by national law’. It follows that if a NCA declines a request for assistance, this decision could also be a consequence of the impossibility to conduct the requested investigations or to provide the assistance under the national law of the investigating authority.
918 See supra 2.3.1.2(a). See also S. BRAMMER, Horizontal aspects 178 of the electronic version of this publication. This author also adds that ‘[e]qually, the question whether the authority granting assistance is at all entitled, in terms of proportionality of the measures, to conduct an on-the-spot investigation at a particular company or search the private premises of an employee is governed by the applicable law in the Member State of origin. Where the transmitting authority is required to demonstrate a certain level of suspicion in order to be permitted to search business premises or private homes, the NCA requesting assistance has to furnish sufficient information for the transmitting authority to establish the probable cause according to the standards applicable in the Member State where the inspection is to be
Together with Article 12 of Regulation 1/2003, Article 22 establishes essential cooperation mechanisms to combine the NCA’s and Commission’s actions in a way that enforcement and fact-finding initiatives, and more specifically their investigations and detections capacity, are strengthened and maximised throughout the European Union. Both provisions facilitate the collection of evidence and, in general, the mutual assistance amongst NCAs. Notably, Article 22(1) makes it possible to find and collect evidence of an infringement when the evidence is located in a different Member State. In this sense, both rules (i.e. Article 12 and 22 of Regulation 1/2003) constitute vital mechanisms of the system installed by Regulation 1/2003. The European cartel prohibition can now be enforced by a single NCA, even if it needs the investigatory and administrative support of the NCAs of other Member States to prove the existence and punish the illegal agreement.

In the field of cartel enforcement, assistance provided in accordance with Article 22 has proven to be very useful. Commonly, such requests for assistance were followed up by the respective authority and, frequently, the results have led to cartel investigations by the receiving NCA. This can be illustrated with several examples. Particularly, K. DEKEYSER AND D. DALHEIMER affirm that:

‘[e]ven during the first months of Regulation 1/2003 Article 22(1) was applied multiple times. For example, inspections, requested by the Italian competition authority were conducted in Germany, France and Spain at the request. Similarly, the Austrian competition authority carried out two inspections at the request of the German authority. In addition, interviews have been conducted by the UK authority on behalf of the Irish authority. Moreover, the application of this provision has not descended with the years, on the contrary: the assistance mechanisms are still frequently used’.  

This brief comment indeed demonstrates the willingness of ECN members to cooperate by assisting each other and sharing information and knowledge, significantly reinforces their individual (but, at the same time, collective) capability to detect and to sanction violations of EU competition law.

conduct. The fact that a lower threshold would apply in the Member State of the authority requesting assistance is irrelevant. Similarly, the national the law of the NCA carrying out the inspection determines whether a search warrant is required*.  

Interestingly, it has even been argued that ‘the provisions on exchange of information (Article 12), on carrying out an investigation on behalf of another authority (Article 22) - are, actually, measures of harmonisation’ (PANEL TWO – BROAD SYSTEMIC ISSUES (comment made by C. GAUER 156). See further section 2.3.1.2(d).

This statement is confirmed by the fact that as the new system regarding the allocation of cases indicates, the regime is intended to allow Article 101 TFEU to be applied and enforced by one single European competition authority. See also in this sense S. BRAMMER, Horizontal aspects 176-177 of the electronic version of this publication.


For example, in March 2010 the Italian Competition Authority carried out an inspection on behalf of the Spanish Competition Authority at the premises of one of the market leading producers and sellers of plastic containers for fruit and vegetable packaging located in Italy. Following the inspection, the Spanish authority opened formal proceedings on the basis of the Spanish Competition Act 15/2007 of 3 July 2007 and Article 101 TFEU. The inspection was very productive, and the cooperation and mutual support between the authorities took place fluently. Moreover, in the same year, the Austrian Competition Authority conducted an inspection on the behalf of the German Competition Authority in the sector of the production of fire-fighting vehicles and super-structural parts. See ECN, “Special Issue: a look inside the ECN Network, its Members and its work Brief”, December 2010, at 19, available at http://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf, (hereafter: ‘ECN, “Special Issue: a look inside”’). For examples of successful cooperation between Denmark and Sweden see ECN Brief, Extended Issue 5/2012, available at http://ec.europa.eu/competition/ecn/brief/05_2012/dk_sv.pdf, (hereafter: ‘ECN Brief, Extended Issue 5/2012’).

See also K. DEKEYSER AND M. JASPERS, “A New Era” 8.
As a whole, these possibilities constitute a crucial initiative to enhance effectiveness in EU anti-cartel enforcement.

c. The ECN as means to achieve full consistency: cooperation in individual cases and general policy discussions

Regulation 1/2003 contains three chief mechanisms designed to guarantee a fully coherent application and interpretation of the EU competition provisions. These rules are namely: (i) the obligations contained in Article 3; (ii) the requirement contained in Article 11(4) to inform the Commission before adopting a decision; and (iii) the power of the Commission to intervene in a case and, thereby, relieve the pertinent NCA of its competence to handle the case, as established in Article 11(6). These provisions constitute, as a whole, the essential foundation of the far-reaching cooperation possibilities among the ECN participants.

As discussed above, Article 3 imposes the obligation to apply EU competition law in a manner that convergence between national and EU competition law is ensured when trade among Member States is affected.\(^{925}\) Article 11(4) also plays an essential role in further enhancing consistency and supporting the principles established in Article 3. More precisely, this provision stipulates that NCAs must inform the Commission no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation. For this purpose, NCAs must provide the Commission with a summary of the case, or (a draft of) the envisaged decision. Furthermore, this information may also be made available to other NCAs. In practice, this is frequently the case.\(^{926}\) In this context, the Commission – and other members of the ECN – may make informal observations\(^{927}\) to the NCA in question about the case at hand.\(^{928}\) According to the Commission Staff Working Paper, ‘[t]he Directorate General for Competition has developed a practice over the last years of submitting observations to the national competition authorities in many cases’. Such observations commonly focus on (relatively) significant issues and are meant to promote a uniform approach on aspects concerning e.g. product market definition (i), coordination with on-going Commission cases (ii) or with EU case-law (iii).\(^{929}\) Although such observations should be regarded as an attempt to draw the NCAs’ attention to a precise issue that may be relevant for the assessment of the case, it is important to emphasise that NCAs voluntarily decide whether or not the comment is to be taken into account in their envisaged

\(^{925}\) For a more detailed discussion of the obligations contained in Article 3 see supra sections 2.2.2 and 2.2.3 of this Chapter.

\(^{926}\) See J. CAPIA'I et al., “Developments in and around” 84. These commentators affirm that '[b]y 1 June 2012, the ECN had been informed of 588 envisaged decisions by NCAs. The number of enforcement decisions reported by NCAs and reviewed by the Commission was consistently high throughout the years, reaching a peak in 2010 which amounted to a 36% increase compared to the previous year. In 2011, no less than 88 cases were submitted by the NCAs'. See also D. GERARD, “The ECN” 12 of the online version of this article; “Report on the Enforcement by NCAs and the ECN” in M. MEROLA AND D. WAELEBROECK (eds.) Towards an optimal enforcement of competition rules in Europe, Brussels, Bruylant 2010, 502 p., at 338-339.

\(^{927}\) These observations have been made orally but also in writing form. About 10% of the cases contain written observations of DG Competition. Commission Staff Working Paper on the functioning of Regulation 1/2003, para 257.

\(^{928}\) ECN Notice, para 46. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 255 which states that '[t]he Directorate General for Competition acknowledges receipt of information on envisaged decisions pursuant to Article 11(4), permitting undertakings to verify compliance with the obligations provided for by Article 11(4) in the proceedings of the national competition authority or, where they deem it appropriate, in appeal proceedings in the Member States'.

\(^{929}\) Commission Staff Working Paper on the functioning of Regulation 1/2003, para 257. This document continues by stating that the observations did not contain any new evidence or information that would be exculpatory or incriminating.
decision. However, as the Commission Staff Working Paper specifies, these comments are normally taken into consideration in the final decision. Moreover, in order to further promote coherence, Article 11(5) provides that NCAs may also discuss with the Commission any case involving the application of EU law. The instrumental role of discussions of cases within the network is also reinforced by the role of the Advisory Committee. In fact, the Advisory Committee is described in the Network Notice as ‘the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law’.

In the White Paper on modernisation, the Commission anticipated that ‘[t]he proper functioning of the network between the Commission and the Member States clearly implies a reinforcement of the role of the Advisory Committee on Restrictive Practices and Dominant Positions. It would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with them […] the Commission, acting on its own initiative or at the request of a Member State, could also be empowered to ask the Committee for its opinion on cases of application of Community law by national authorities’.

This early statement has clearly inspired the wording of Article 14(7) of Regulation 1/2003. This provision stipulates that cases which are being dealt with by a NCA, can be included on the agenda of the Advisory Committee by the Commission and thereupon discussed. This can be done both at the request of a NCA or of the Commission. Furthermore, it is interesting to note that Article 14(7) adds that ‘[a] request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6)’. This article is meant to promote dialogue between the NCAs and the Commission.

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930 In this context the Commission clarifies that ‘[e]very case is investigated and decided under the full and sole responsibility of the authority dealing with the case’. Ibid, para 258.
931 Commission Staff Working Paper on the functioning of Regulation 1/2003, para 259. The NCAs maintained that, in the rare cases that such considerations or observations were not taken into account, this was due to the particularities of the case (e.g. specific market knowledge). In addition, Commission commented that observations exchanged in the framework of Article 11 of Regulation 1/2003 are ‘internal documents’ that ought not to be disclosed. See Article 27(2) of Regulation 1/2003 and ECN Notice, para 4.
932 This can also be done by the Commission on its own initiative. In either case, the NCA in question is informed.
933 In is interesting to note that the Advisory Committee also existed under Regulation 17. However, as stated in Regulation 1/2003, since the Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 functioned in a very satisfactory manner, it was presumed that it would fit well into the new system of decentralised application. Accordingly, the revised system built upon the rules of Regulation 17 while improving its effectiveness. Regulation 1/2003, recitals 19-20. However, it has been argued that ‘[i]n practice, though, it is unclear whether the Advisory Committee has actually grown in importance with the entry into force of Regulation 1/2003’. D. GERARD, ‘The ECN’ 20 of the online version of this article.
934 See in this sense J. CAPIAU et al., “Developments in and around” 84: ‘[f]rom the early days of enforcement by the Commission, Member States’ authorities have been involved in the decision-making of the Commission through the Advisory Committee’.
935 ECN Notice, para 58. See also ECN Notice, para 1.
936 White Paper on modernisation, para 106.
937 In either case, the Commission shall inform the competition authority concerned. However, the Advisory Committee will not issue opinions in cases dealt with by NCAs (Regulation, 1/2003, Article 14(7)).
938 See also ECN Notice, para 62. Despite the greater importance of the role of the Advisory Committee with the entry into force of Regulation 1/2003, it has been questioned whether ‘the Advisory Committee has actually grown in importance with the entry into force of Regulation 1/2003 and, specifically, whether national cases have been discussed at any of its meetings, at least more than occasionally’ (D. GERARD, ‘The ECN” 20 of the online version of this article).
939 It must be pointed out that the mere possibility to discuss national cases during these meetings undoubtedly constitutes an advantage. Therefore, if there is a lack of consensus between competition authorities, they will always have the opportunity to deal with the issue in question by means of dialogue in the framework of the Advisory Committee.
in case of a disagreement as regards the application of EU competition law. In this regard, it can be considered a preventive measure for both NCAs and the Commission to reach a consensus and thereby avoid proceedings to bring NCAs investigations to an end on the basis of Article 11(6).\footnote{On the other hand, following this interpretation, this provision confirms that the mechanism envisaged in Article 11(6) of Regulation 1/2003, is indeed conceived by Regulation 1/2003 as a subsidiary or, in other words “last back up plan” to achieve consistency. Accordingly, only when the Commission perceives an important inconsistency or incoherence, it will take the necessary steps on the basis of Article 11(6) to initiate its own proceeding and, thereby, avoid an undesirable outcome.}

Despite the importance of these rules, one of the most important statements made in Article 14(7) of Regulation 1/2003 is that ‘[t]he Advisory Committee may also discuss general issues of Community competition law’ (emphasis added).\footnote{See also EEC Notice, para 63.} It is surprising, in this context, that the Commission Staff Working Paper did not mention the (role of the) Advisory Committee within the ECN framework.\footnote{See also referring to this aspect D. GERARD, “The ECN” 20 of the online version of this article.} Yet, the proclamation that ‘[t]he ECN is a forum [which] provides a framework for discussing a broad range of competition related topics’\footnote{See e.g. See EEC, “Special Issue: A Look Inside” 4. See also Report on the function of Regulation 1/2003, para 29; Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 248 et seq; see also commenting on this aspect D. GERARD, “The ECN” 20 of the online version of this article.} or ‘a forum for discussion and cooperation’ as defined in the ECN Notice itself,\footnote{EEC Notice, para 1.} has undeniably become reality.

The ECN joint Statement in effect predicted that the decentralization of the implementation of EU competition rules would strengthen the position of the NCAs, which – as fully competent authorities to apply the EU antitrust provisions – would actively contribute to the development of competition policy, law and practice.\footnote{EEC joint Statement, para 6. See also D. GERARD, “The ECN” 20 of the online version of this article.} This vision is fully in line with the statement that: ‘[t]he Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency’ (emphasis added).\footnote{This has also been recognised by the Commission in the Staff Working Paper on the functioning of Regulation 1/2003, para 114. See also e.g. F. CENGIZ, “Multi-level Governance in Competition Policy: the European Competition Network”, 2010 (35) ELRev, 660-677, at 667-668 (hereafter: ‘F. CENGIZ, “Multi-level Governance”’); D. GERARD, “The ECN” 20-21 of the online version of this article.} Moreover, the role of the ECN became even greater than the Commission itself expected.\footnote{See Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 114 and 248.} In practice, the formal mechanisms contained in Regulation 1/2003 which are designed to ensure consistency, have mainly been overtaken by the far-reaching endeavour of the ECN members to enhance the coherent application and interpretation of the EU antitrust rules.\footnote{ECN Notice, para 6.}

‘Currently the ECN meets at different levels: (i) the meetings of the Directors General of the European Competition Authorities provide the forum for discussing strategic issues within the Network and constitute the top level of the ECN framework. (ii)The ECN Plenary where horizontal antitrust issues of common interest are discussed. Participants are officials of the national competition authorities responsible for ECN matters and officials of the ECN unit of DG Competition. (iii)The horizontal Working Groups: the ECN provides for a number of working groups dealing with horizontal questions of legal, economic or procedural nature. Examples include the Cooperation Issues and Due Process Working Group and the Competition Chief
Economists Working Group. (iv) The Sectoral Subgroups: the ECN encompasses a range of subgroups dealing with particular sectors’. 948

According to the Commission, the constant dialogue between the EU competition authorities on all levels over the last years has been decisive to achieve a higher level of coherence in the application of the EC competition rules. Frequent (informal) exchange of experiences and views, has resulted in increased confidence between network members, which, at the same time, increases their expertise and enhances consistency. In the words of the Commission, ‘[t]his has led to the creation of a space to think that allows fruitful discussions in a spirit of close cooperation and with the final objective of promoting a common competition culture in Europe’. 949 950

This discussion suggests that, generally, the information sharing tools combined with the possibility to get involved in discussions as regards the application, interpretation and enforcement of the EU competition rules, undoubtedly constitute a key element of the ECN. These elements not only allow NCAs – and the Commission – to share enforcement experiences and generally learn from each other’s practical approaches. The informal (and in certain cases, voluntary) nature of such initiatives further motivate competition authorities to seriously consider the observations of other ECN members about their (envisaged) decisions. 951 952 Moreover, the rules contained in Article 11(4) function well in practice. These positive experiences have, at the same time, made the major fears

948 ECN, “Special Issue: A Look Inside” 4. Currently functioning subgroups include the Energy Subgroup, the Food Subgroup and the Banking and Payments Subgroup. In these subgroups, expert officials of the NCAs and the DG Competition share views and good working experiences. Mainly, they work on substantial questions, thereby enhancing a common competition culture in their sectors.

949 Commission Staff Working Paper on the functioning of Regulation 1/2003, para 249. As the Commission affirms ‘[t]his achievement is widely recognised by the legal and business community which calls, however, for more transparency about ongoing discussions in the network’. See also J. CAPIAU et al., “Developments in and around” 84 commenting in particular that the permanent exchange of experiences and extensive communication help to ensure common approaches in similar cases; E. PAULIS and E. DE SMUTER, “Enhanced enforcement of the EC competition rules since 1 May 2004 by the Commission and the NCAs. The Commission’s view”, Paper prepared for the conference “Antitrust Reform in Europe: A Year in Practice” organised by IBA (International Bar Association) and the Commission, March 2005, Brussels, at 9-11; F. CENGI, “Multi-level Governance” 667-668; D. GERARD, “The ECN” 21 of the online version of this article. This last commentator observes that ‘the setting up of the complex network enforcement machinery appears to have caused a natural hybridization of the policy-making process by allowing for the sharing of experiences beyond the mere sharing of information and eliciting bottom-up policy contributions from the various enforcement sites’.

950 In this regard, D. GERARD has observed that ‘[t]o the credit of the Commission, it emerges from recent studies that the latter hasn’t attempted to control or dictate such process but to encourage it and channel its manifestations, notably by providing organisational support. Thus, as Kassim and Wright have explained, if the Commission sets the agenda of ECN meetings, for example, NCAs are invited to approve it and to add items to it’ (D. GERARD, “The ECN” 21, referring to H. KASSIM AND K. WRIGHT, “The European” 16). Likewise, policy discussions are not dominated by the Commission, as its officials tend to take part in working groups more or less as passive observers (D. GERARD, “The ECN” 17). Eventually, the picture that emerges is very much that of a genuine “partnership of equals” between the ECN members all involved in a “joint enterprise” aimed to build a common competition culture (D. GERARD, “The ECN” 15-16). See also the 1/2003 Staff Working Paper, para 183.

951 See for a similar vision, D. GERARD, “The ECN” 13 of the online version of this article (and further references).

952 ‘Recent research about the ECN emphasises the increasing respect for the ECN as learning framework. Not only does it benefit NCAs which have a more limited experience with the (EU) competition rules but, these mechanisms allow the Commission to perform its role of supervisor and further develop an uniform and consistent EU competition policy’.

953 Yet, it has also been argued that the informal character of the ECN operational methods may put at risk the legal transparency and of the network and create due process issues (F. CENGI, “Multi-level Governance” 671). Such concerns relate particularly communication taking place in the framework of the ECN (which is not disclosed to parties) but may have an impact on the final outcome of the proceedings (see D. GERARD, “The ECN” 13 of the online version of this article).
regarding inconsistency and incoherency in a decentralised regime fade away. 953 This suggests that the Commission will only take the necessary steps on the basis of Article 11(6) when there is a major risk of incoherence.

d. Voluntary harmonisation within the ECN framework: the example of leniency

(i) The process of soft harmonisation

The impact of the ECN goes actually much further than the cooperation of obligations that were just discussed. By creating a forum for discussions in which competition authorities share all kind of experiences and debate issues (beyond individual cases), the ECN members are also capable of influencing national policy reflections. As such, the creation and further functioning of the ECN has undoubtedly created an accelerated process of voluntary harmonisation. 954

This section will show that this process of voluntary harmonisation plays a crucial role in promoting additional convergence also in areas that are not regulated by Regulation 1/2003, such as sanctions and procedural rules. This will be illustrated by analysing the degree of convergence achieved by the ECN members in the field of leniency.

As is well-known, while Articles 101 and 102 TFEU are generally applicable when there is an appreciable effect on interstate trade, 955 the procedural framework and the sanctions for the enforcement of these provisions have not been harmonised through European legislation. This means that NCAs (and national courts) will apply Articles 101 and 102 TFEU by using their respective national procedural rules and imposing the sanctions foreseen in their respective systems. 956 This results in considerable differences in these areas, which may undermine the cooperation mechanisms introduced by Regulation 1/2003 and the ECN Notice, and the effectiveness of the enforcement system as a whole. 957

953 Still, stakeholders argue that the Commission should further examine means to enhance consistency, for instance, ‘further strengthening of the mechanisms provided for in Article 11 (e.g. consultation instead of information, more systematic follow-up of observations and check of final decisions or appeal procedure to the Commission’. Commission Staff Working Paper on the functioning of Regulation 1/2003, para 261.

954 See in this sense F. CENGI, “Multi-level Governance” 669-670, who observes that the acceleration in the process of voluntary harmonisation is also a consequence of the fact that the modernisation reforms have intensified the symbiotic relationship between the national and EU legal regimes in the field of procedural cooperation. J. VENIT, “Modernization and Enforcement – The Need for Convergence: On Procedure and Substance” in C-D. EHLEMMANN AND I. ATANASIU (eds.) European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Hart Publishing, 736 p., at 337 (hereafter: ‘J. VENIT, “Modernization”’). This author comments that ‘the modernization program looks like a “best practices” adaptation and it would probably be mistaken to ignore the role that the interaction with other non-European antitrust enforcement agencies had on the decision to modernize. Indeed, learning from other enforcers and the adoption of best practices and the direction of the exchange is hardly one way has been one of the significant by-products of the greatly increased enforcement agency interaction over the past ten years. Compare K. DEKEYSER AND M. JASPERS, “A New Era” 11 (more precisely these authors call the ECN cooperation mechanisms “a catalyst for convergence”. See also J. CAPIAU et al., “Development in and around” 85-86; C. HARDING, “Effectiveness” 659.

955 See supra section 2.2.2 of this Chapter.

956 Despite the fact that each Member State must foresee and apply its own procedural rules and sanctions, their systems are obviously subject to the general principles of effectiveness and equivalence. See Joined cases C-295/04 to C-298/04, Munfredi [2006] ECR I-6619, paras 61 and 64.

957 See emphasising the damaging effects of procedural diversity e.g. K. DEKEYSER AND M. JASPERS, “A New Era” 13; F. CENGI, “Multi-level Governance” 669: ‘[i]n particular, diversity between national remedies was expected to jeopardise and complicate information exchange between legal regimes which impose civil and criminal remedies on anticompetitive behaviour respectively, due to the different levels of rights of defence enshrined in those regimes’. J. VENIT, “Modernization” 341.
Despite the absence of harmonisation in the field of sanctions and procedural rules, it appears that Member States started to voluntarily align procedures and/or sanctions towards a common European model, thereby leading to what has been described as a “healthy imitation process” or soft harmonisation trend.

The Reports by the ECN on investigative and decision-making powers, which were published for the first time in November 2012, confirm that considerable efforts have been made by national legislators to align and make the national procedures for the enforcement of Article 101 (and 102) TFEU more convergent. In particular, basic aspects of decision-making powers and procedures, such as the power to take prohibition or commitment decisions or to grant interim measures, are currently present in all or a great majority of Member States. Furthermore, procedural elements that are essential to safeguard the rights of defense (such as the right to be heard through a statement of objections or equivalent or the right to access to file) can also be found in all jurisdictions in one form or another.

This trend of increasing convergence in sanctions and procedural rules is clearly a positive and very welcome development. Not only undertakings that are operating in the market can benefit from additional legal certainty. Most importantly for this study, it also significantly enhances cooperation among the members of the ECN, which, as a consequence, will not be reluctant to rely on each other and further collaborate. In this sense, maximised convergence can undoubtedly contribute to promoting effective anti-cartel enforcement.

958 See e.g. K. CSERES, “Comparing” 17; C. LEMAIRE, “What is the Interplay between EU and National Enforcement and the Impact on Sanctions?”, presentation prepared for the conference “Deterring EU Competition Law Infringements: Are We Using the Right Sanctions?” organised jointly by Tilburg University and Liège Competition and Innovation Institute, 2012, Tilburg, at 17, available at http://antitrustfair.files.wordpress.com/2012/12/christophe-lemaire-interplay-between-eu-and-national-enforcement-mode-de-compatibilite3a9.pdf; J. CAPIAU et al., “Developments in and around” 86; K. DEKEYSER AND M. JASPERS, (“A New Era” 12) note “[a]n example would be the clear trend towards the abolition of the notification system at national level. Today, all but five Member States have abolished (or are in the process of abolishing) their notification system (see supra Chapter 5, section 1). Another area where a considerable convergence has already taken place is the alignment of national investigative powers to those of the Commission. This alignment concerns different aspects of the Commission’s competences such as the power to conduct spot investigations (power to seal business premises, books and records; power to inspect non-business premises), as well as the power to adopt interim measures, commitment decisions or to make general sector inquiries. In addition, it should be noted that the EU Courts have also made an important contribution to soften the existing divergences through their case law. Particularly, the EU jurisprudence on procedural rights in competition proceedings, together with the increasing alignment of procedural rules and sanctions of national laws towards the EU law model, over and beyond any implementation obligations, have been decisive to achieve the current degree of convergence. See K. DEKEYSER AND M. JASPERS, “A New Era” 12.


962 For instance, when a NCA requires a different NCA to conduct inspection on its behalf on the basis of Article 22 of Regulation 1/2003. See also K. DEKEYSER AND M. JASPERS, “A New Era” 12.

963 Commission SWD (2013) 159 final, at 12; see also e.g. A. M. MATEUS, “Ensuring a more level playing field in competition enforcement throughout the European Union”, 2010 (31-12) ECLR, 514-529, at 516-517; K. DEKEYSER AND M. JASPERS, “A New Era” 12.
(ii) The example of the leniency field

One specific and evident area of voluntary harmonisation is the field of leniency. The Commission’s leniency programme has proven to be one of the most efficient and effective enforcement instruments in the detection and punishment of cartels. Member States are free to decide whether or not to adopt national leniency programmes. Yet, it is unsurprising that, following the example of the Commission, this useful tool has been introduced in nearly all the national enforcement systems in order to improve and enhance the effectiveness of their cartel detection tools. Furthermore, given the great success of the leniency system, it is essential that the Commission and NCAs cooperate and do their best to maintain the success of the leniency programme(s) and further motivate undertakings to come forward and cooperate with a given competition authority.

Leniency in the context of the modernisation reforms

Ever since Regulation 1/2003 came into force, the leniency system has constantly been at the centre of the debate. In effect, Regulation 1/2003 did not introduce an EU-wide leniency programme that would harmonise the main elements and procedures of European leniency policies. Given the

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964 See also commenting that the field of leniency is a good example of voluntary harmonisation e.g. J. CAPIAU et al., “Developments in and around” 86; F. CENGIZ, “Multi-level Governance” 670; K. DEKEYSER AND M. JASPERS, “A New Era” 12; PANEL TWO – BROAD SYSTEMIC ISSUES (comment made by C. GAUER 157). C. GAUER comments in this context that ‘the [leniency] system can work without harmonisation of the different leniency programmes that currently apply in the Member States with respect to companies and/or individuals. At the same time, if the system is to work properly, we will have to make sure that efficient leniency programmes are set up in all Member States. But probably ‘soft’ harmonisation will lead to this effect’.

965 *Infra* Chapter 8. See C-D. EHLEMMANN, “Session A: Unearthing Cartels-The Evidence - Panel I: Oligopoly Theory and Economic Evidence” in C-D. EHLEMMANN AND I. ATANASIU (eds.) *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* Oxford, Hart Publishing 2006, 736 p., at 6. This commentator affirms that a ‘total of one hundred and thirty-four applications up to end of 2005 under the 2002 Notice was made by companies headquartered in twenty different countries, primarily in EU-15 Member States. […] By the end of 2005, twice as many applications had been submitted under the new Notice as compared with its predecessor’.

966 In 2012, all NCAs except Malta had adopted the leniency system. A list with the NCAs which have adopted a leniency programme can be found at http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf. In addition, in 2010 the Maltese competition authority was considering to introduce a leniency programme. See http://ec.europa.eu/competition/ecn/brief/01_2010/convergence_ecn.pdf. The first draft was published in 2013, see http://ec.europa.eu/competition/ecn/brief/03_2013/mt_len.pdf.

967 See also K. DEKEYSER AND M. JASPERS, “A New Era” 15. These authors rightly point out that ‘the above-mentioned trend amongst Member States to introduce leniency programmes has certainly been boosted and inspired by the know-how and experience of other ECN members of such programmes’.

968 The need to maintain the attractiveness of the leniency programme has been emphasised several times by the European competition authorities. See for instance, the 2002 Competition Report in which the Commission underlined that ‘[t]he new leniency notice improves on the 1996 leniency notice in several respects. It incorporates a number of changes designed to make it more attractive for companies to come forward, and thereby to make the Commission’s fight against cartels even more effective’. Commission, “XXXIIInd Report on Competition Policy”, 2002 Brussels, at 29.

ECN work-sharing and information exchange mechanisms adopted within the framework of Regulation 1/2003, it is evident that the success of the different leniency programmes in Europe is interdependent. This is illustrated, inter alia, by the possibilities introduced by Regulation 1/2003 to share information and use such information in evidence, which emphasised the need to protect the confidentiality of the information provided voluntarily by leniency applicants when the information in question is going to be exchanged within the ECN framework.

The Network Notice addressed this issue by installing specific safeguards for information submitted within the framework of the leniency programme. Paragraph 39 of the ECN Notice in particular provides the necessary protection by stipulating that when an NCA deals with a case that has been initiated on the basis of a leniency application, information submitted to the network pursuant to Article 11 cannot be used by other ECN members to start an investigation on their own behalf under the EU competition or under national competition law. Likewise, information transmitted for the purpose of obtaining assistance from another NCA under Articles 20 or 21 of Regulation 1/2003 or with the goal of carrying out an investigation or other fact-finding measure under Article 22 of the Council Regulation, may only be used for the purpose of the application of said Articles.

Therefore, ECN members that want to use information obtained by a different member on the basis of the leniency programme must make a request under Article 12 of Regulation 1/2003. In this case scenario, (that is, if the NCA in question makes such a request) the safeguards contained in paragraphs 40 and 41 of the ECN Notice will be applicable. According to these provisions, leniency related information will only be exchanged under certain limited circumstances.

Pursuant to paragraph 40 of the ECN Notice, the consent of the leniency applicant is required to transmit the information voluntarily submitted to another ECN pursuant to Article 12. Similarly, the consent of the leniency applicant is necessary to transmit information obtained during an inspection.

970 J. CAPIAU et al., “Developments in and around” 86.

971 As emphasised by F. BARR, ‘[l]eniency programmes operate on the basis of confidentiality of the information that an undertaking has provided in return for a grant of immunity from sanction’. See F. BARR, “Panel Three: Technical Problem Areas” in C-D. EHLMANN AND L. ATANASIU (eds) European competition law annual 2002: Constructing the EU Network of Competition Authorities, Oxford, Hart Publishing 2003, 550 p., 295 (hereafter: ‘F. BARR, “Panel Three”’). See also K. DEKEYSER AND M. JASPERS, “A New Era” 13; A. CARUSO stating that ‘[o]ne of the crucial elements of the EU Leniency Programme, […] is the protection of confidentiality of the information disclosed by cooperants. Confidentiality is a key feature for the functioning of the programme and protection of leniency information is granted, depending on the phase of the proceedings and on the entities which may request or obtain disclosure of information (such as parties to the proceedings, third parties, Member States judges, etc’.) A. CARUSO, “Leniency Programmes and Protection of Confidentiality: The Experience of the European Commission”, 2010 (1-6) Journal of European Competition Law & Practice, 454-474, at 454 (hereafter: A. CARUSO, “Leniency”’).

972 See also e.g. C. GAUER AND M. JASPERS, “Designing a European Solution for a “One-Stop Leniency Shop”, 2006 (27-12) ECLR, 685-692, at 686 (hereafter: ‘C. GAUER AND M. JASPERS, “Designing a European”’) who specify that “[t]hese safeguards have only been put in place to guarantee that the new mechanisms to exchange and use information in evidence that were introduced by Regulation 1/2003 would not refrain applicants from coming forward’.

973 ECN Notice, note 16. However, as S. BLAKE and D. SCHNICHELS (“Leniency following” 9) point out ‘[a]nother ECN member will […] still be free to open an investigation if it receives sufficient information to enable it to do so from another source, such as a complainant, an informant or another leniency applicant’. This is also stipulated in paragraph 39 of the Network Notice.

974 See ECN Notice, para 39.
These safeguards enable the all European competition authorities to exchange and use in evidence information obtained following a leniency application without jeopardising, in particular, the effectiveness of their respective programmes and, more generally, of their anti-cartel enforcement systems. Furthermore, the application of these rules has been taken very seriously by NCAs. This strict approach as regards the application of these provisions minimises the concerns expressed by potential leniency applicants, which want to avoid the risk flowing from the exchange of leniency related information to a different ECN member.

While the implications of the ECN information exchange system did not become a crucial issue, the system of parallel competences and work sharing between the Commission and NCAs added to the fact that an application for leniency to one authority was (and is) not to be considered an application to another authority, became one of the major concerns in view of modernisation reforms.

In effect, if a leniency applicant has participated in a cartel agreement operating in multiple jurisdictions, he may be confronted with a number of leniency programmes that may potentially be applicable. When a case has already been allocated to a certain authority on the basis of the ECN work sharing rules, it is clear for the undertaking in question which authority must be approached to make a leniency application. However, this situation becomes more problematic if the case has not yet been allocated, or is subsequently re-allocated. This concern became more prominent in the

975 See para 40 of the ECN Notice. See for a detailed analysis of these safeguards S. Blake and D. SchnitcheLS, “Leniency following”. See also infra Chapter 8.

976 See ECN Model Leniency Programme (as revised in November 2012), at 9. See para 40 of the ECN Notice.

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light of the fact that, when this occurred, not all NCAs had a leniency programme. To be precise, only four Member States had adopted leniency programmes when the Commission introduced its revised Leniency system in 2002. Nowadays this has fundamentally changed and the absence of leniency systems is no longer subject of concern. A great majority of NCAs has incorporated a leniency programme into their enforcement systems.

The Commission addressed the issues relating to leniency applications and the flexible case-allocation system in the ECN Notice. More precisely, the Commission clarifies that – given (i) the absence of a European Union-wide system or fully harmonised programme and (ii) the fact that an application for leniency to a certain authority is not to be considered an application for leniency to any other authority – a leniency applicant may have an interest in lodging an application for leniency with all European competition authorities which are competent to apply Article 101 TFEU in the territory that has been affected by the violation and, therefore, may be considered “well placed” to take action against the cartel infringement in question. The Commission adds that, provided the crucial importance of timing in the leniency system, applicants should consider whether it would be appropriate to file leniency applications simultaneously with the relevant authorities.

A different issue stemming from the modernisation reforms concerns the fact that the different leniency programmes (which may be potentially applicable depending on the case) may also contain considerably diverging, if not contradictory, rules. This situation causes uncertainty for leniency applicants as regards the rules and procedures that would be applicable depending on the authority

Commission and made a leniency application solely to it in the belief that the Commission would have sole jurisdiction, then sees the case being subsequently reallocated within the ECN to an authority where the leniency applicant had not or could not have applied for leniency. (ii) Reallocation from NCA to Commission: conversely, after a leniency applicant has made a leniency application to one NCA, the case is reallocated to the Commission to which no leniency application had been made. (iii) Reallocation between NCAs: a leniency applicant, has sought leniency before NCA’s with a leniency programme, but then sees the case is reallocated to an NCA which either does not operate a leniency programme or operates a programme for which the company is ineligible’. Moreover, it must be acknowledged that, as K. DEKEYSER and M. JASPERS (“A New Era” 14) comment, ‘the fact that an authority would, according to the case-allocation criteria, appear particularly well placed to deal with a case does not prevent another well placed authority from acting. Neither Regulation 1/2003 nor the Network Notice create any legitimate expectations for companies in relation to case-allocation. The fact that an applicant has filed for leniency with a particular authority, including the Commission, does not entitle the applicant to have the case dealt with by that authority, irrespective of the characteristics of the case. Neither does it prevent another authority from investigating the same case. The only situation where the applicant can be sure that no other Network member will deal with the particular cartel is when the Commission has formally initiated proceedings under Article 11(6)’. See also supra 2.3.1.1 in this Chapter.

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982 See also I. S. FORRESTER, “Searches Beneath” 177.
983 See C. GAUER AND M. JASPERS, “ECN Model Leniency Programme — a first step towards a harmonised leniency policy in the EU”, 2007 (1) Competition Policy Newsletter, 35-38, at 35 (hereafter: ‘C. GAUER AND M. JASPERS, “ECN Model”’). In 2002, only four Member States had a leniency policy in place. Five years later, that number has increased to currently 23, with ongoing reflections in a number of other Member States. See also K. DEKEYSER AND M. JASPERS, “A New Era” 14. (‘Although this is a trend that must be wholeheartedly welcomed by both applicants and enforcers, the increasing number of parallel leniency programmes within the ECN however also underlines a possible short-coming of the current system’).
984 ECN Notice para 38. See also commenting on this aspect K. DEKEYSER AND M. JASPERS, “A New Era” 14-15, who reiterate that ‘[t]his implies that a prudent applicant may need to file for leniency with several ECN members’.
985 However, this solution is far from perfect. It is in indeed a fact that ‘multiple filing with a large number of authorities is often cumbersome, costly and difficult to organise within a very short period of time. In addition, applicants would normally be bound by a duty of cooperation vis-à-vis all these authorities, irrespective of whether the authorities would in the end investigate the case or not’ (C. GAUER AND M. JASPERS, “Designing a European” 686). Despite these disadvantages, it could also be argued that by filing for leniency with several ECN members, the applicant could be protected from investigations which NCA could open on the basis of other information, such as complaints. See also for a similar reasoning K. DEKEYSER AND M. JASPERS, “A New Era” 15.
dealing with the case and the consequences of such an application. As a result, undertakings considering whether to apply for immunity would firstly assess whether they satisfy the conditions of the strictest leniency programme (potentially) applicable before making an application.

In 2005, the ECN members took the necessary initiatives in order to avoid than an applicant would be subject to contradictory demands when applying for leniency in parallel to multiple NCAs. This may occur when the leniency system of one Member State contains a behavioural obligation for the applicant that is not permitted by the leniency system of a different Member State. It has been argued that this risk can only be materialised if one authority obliges the leniency applicant to terminate its participation in the illegal agreement at the time of the application while other NCAs request it to prolong its participation to protect the investigation.

The ECN Members agreed on a temporary solution to avoid conflicting obligations for leniency applicants. In accordance with this understanding, the authorities that had discretion regarding termination of the suspected infringement, would align to the standard imposed by the authority without discretion. In other words, all authorities would ask the applicant to stop its activities immediately. In case all concerned authorities were to have discretion, discussions at an early stage could also ensure a coherent and uniform approach towards the applicant.

The ECN Model Leniency Programme

After clarifying how companies apply for leniency when different programmes may be applicable, the ECN members focused on softening the discrepancies that existed among national leniency programmes which could affect the general effectiveness of the leniency system.

While providing protection for “cross-border leniency applicants” is an essential condition for the effectiveness of the whole system, it is a fact that if (significant) divergences exist between leniency programmes, undertakings may become more reluctant to apply for leniency, or even completely

987 C. GAUER AND M. JASPERS, “Designing a European” 686. These commentators also add in this regard that leniency applicant also must meet the leniency threshold with the lowest degree of legal certainty provided by the least beneficial programme. As an example they state the following: ‘If, […] an authority does not give any assurance to applicants before the very end of its proceedings, the potential applicant will balance that uncertainty before applying to any authority. Discrepancies not only make the assessment and the decision to report illegal activities more complex but some discrepancies may even deter applicants from reporting certain conduct at all’.
988 The fast reaction of the ECN to these concerns is also undoubtedly connected to the frequent sharing of experiences on the practical handling of leniency cases, which was meant to stream-line and improve the procedure. See K. DEKEYSER AND M. JASPERS, “A New Era” 15.
990 See e.g. Commission’s 2002 Leniency Notice. This situation was later remedied with the adoption of the Commission’s 2006 Leniency programme.
991 At that moment this was the case, for instance in Germany and the UK.
992 In effect, even if this obligation is justified in order to benefit from leniency, still when this obligation is formulated in absolute terms, this situation can be greatly problematic for applicant. This is certainly the case provided the simultaneous obligation for the leniency applicant not to disclose the fact of its cooperation in order to avoid that evidential material is destructed and the Commission’s investigation is undermined. See also commenting on this aspect, comments of WilmerHale on the draft notice on immunity from fines and reductions of fines in cartel cases, at 4 available at http://ec.europa.eu/competition/cartels/legislation/files_leniency_consultation/wilmerhale.pdf.
refrain from offering their cooperation to competition authorities. In order to be willing to lodge a leniency application companies must, therefore, be certain that they are able to benefit from one of the chosen systems. Put otherwise, they must fulfil all the conditions stipulated under the most strict leniency system that may be applicable according to the work sharing criteria. In addition, and as has been acknowledged by the Commission, filing and processing leniency applications – when the respective competition authority will not even initiate proceedings – constitutes a hindrance not only for undertakings but also for competition authorities.

In view of the shortcomings of the system, (now former) Commissioner for competition N. Kroes stressed in 2005 the need to fully exploit the possibilities of the ECN by creating on a “one stop shop” system. Following this declaration, various “one stop leniency shop” options were put forward and discussed.

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994 See ECN Model Leniency Programme, para 2.
995 See supra section 2.3.1.1 of this Chapter. See also C. Gauer and M. Jaspers, “Designing a European” 686, stating that ‘the discrepancies between the existing programmes could have adverse effects on those programmes that offer a more favourable treatment to applicants and would seem to function well. It can result in potentially less applications to the authorities and to less cartel detection in the EU’. This aspect has also been recognized by NCAs, see e.g. ECN Brief, Extended Issue 5/2012 58: ‘[i]n the context of parallel competences under Regulation 1/2003, potential leniency applicants are likely and even encouraged to apply to all authorities whose territory is affected by the infringement and which may be considered well placed to act against the infringement in question (see point 38 of the Commission’s ‘Network Notice’). This implies that the incentives to apply under a given leniency programme depend both on the said programme’s inherent characteristics but also on the availability of leniency and the characteristics of the programmes established by other authorities within the ECN which may also be in a position to act against the infringement. Discrepancies between programmes may thus, in some instances, have a chilling effect on multijurisdictional applications’.
996 See also ECN Model Leniency Programme, Explanatory Notes, para 6. In this document the Commission itself admitted that '[f]or cases involving a significant number of jurisdictions and for which the Commission is particularly well placed to act within the meaning of the Network Notice, the multiple filing of complete applications to all other possibly well placed CAs can be a cumbersome process which could discourage certain applicants from applying for leniency under any programme’. This vision is also shared by C. Gauer and M. Jaspers, (“Designing a European” 686-687) who note that ‘multiple applications with a large number of competition authorities is often problematic, costly and difficult to arrange within a very short lapse of time. Furthermore, companies would normally be under duty of cooperation vis-à-vis all these authorities, regardless of whether the authorities would in the end investigate the case or not. As regards competition authorities she points out that even if the current system ensures an efficient division of work between the authorities, processing leniency applications and granting immunity in cases where the authorities know that they will not ‘take action is unnecessarily burdensome’. See also C. Gauer and M. Jaspers, “ECN Model” 35. See, however, also I. S. Forrester, “Searches Beneath” 177. However it should also be taken into account that as this author rightly pointed out in 2006 the concerns about the multiple and parallel application may have been exaggerated. ‘It would be strange if a corporate group had to make applications to all 25 Member States, each with their own distinct features and procedures, and of course to the Commission!’ Still, he also admits that this does not imply that the system is fully efficient and that no issues may raise at all. Consequently, he agrees about the fact that there is a need to develop a “one-stop leniency shop”.
997 See also Commission Staff Working Paper, supra, and more particularly Regulation 1/2003, para 232: ‘[i]n the stakeholder consultation, the legal and business community stated a strong preference for a more centralised approach for leniency in the European Union, some expressing a desire to see the matter dealt with by regulation. At the same time, practical experience suggests that potential applicants are generally aware of the system and undertake the necessary to protect their interests’.
998 More precisely three models were suggested. (i) A system of mutual recognition of immunity and fine reduction among authorities within the ECN; (ii) a fully centralised system in which the Commission would act as a secretariat for the ECN; (iii) a merger model system in which ECN members would share the responsibilities for handling cartel cases according to jurisdictional thresholds. For a detailed assessment of these “one stop shop” from an enforcer’s perspective, see C. C. Gauer and M. Jaspers, “Designing a European” 687-688. These authors also pointed out that none of these systems ‘is practicable and efficient in terms of competition enforcement’.
The system that was finally chosen is known as the ECN Model Leniency Programme. The Model was unanimously endorsed by the ECN Heads of Authorities and published in September 2006.\textsuperscript{999} The ECN Model Leniency Programme is characterised by two main features. First, it aims at achieving (soft) harmonisation of the key rules and procedures that could have a negative impact on firms considering to make a leniency application. This is, in essence, the main goal of the ECN Model Leniency Programme, namely that applicants are not discouraged from revealing illegal cartel agreements due to (i) discrepancies between the different leniency programmes, (ii) uncertainty as regards the information that they must submit or (iii) uncertainty as regards their cooperation obligations.\textsuperscript{1000,1001} For this reason, the model specifies the treatment which can be anticipated for applicants in any ECN jurisdiction once alignment of all programmes has taken place. Second, in order to alleviate the burden of multiple filings, the ECN Model Leniency Programme introduced the innovative ‘summary application system’.\textsuperscript{1002}

The foundations of the ECN Model Leniency Programme were set out in 2004, when a specific working group dedicated to leniency issues was formed in the context of the ECN framework.\textsuperscript{1003} The Working Group deeply assessed the question regarding (absence of) harmonisation of national leniency systems, as well as the main drawbacks of the multiple filing system. Once the key divergences between the different leniency programmes were identified,\textsuperscript{1004} the Group used an innovative working method. Particularly, its members shared experiences and had intensive discussions in order to develop consensual and suitable solutions.\textsuperscript{1005} For this purpose, the Working Group not only included leniency experts from the Commission and all NCAs.\textsuperscript{1006} Representatives

\textsuperscript{999} The (most recent version of the) ECN Model Leniency Programme can be found at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf. The ECN Model Programme was published together with Explanatory Notes which provide guiding explanations on its provisions. The Explanatory Notes are available at http://ec.europa.eu/competition/ecn/index_en.html. See also for the most frequently asked questions http://ec.europa.eu/competition/ecn/mlp_2012_faq_en.pdf. About the revision of the ECN Model Leniency Programme see this section below.

\textsuperscript{1000} For this reason some provisions are more specific than others. For instance, ‘[t]he ECN Model Programme has less detailed rules and procedures for “post-inspection” immunity applications or reduction of fines applications. The reason for this is two-fold. In the vast majority of cases, this type of applicants would only come forward after an investigation has started. The applicant will therefore know which authority is handling the case and will know what rules it has to comply with if it wants to benefit from that authority’s leniency programme. Secondly, if that authority has chosen a very strict policy for rewarding such “post-inspection” co-operation, this will (contrary to the “pre-inspection” scenario) not have a negative impact on other authorities programmes’ (C. GAUER AND M. JASPERS, “ECN Model” 36-37).

\textsuperscript{1001} This objective is clearly in line with the whole rationale of leniency programmes. As it will be examined in the next Chapter, the leniency system is an investigatory tool designed to uncover and subsequently punish secret cartel agreements.

\textsuperscript{1002} See ECN Model Leniency Programme, para 2. For some literature commenting on this aspect see J. CAPIAU et al., “Developments in and around” 86; C. GAUER AND M. JASPERS, “ECN Model” 35; K. DEKEYSER AND M. JASPERS, “A New Era” 15.

\textsuperscript{1003} See F. CENGIZ, “Multi-level Governance” 670; K. DEKEYSER AND M. JASPERS, “A New Era” 16. The ECN working group was dedicated to the ECN Model Leniency Programme for a period of twelve months.

\textsuperscript{1004} For a more detailed analysis of the shortcomings, see C. GAUER AND M. JASPERS, “The European Competition” 10; see also C. GAUER, “Les programmes de clémence et le fonctionnement du réseau”, 2005 (3) Concurrences, 16-18, at 16-17.

\textsuperscript{1005} C. GAUER AND M. JASPERS, “Designing a European” 687-688. Compared to the lower level of cooperation among competition authorities exiting under Regulation 17, the far reaching cooperation taking place under Regulation 1/2003 is at least remarkable. In this sense, it is unsurprising that the ECN Model Leniency Programme has been described as “the most striking example of what could be referred to as the new era of ECN cooperation” (K. DEKEYSER AND M. JASPERS, “A New Era” 16).

\textsuperscript{1006} The drafting of the MLP was co-steered by the Conseil de la concurrence (now the Autorité de la concurrence) and the (former) Office of Fair Trading (now the Competition and Markets authority). ECN Brief, Extended Issue 5/2012 58.
from the business and legal community with practical expertise in multiple filings were also involved. In addition, the debates often coincided with the Commission’s internal reflections on possible “one stop shop” options.\textsuperscript{1007} As a result of these efforts, all the positive experiences from the functioning of the Commission’s and national leniency regimes were brought together.\textsuperscript{1008}

The ECN Model Leniency Programme should, however, not be seen as a simple compilation or as an enumeration of well-working elements of different leniency systems. The Model was consciously conceived as the foundation for soft harmonisation of all European leniency programmes.\textsuperscript{1009} Moreover, it aims to stimulate the Member States that had (or have) not yet adopted a programme, to introduce one into their enforcement systems.\textsuperscript{1010} In order to reach this goal the ECN Model Leniency Programme includes all the procedural and substantive elements that in the view of ECN must be shared by all programmes.\textsuperscript{1011} Ideally, these elements should be implemented and incorporated by each NCA in its own leniency system.\textsuperscript{1012} Although, the ECN Model Leniency Programme has a non-binding nature and it does not create any legitimate expectations or rights for applicants, the fact that European competition authorities made a strong explicit commitment to use their best efforts to align their leniency programmes with the Model Programme,\textsuperscript{1013} does indicate that ECN members are willing and have the intention to give further effect to the Model.

In this context, it is noteworthy that the Model Leniency Programme is designed to achieve (only) minimal harmonisation. Consequently, it only includes the elements that are needed to align all national leniency systems in order to preserve the effectiveness of leniency as an enforcement tool.\textsuperscript{1014} This implies that NCAs are competent to adopt more favourable provisions for companies to

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\item \textsuperscript{1007} K. DEKEYSER AND M. JASPERS, “A New Era” 16.
\item \textsuperscript{1008} See also Commission, Press Release IP/06/1288, “Competition: Commission and other ECN members co-operate in use of leniency to fight cross border cartels”. See also F. CENGIZ, “Multi-level Governance” 670.
\item \textsuperscript{1009} See ECN Model Leniency Programme, Explanatory Notes, point 7. See also ECN Model Leniency Programme, Report on Assessment of the State of Convergence, point 11, available at http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf, (hereafter: ‘Leniency Convergence Report 2008’). According to the Report, ‘the Model Programme was adopted with a view to enhance the effectiveness of leniency programmes within the Network. The convergence of leniency programmes is a tool to achieve this aim. In this context, convergence of certain elements plays a crucial role, while other elements serve to facilitate the functioning of programmes’; ECN Brief, Extended Issue 5/2012 58. (‘[T]he MLP provides for a set of procedural and substantive principles designed to serve as a blue-print for a leniency programme’ (emphasis added). See Explanatory Notes, point 10. See also Convergence Report 2008’ point 5. While the ECN Model Programme was conceived as the basis for achieving soft harmonization, the model recognizes that not all authorities have the power to implement changes in their national leniency programmes as this power is held by other bodies (point 9 of the Explanatory Notes). The (progressive) establishment of a common European model is therefore not only dependent on the will of NCAs. See also C. C. GAUER AND M. JASPERS, “Designing a European” 689; C. GAUER AND M. JASPERS, “ECN Model” 35.
\item \textsuperscript{1011} This feature distinguishes the ECN Model Programme from other initiatives undertaken in other international fora to enumerate general principles for leniency programmes (see K. DEKEYSER AND M. JASPERS, “A New Era” 17. (“Compare for example the “Principles for Leniency Programmes” developed within the framework of the European Competition Authorities (ECA)”, September 2001, published on inter alia the webpage of the German Federal Competition Authority available at http://www.bundeskartellamt.de/deutsch/download/pdf/ECA/ECA_principles_for_Leniency_Programmes.pdf. See also C. GAUER AND M. JASPERS, “ECN Model” 35). See also Commission Press Release, IP/06/1288, “Competition: Commission and other ECN members co-operate in use of leniency to fight cross border cartels”.
\item \textsuperscript{1012} See Model Leniency Programme, point 3. Therefore, the ECN Model Leniency Programme is not designed as a system under which undertakings can apply for immunity or a fine reduction. See also C. GAUER AND M. JASPERS, “ECN Model” 36.
\item \textsuperscript{1013} Model Leniency Programme, point 3.
\item \textsuperscript{1014} However, as C. GAUER AND M. JASPERS (“ECN Model” 38) correctly argue although this does not mean a completely aligned leniency policy can be achieved in a near future, this does not appear to be necessary.
\end{itemize}
obtain immunity or fine reductions under their respective leniency systems. This possibility should be welcomed for two main reasons. On the one hand, it allows NCAs to adapt or modify their national leniency systems to their respective needs. On the other hand, the possibility of adopting more permissive leniency regimes does not have a negative impact on the level of legal certainty. The ECN Model Leniency Programme still clarifies what are the most strict conditions and obligations that undertakings must satisfy in order to benefit from the system. The fact that on the basis of a national leniency system, an applicant must submit less or less accurate information (or that the cooperation obligations are less strict) than in other national leniency programmes, cannot be seen as disincentive for undertakings to reveal illegal cartel agreements. On the contrary; since companies can only predict (on the basis of the Model) what their obligations are “in the worst case scenario”, the possibility that less strict rules may be applicable may in effect constitute an additional incentive for companies to come forward under the leniency system. This option is therefore in line with the ultimate objective of the Model.

The key elements the ECN Model Leniency Programme seeks to align concern fundamentally (i) the scope of application of the programme; (ii) the type of information that an applicant must submit in order to benefit from immunity; (iii) a coherent set of termination and cooperation duties and; (iv) the excluded immunity applicants. In addition, certain procedural elements have also been included in order to maximise the efficiency of the application process and also with a view to achieving the goals of the ECN Model Leniency Programme. This pertains to the introduction of a marker and the summary application system for immunity applications.

The summary application system is one of the most important elements introduced in the ECN Model Programme. The system is designed to facilitate leniency applications, for both firms and competition authorities, in cases in which the Commission is particularly well placed (that is, in cases concerning more than three EU Member States) and where the coexistence of multiple systems may lead to inefficiencies.

In essence, if a full application has been made to the Commission, NCAs can accept temporarily to protect the position of the applicant, if he provides limited information. When one of the relevant

1015 Model Leniency Programme, point 3.
1016 It has indeed been recognised that “[e]ach NCA should implement the model in a manner that fits its own enforcement system. A harmonised leniency policy that ensures that immunity applicants know what they can expect from the different authorities in terms of the evidence to be provided and the cooperation and assistance they may have to give would be sufficient to remove the deficits of the current system’. See C. GAUER AND M. JASPERS, “ECN Model” 38.
1017 See also C. GAUER AND M. JASPERS, “ECN Model” 37.
1018 See about the concept of a marker supra Chapter 8, section 4.3.2.4.
1019 Since the purpose of this section is to demonstrate the significant degree of convergence which can be achieved through the ECN mechanisms as well as through soft harmonisation, this (sub)section will not further address the different provisions contained in the ECN Model Leniency Programme. Reference is instead made to the following articles: K. DEKEYSER AND M. JASPERS, “A New Era” 16-22; C. C. GAUER AND M. JASPERS, “Designing a European” 679-693; C. GAUER AND M. JASPERS, “ECN Model”.
1020 See also C. GAUER AND M. JASPERS, “Designing a European” 692. These authors rightly state that “[h]armonisation of the leniency programmes and introduction of a uniform system for summary applications alleviate the burden on applicants and authorities while fully exploiting the potential and dimension of the network and the European antitrust enforcement system’.
1021 The ECN Model Programme (point 24) specifies the type of information that is needed for a summary application and clarifies that such information can always be given either in writing or orally. The type of information can concern details of the cartel participants, the products, the affected territories, the duration of the agreement and the nature of
NCAs wants to act on the case, the leniency applicant will get some additional time to complete his application. However, it is important to keep in mind that a NCA will not grant (or deny) immunity on the basis of a summary application system. NCAs will only acknowledge receipt of the summary application and grant the applicant a protected position in the leniency queue based on the date and time when the information was provided. Moreover, if the applicant is the first to lodge an application in respect of the alleged cartel at the NCA concerned, he will be informed.

The summary application system allows to reduce the administrative burden linked to multiple leniency applications, not only for competition authorities but also for applicant undertakings. On the one hand, undertakings that are planning to make a leniency application can now choose not to file full and complete applications with all authorities that could (under the work-sharing criteria in the ECN) be considered “well placed” to act on the case. Instead, NCAs agree under this system to receive only a short description of the agreement that has been reported to the Commission. On the other hand, the system will also be useful for authorities, as it will facilitate the processing of the applications in situations in which it is most likely that the Commission handles the case. An additional advantage is that these objectives are achieved without putting at risk the flexible work-sharing mechanisms of the ECN.


1023 ECN Model Programme, point 26. See also Commission, MEMO/06/356; C. GAUER AND M. JASPERS, “ECN Model” 37.

1024 ECN Model Leniency Programme, point 25. In this sense the summary application system can be seen as “indefinite marker”. An important difference is that, in contrast to the traditional marker, a leniency applicant does not need to complete his application, unless the competition authority specifically requests it. Compare the marker system under the Commission’s Leniency Notice infra Chapter 8, section 4.3.2.4.

1025 The first version of the ECN Model Programme (point 31) explicitly pointed out that this aspect ‘may be reviewed on the basis of the experience gathered by the ECN members’. For this purpose, ECN authorities continued sharing and exchanging practical experience and concerted meetings on nine occasions between 2010 and 2012 to deal with the issue within the ECN Working Group Cartels. As a result of this process, in which a great majority of ECN members participated, the ECN Heads of Authorities endorsed on 22 November 2012 a revised version of the ECN Model Programme. An important modification is that under the revised Model Leniency Programme all leniency applicants applying to the Commission in cases concerning more than three Member States are able to submit a summary application. In contrast, under the previous version of the Model only the first applicant, i.e. the immunity applicant, was allowed make summary applications. In addition, a number of clarifications have been introduced. Still, in order to maintain stability and certainty for companies, the key points of the Model remain unchanged. The revised Model is available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf. See also Commission, FAQ. European Competition Network refines its Model Leniency Programme, available at http://ec.europa.eu/competition/ecn/mlp_2012_faq_en.pdf. See also ECN Brief, Extended Issue 5/2012 58; C. GAUER AND M. JASPERS, “ECN Model” 36. It is illustrative to note in this context that the modifications made in the 2006 Leniency Notice of the Commission concerning immunity, the termination and the cooperation obligations to benefit from immunity and reduction of fines applicants as well as the introduction of the marker system are based on the reflections adopted under the ECN Model Programme.

1026 ECN Model Leniency Programme, point 2. See also ECN Model Programme – Explanatory Notes, point 7.

1027 ECN Model Programme – Explanatory Notes, points 41–42. In addition it is interesting to note that in 2012, the ECN agreed on a standard template for summary applications, which companies are able to use in all Member States (the template can be found at http://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf. A list of national authorities which accept summary applications in English has been published (the list is available at http://ec.europa.eu/competition/ecn/leniency_programme_nca.pdf).

1028 See further ECN Brief, Extended Issue 5/2012 58. As the French competition authority rightly comments ‘a reason for more convergence between the respective leniency programmes lies in the need to allow for a swift and efficient cooperation amongst competition authorities, either to allocate the case or to improve coordination in related cases
At the end of 2008, the ECN assessed the status of convergence of the European leniency programmes. The purpose of this assessment was to show the achievements of the convergence process and to evaluate whether the further initiatives in the field of leniency were (and are) needed. According to the report, the most important adjustments took place in the period between 2006 and 2008, when most Member States aligned their respective leniency systems (or adopted new ones) towards the Model Programme. Today, all the Member States except Malta have leniency programmes. In addition, most Member States have modified their leniency systems (or introduced one) in order to align them with the European Model Programme. In this process of adjustment, NCAs followed the crucial elements provided by the Model Leniency Programme (and more indirectly the Commission), like the scope of application of the programme, the marker system, summary applications, oral submissions and aligned conditions for leniency. However, a number of divergences are still present in the ECN as regards certain features of the Model. Particularly, the 2008 Leniency Convergence Report reveals that:

- the scope of leniency programmes in the ECN covers secret cartels, while a few programmes extend their respective leniency systems to a wider scope of infringements. Several programmes exclude more applications from immunity than provided for in the Model Programme. The majority of leniency programmes contain an equivalent evidential threshold for immunity as in the Model Programme. Moreover, most of the programmes contain equivalent conditions for leniency as stipulated in the Model Programme. As concerns the applicant's obligation to end involvement in the cartel following its application, according to certain programmes the leniency applicant must end its involvement following the application without the exception foreseen in the Model Programme. Concerning procedural issues, most programmes provide for the necessity to make an explicit application for leniency and foresee that immunity will be granted and rejected in writing. Twenty programmes provide for a marker system. Summary applications alongside an application with the Commission in cases for which the latter is particularly well placed are available in twenty three Member States; seventeen of them accept oral summary applications. Full leniency applications are accepted orally under nineteen leniency programmes.

Despite the remaining divergences, the Leniency Convergence Report shows that great achievements have been attained based on the convergence process between European leniency

which have triggered multiple leniency applications. Convergent conditions and safeguards can facilitate cooperation amongst authorities to an extent which may not be achieved by a mere exchange of experience and/or increased knowledge of jurisdictional differences.

1029 See ECN Model Leniency Programme, Report on Assessment of the State of Convergence, points, 9 and 15, available at http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf, hereinafter: ‘Leniency Convergence Report 2008’. In addition, it should be noted that “[t]he Model Programme did not set out a deadline when the alignment of leniency programmes with the Model Programme was expected to be completed’. However, as an integral part of the Model Programme, it was agreed that the state of convergence of leniency programmes of ECN members would be assessed no later than at the end of the second year after the publication of the Model Programme. After the report was published, a number of reforms had taken place or were still on-going in a number of Member States. These initiatives are commented in the report insofar as the necessary information was available over 1 October 2009 (Leniency Convergence Report 2008, point 8). Particularly, according to the report; ‘legislative reforms (including any amendments to leniency programmes or related laws) are pending in five Member States: Cyprus, Greece, Estonia, Finland and Luxembourg. The Slovenian Competition Act was [also] recently amended’ (Leniency Convergence Report 2008, point 13).

1030 Leniency Convergence Report 2008, point 7. See also C. GAUER AND M. JASPERS, “Designing a European” 692. These authors comment that already in 2006 ‘one can clearly see that the work has influenced and guided the national leniency programmes that have recently been developed or are in the process of being adopted. The authors believe that the full implementation of the ECN Model Programme will considerably facilitate applications in the multi-enforcer environment of the ECN’.


1032 Ibid, points 13-14.
systems. Within a (relatively) short period of time, the ECN members successfully identified a significant obstacle for the effective enforcement of the EU cartel ban and jointly developed a suitable solution. Through the Model Leniency Programme convergence on the key crucial issues has effectively taken place. The discrepancies that have been identified as problematic have been removed while the procedure has been streamlined. This has resulted in additional predictability for potential applicants, who will not refrain from cooperating on the basis of the leniency system due to a lack of uniformity.1033

The unique working method that was used by NCAs has been determinant in the course of this process. Constant interaction and sharing of practices and experiences between all competition authorities in order to reach a compromise represents a whole new level of cooperation within the network, which goes much further than the legally established obligations. This innovative approach can be considered in itself as a success within the network.1034 In this sense, it is not really surprising that the convergence report concludes by stating that the efforts carried out within the ECN have acted as a major catalyst in encouraging Member States and/or competition authorities to further develop their leniency policies and encouraging alignment between them.1035

Seen from a general ECN perspective, the Model Leniency Programme and the commitment that each ECN member has demonstrated to move towards a common model, suggests that the working method used in the area of leniency can be a unique example to follow in other areas where additional convergence is needed.1036

3. Concluding remarks: achieving (voluntary) convergence in the enforcement of the cartel prohibition

The modernised system of Regulation 1/2003 has brought fundamental changes to the enforcement of EU antitrust rules, in particular by decentralising the application of EU competition rules and setting out the basis for effective cooperation between European competition authorities. One decade after the adoption of Regulation 1/2003 experience has shown that the new enforcement system has had a positive impact on Member States and their respective competition law and policy systems. Even if such positive impact had been intended, and therefore anticipated, the beneficial effects of Regulation 1/2003 have gone beyond all expectations.1037

1033 See also K. DEKEYSER AND M. JASPERS, “A New Era” 22-23; C. GAUER AND M. JASPERS, “ECN Model” 38. These authors add that “[c]omments received in the context of the public consultation of the revised Commission Leniency Notice show that the ECN Model Programme has been received as a tool to interpret less specific provisions in individual programmes’. This interpretative function of the Model Leniency programme undoubtedly leads to increased uniformity between national leniency systems.


1036 K. DEKEYSER AND M. JASPERS, “A New Era” 22-23. These commentators add that “[t]he results of the ECN Model Programme can send important signals that what has been achieved on the European level might also be feasible on the international field’.

The process of adoption of Regulation 1/2003 triggered – directly or indirectly – innumerable reforms of the national competition systems. Specially, the more active role of NCAs resulting from the decentralisation of the enforcement of the antitrust provisions required Member States to adapt their national competition legislation to the newly established European legal framework. More than a decade later one cannot but affirm that the substantive provisions under which agreements between undertakings are assessed in the different Member States are to a great extent convergent. Furthermore, additional initiatives have been undertaken by Member States in order to ensure that national competition bodies are effectively designated and entrusted with all the essential powers to ensure the enforcement of Articles 101 and 102 TFEU as required by Regulation 1/2003. The specific example of Austria is quite illustrative in this context:

In Austria, ‘the modernization process behind what was to become Regulation 1/2003 in late 2002 influenced the political and legislative process […] already from 2000 onward. The cornerstones for the modernization of the European competition rules set out in the Commission’s White Paper of 1999, namely the abolition of the notification system and the decentralization of the application of competition rules had started raising doubts as to the adequacy of the institutional setup for competition enforcement that existed then in Austria. This process eventually led to the enactment of the Competition Act establishing the independent Federal Competition Authority as of 1 July 2002 as the designated body for the investigation of competition cases (under national as well as European competition law)’.

Despite the essential reforms to make national competition systems compatible with the EU competition law system, it became apparent for Member States that in order to maximize their enforcement potential and to secure a proper functioning of the ECN mechanisms, NCAs needed more advanced and updated tools. Subsequently, Member States decided to progressively initiate a renovation process of their competition law (enforcement) systems, which specially focuses on areas that were not regulated by Regulation 1/2003, such as procedural provisions and sanctioning powers. These additional and voluntary reforms have been inspired by both (i) the leading role – and

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1038 See supra Chapter 5, section 2.2.1 and 2.2.2 and 2.2.4. See for a specific testimonies of a NCAs, ECN Brief, Extended Issue 5/2012 58 (‘The Competition Act (Chapter 379 of the Laws of Malta) in Malta has been amended on different occasions. In particular in 2004, following Malta’s accession to the EU, the individual exemption and negative clearance systems were repealed and a system based on self-assessment was adopted in line with Regulation 1/2003’). Also Bulgaria is an example of NCA which ‘undertook major efforts to introduce national competition law reforms that reflected the new role of the national competition authority in relation to the modernized application of the EU competition law after Regulation 1/2003’. In Finland, ‘[t]he first national legislative reform resulted from the modernization of the EU antitrust rules which enabled the decentralization of cases to national competition authorities (NCAs) as well providing for measures to ensure the uniform application of common competition rules’. ECN Brief, Extended Issue 5/2012 58-59.

1039 See supra Chapter 5, section 2.2.4.

1040 ECN Brief, Extended Issue 5/2012 58. In addition in Austria the sanctioning system based on the Cartel Act 1988 was transformed from a criminal system to a fines system of based on the Commission’s model. The enactment of the Cartel Act 2005 resulted in broad harmonization of national law with European law. The 2005 Act abolished the notification system and aligned the national equivalent of Article 101 TFEU with this provision. The types of decisions which can be adopted under national competition law now also correspond to the related provisions of Regulation 1/2003. Also fines, penalty payments and the limitation period are complete convergent. See also in the same issue “Bulgaria: The Modernisation of Competition Law after Regulation 1/2003”, ECN Brief, Extended Issue 5/2012 58, stating that: ‘[a]s a newcomer to the EU, Regulation 1/2003 enabled the Bulgarian CPC to assert its authority as national competition body entrusted with all the powers and legal instruments necessary to ensure effective competition within the Internal Market’.
increased enforcement powers – of the Commission\(^{1041}\) as well as (ii) by the policy work conducted in the platform created by the ECN.\(^{1042}\)

The reforms conducted in Finland clearly reflect the influence of the Commission’s enforcement approach in the Member States. In Finland, the revised Competition Act, which is applicable since 1 November 2011, enhanced the investigation powers of the Finnish Competition Authority in several ways. In line with the modernisation Regulation, the Finnish Competition Authority has been enabled to conduct inspections of private premises on the basis of its national investigative powers.\(^{1043}\) Furthermore, the new Competition Act empowered the competition authority with the competence to interview natural persons when there is a reasonable suspicion of their involvement in a competition law violation. According to the Finnish Competition Authority, these new possibilities enhance its potential to seek clarifications and conduct enquiries at other times than the inspection of a company itself.\(^{1044}\)

The enforcement system of Cyprus illustrates, on the other hand, the importance of the work conducted within the ECN framework. The knowledge platform created by the ECN to share experiences and provide mutual guidance, offered the Cypriot competition authority, which is a small and less experienced authority, the appropriate mechanisms to devise effective enforcement instruments. As a result, it was able to effectively enforce the EU competition rules.\(^{1045}\) For this competition authority, the ECN Model Leniency Programme – which served as the foundation for the Cypriot Leniency Programme introduced on 2 May 2012 – is the most illustrative example of the advantages of the ECN platform.\(^{1046}\)

The success of the reforms can also be shown in quantitative terms. Since the beginning of the application of Regulation 1/2003 in May 2004, until 30th September 2013, a total of 1667 investigations conducted under Articles 101 and 102 TFEU – which were initiated by a NCA or by

\(^{1041}\) See infra Chapter 6.

\(^{1042}\) See for a similar (and earlier) opinion, K. DEKEYSER and M. JASPERS, “A New Era” 22-23. See also ECN Brief, Extended Issue 5/2012 58: ‘[d]riven by the necessity to amend the [competition law system] before Bulgaria’s accession to the EU in order to avoid contradiction between the national and EU competition rules, the Bulgarian Commission on Protection of Competition drafted a new law in view of providing it with competences as a national competition authority under Regulation 1/2003, as well as incorporating provisions based on the enforcement practices of the European Commission and other NCAs as regards the legal framework for competition protection’.\(^{58}\)

\(^{1043}\) In order to conduct this type of inspection, the Finish competition authority must have prior authorization from the Market Court. Compare infra Chapter 7, section 3.2.

\(^{1044}\) ECN Brief, Extended Issue 5/2012 58-59. In addition, the 2011 Competition Act ‘gives the Finnish Competition Authority the possibility to prioritize its tasks and to decide not to investigate a case if it does not meet a fixed set of criteria. As a result, the FCA can better focus its efforts and allocate limited resources to fighting the most serious violations in the economy, thus meeting its legal obligations’. See also in the same issue “Austria: How Regulation 1/2003 influenced the Development of Competition Law”, at 58. In Austria, ‘[i]n light of practical experience gained in enforcing the competition rules, a further alignment of the [competition authority’s] powers with those of the European Commission is foreseen. The [competition authority] shall be vested with the power to seal premises during inspections as well as to ask for explanations on facts and documents relating to the subject-matter and purpose of the inspection. Furthermore the FCA shall receive the power to issue requests for information by way of binding decision (instead of obtaining a court order)’.\(^{59}\)

\(^{1045}\) ECN Brief, Extended Issue 5/2012. More specifically, through the ECN the competition authority of Cyprus was able to exchange helpful information and expertise and take part in the development of policies as well as to coordinate on the application of competition policy. In addition, as this competition authority states: ‘the knowledge shared within the ECN on different sectors of the economy enabled the competition authority of Cyprus to avoid pitfalls and bypass to a large extent the learning curve in the application of the EU competition rules’ […] Thanks to the exchange of experience with other ECN members, the [competition authority of Cyprus] has become aware of various difficulties that may arise in practice in the application of leniency programmes and has been able to take these into account while setting up its own programme. Another example where the [competition authority of Cyprus] benefits from the expertise from other competition authorities is the area of cartel settlements in which it is greatly inspired by the procedures and approach used by the European Commission in such cases’.\(^{22}\)

\(^{1046}\) ECN Brief, Extended Issue 5/2012. This policy brief also emphasises the practical importance of the ECN initiatives in the context of Leniency.
the Commission – have been reported to the ECN. NCAs initiated 1434 investigation cases, and in 692 cases adopted (final) decisions ordering termination of infringements, imposing fines or accepting commitments.\footnote{1047}\footnote{1048} During the same period, the Commission, on the other hand, initiated 233 investigations and adopted 94 final decisions.

On the basis of the statistics of the ECN, it is clear that NCAs have become the key public enforcers of Articles 101 and 102 TFEU. They initiated 86% of the investigations conducted on the basis of the EU antitrust provisions and adopted final decisions in 88% of the cases in which an investigation was started. Since the enforcement activity of the Commission has not diminished in the context of Articles 101 and 102 TFEU (and even has increased in cartel cases), the decentralised enforcement system, compared to the former system of Regulation 17, has clearly caused a quantitative leap in enforcement terms.\footnote{1049}\footnote{1050}

From a general enforcement perspective, it can be affirmed that Regulation 1/2003 has played an essential role in improving the legal framework designed to protect competition in the internal market, and in increasing the effective enforcement of both EU and national competition rules by NCAs. The favourable legal environment created by Regulation 1/2003, as followed by further improvements at European level and within the ECN framework, has given impetus to Member States to conduct additional reforms in their national competition systems. This whole process has undoubtedly not only resulted in a significant degree of voluntary convergence among national competition law systems, but most notably it has led to increased and more effective anti-cartel enforcement.\footnote{1051}

\footnote{1047} See Regulation 1/2003, Article 11(4).
\footnote{1048} These statistics can be accessed at \url{http://ec.europa.eu/competition/ecn/statistics.html}. See also (for the period from 1 May 2004 – 31 December 2012), W. Wils, “Ten Years” 7-8 of the online version of this article.
\footnote{1049} In this context W. Wils observes that ‘the overall number of decisions ordering termination of infringements of Articles 101 or 102 TFEU, imposing fines or accepting commitments has undergone an eightfold increase’. W. Wils, “Ten Years” 7-8 of the online version of this article.
\footnote{1050} In addition, the statistics of the ECN on antitrust cases per Member State also provide a useful overview. This list indicates the number of investigations that have been started as well as the number of decisions that have been adopted by each Member State. It is notable in this context that, as the list shows, the most efficient Member States in terms of decisions adopted correspond to the larger Member States. According to the list: the French authority (which initiated 219 investigations and adopted 95 decisions); the German authority (which initiated 167 investigations and adopted 88 decisions), the Italian authority (which initiated 100 investigations and adopted 87 decisions); and the Spanish authority (which initiated 113 investigations and adopted 80 decisions) are the most active competition authorities (see \url{http://ec.europa.eu/competition/ecn/statistics.html}). In this regard, W. Wils rightly notes in this context that ‘national competition authorities with the largest output each adopt as many or even more decisions than the European Commission’. On the other hand, as W. Wils states ‘[t]he differences between Member States also show the potential for further increase, as national competition authorities increase their output over time’. According to him ‘[t]he best example of this is the Spanish competition authority: In the first three years of application of Regulation 1/2003 (from 1 May 2004 to 31 December 2006), it accounted for 8 decisions out of the 172 for all national competition authorities, ranking (shared) eighth among the national competition authorities; in the following three years (from 1 January 2007 to 31 December 2009), it accounted for 20 out of 202 decisions, ranking fourth; and in the most recent three years (from 1 January 2010 to 31 December 2012), it accounted for 45 out of 272 decisions, ranking first’. W. Wils, “Ten Years” 7-8 of the online version of this article.
PART III. ENSURING EFFECTIVE ENFORCEMENT BY THE COMMISSION AND THE NCAS

In Chapter 5, the great and positive impact of the modernisation reforms on the effective enforcement of the EU cartel prohibition was discussed. As a direct result of the adoption of Regulation 1/2003, Member States have embedded the European competition rules and conducted the necessary legislative reforms to satisfy the obligations imposed by Regulation 1/2003. Furthermore, even if this Regulation did not contain specific requirements with regard to enforcement methods, procedural rules or the institutional frameworks to be adopted by the Member States, as a result of the enhanced cooperation between the NCAs and the Commission, Member States have aligned their national systems even further than they were required to, thereby creating a voluntary harmonising effect. This exceptional process of spontaneous convergence can undoubtedly be described as one of the most important successes of the modernisation reforms: Member States (or at least most of them) have modelled their competition law and enforcement systems on European competition law to a great extent.

In the process of engaging in spontaneous harmonisation, Member States have often followed the example of comparable rules in the European Union. In this sense, the enforcement system of the Commission has played a crucial role. The Commission is not only an effective enforcer of the European antitrust rules within the ECN. In addition, it also retains particular responsibility for the functioning of the entire European network of authorities. Given the effective and leading function fulfilled by the Commission, Member States have found great inspiration in the Commission’s system and have been keen to modify their national enforcement systems in order to emulate the Commission’s regime. This has clearly resulted in greater convergence between the enforcement regimes of the NCAs and the Commission.

However, not only the system of the Commission served as an inspirational model for Member States to engage in spontaneous harmonisation. Member States have also often found (and still find) useful guiding models or enforcement instruments in each other’s systems. After almost a decade of enhanced cooperation between NCAs within the ECN, there is no doubt that the network can act as a valuable platform for spontaneous harmonisation. While the increased cooperation between the NCAs has been a decisive factor in achieving horizontal convergence, it has also been argued that, even if the Commission constantly refines and develops new enforcement tools aiming at ensuring

\[1053\] See e.g. H. VEDDER, “Spontaneous” 5. With respect to the CEE countries see generally e.g. D GERARDIN AND D HENRY, “Competition Law in the New Member States—Where Do We Come From? Where Do We Go?” in D GERARDIN AND D HENRY (eds) Modernisation and Enlargement: Two Major Challenges for EC Competition Law, Intersentia 2005, 258 p., (hereafter: “D. GERARDIN AND D. HENRY, “Competition””)
\[1054\] This can, for instance, be illustrated by the fact that Member States have given competition authorities increased investigatory powers which resemble the Commission investigation powers. See supra Chapter 5, section 2.3. See also H. VEDDER, “Spontaneous” 17, commenting that “[i]n the Netherlands acts are evaluated every five years and so the Competition Act that entered into force in 1998 was reviewed in 2003. This evaluation coincided with the publication of the Commission proposal (Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty – COM (2000) 582) and Regulation 1/2003. As a result of the evaluation, it was decided to amend the Competition Act in accordance with the new system laid down in Regulation 1/2003. Consequently, the investigatory powers of the Netherlands Competition Authority [were] to be increased […]’.

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optimal enforcement, the current administrative sanctioning system of the Commission based on fines may have reached its limit. In other words, harmful practices such as cartels cannot be effectively deterred by means of fines on undertakings.

In line with this reasoning, a number of Member States have introduced – or consider the introduction of – sanctions for natural persons involved in anticompetitive practices. It can be predicted that if this particular enforcement instrument proves effective and adequate for cartel infringements, an increasing number of Member States may adopt similar sanctions. This could give rise to a contagious trend or movement towards the spontaneous adoption of sanctions for individuals under national competition enforcement systems. Likewise, this logic can be applied to other areas such as investigatory powers, leniency programmes or settlements, which are very likely to be subject to voluntary convergence.

Regulation 1/2003, followed by the process of spontaneous harmonisation, was a key step in providing a more level playing field for businesses operating in the internal market and must, therefore, be seen as a positive and crucial development. Still, even if national procedures are increasingly converging in the way they enforce EU antitrust law, this development has not led to complete uniformity. Divergence subsists on a number of fundamental questions due to the fact that NCAs may impose a varying sanctions and use divergent procedures to apply the European competition rules. Despite all the progress, in practice, the existence of such remaining differences renders the process of natural convergence a questionable and, at the same time, fragile development. The extent to which these remaining differences represent an obstacle in terms of effective enforcement must thus be subject to further reflection. On the other hand, one may also see an opportunity in divergence as a means to enhance effective enforcement. This is especially true

1055 I. S. FORRESTER, “Searches Beneath” 23 of the online version of this publication. See also Chapters 11 and 12.
1056 See further infra Chapter 10. In this context H. VEDDER interestingly botes that ‘both the Courts and the Commission appear to make a clearer distinction between harmless and harmful restrictions of competition whereby the latter are treated to an increasingly criminalised system of enforcement whereas the latter are handed over to the more low key realms of private enforcement. This bifurcation between harmful (hard core) and harmless restrictions together with the decentralisation (through the network) will have important implications for the national systems of competition law’. H. VEDDER, “Spontaneous” 20-21.
1059 This development may also be connected to the conditions that must be satisfied to exchange information as established in Article 12 of Regulation 1/2003 (see supra Chapter 5, section 3.2.1.2(a). As commented above Article 12 imposes limits the exchange information between competition authorities when the sanction to be imposed is a sanction against a natural person. The fact that information can be exchanged when the law of the transmitting authority foresees sanctions of a similar kind, may motive competition authorities to incorporate sanctions on individuals into their enforcement system. According to H. VEDDER, this ‘indicates the potentially powerful role of the network in bringing about spontaneous harmonisation’. H. VEDDER, “Spontaneous” 17
1060 See also K. CSERES, “Comparing” 23.
1061 Supra Chapter 5.
1062 For instance, a certain number of Member States have not introduced the possibility for home searches or the possibility for structural remedies. In addition, the existing divergences can also affect more detailed (and, therefore, less significant) aspects such as ‘whether competition authorities have the power to set priorities or the legal framework for conducting interviews, as well as numerous aspects at a more detailed level, including the criteria for adopting interim measures and sanctions for non-compliance with investigatory measures’. See Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012 COM (2013) 257 final, at 13.
taking into account that the Commission’s sanctioning system based only on fines for companies may not suffice to attain optimal deterrence. The potential of divergence to enhance but also to hinder effective enforcement can only but highlight the need to explore the degree of alignment existent between the enforcement systems of European competition authorities.

In order to conduct this examination it is essential to take into account the importance of the role of the Commission as a leader of NCAs and the significant influence of its enforcement system. In effect, given the leading position of the Commission within the ECN, the Commission appears particularly well-suited to enforce the European cartel prohibition effectively and its system is often seen as a blueprint for Member States. Nevertheless, if the analysis of the Commission’s anti-cartel enforcement system reveals that certain enforcement tools entail important shortcomings or constitute enforcement obstacles that taken as a whole may hinder effective enforcement, such aspects or instruments must be subsequently subject to further examination. Precisely in this context, divergence existing on the Member State level can be extremely valuable to improve potential enforcement deficits of the Commission’s system.

PART III provides a comprehensive analysis of the methods and tools used to enforce European competition law in cartel cases. The first subpart offers a critical overview of the enforcement instruments of the Commission as laid down in Regulation 1/2003 and other (soft-law) legislation that has been adopted with a view to enhancing the enforcement Article 101 TFEU in cartel cases. The second subpart elaborates on both the legislative implementation of the European competition rules with regard to substantive provisions as well as the active enforcement of these rules by the NCAs in a number of Member States. The analysis conducted on the Member State level will focus on the enforcement deficits or shortcomings identified on the Commission level. This approach is not only appropriate to avoid overlapping discussions, but also to ensure the added value of this comparative study. The analysis performed at both the European and national level will shed some light on three key aspects. First, it will clarify whether the Commission’s anti-cartel enforcement system can be considered as effective and can thus be used as a model of inspiration for Member States that wish to improve the effectiveness of their national regimes. Second, by exploring the Member State’s enforcement systems with respect to the areas that can be considered deficient or not fully effective on the level of the Commission, divergent and innovative (national) elements with a real potential to increase overall effectiveness will be identified. Third, as divergence at the Member State level can increase but also reduce and even hinder effectiveness, this discussion will also clarify whether the results achieved in the process of spontaneous harmonisation are sufficient to guarantee an effective enforcement of the cartel prohibition or, conversely, whether further (legislative) efforts are needed.

Taken as a whole, PART III aims to answer the emblematic question of how the effectiveness of the enforcement of the European cartel prohibition (as contained in Article 101 TFEU) can be enhanced in the context of the ECN and decentralised enforcement and, thereby, provide the foundations to

1063 It is, however, outside the scope of this study to examine all systems of competition law in Europe in order to identify their similarities and differences with other competition law systems. This examination is therefore necessarily confined to a case study of four Member States’ competition enforcement system. For practical reasons and because these are of particular interest for this study, the Belgian, Spanish, Irish and German will be the subject of this examination. See infra introduction of Chapter 11.
develop a European-wide enforcement system which may combine different (or refined) enforcement tools of both the Commission and the selected national enforcement regimes.
For over 40 years, Regulation 17 formed the European legal basis to investigate and sanction infringements of the EU antitrust rules. In substance, this Regulation entrusted the Commission with broad powers to inspect the business premises of companies that were suspected of violations of Articles 101 and 102 TFEU and to impose fines and periodic penalty payments on undertakings that were found to have violated the EU competition rules. Although for some time, inspections appeared to have fallen in disuse, the adoption of the first Leniency Notice in 1996 re-encouraged the Commission to increase its dawn raid activity. Yet, only in 2002 following the revision of the first Leniency Notice and the clarification of its conditions, the number of inspections was dramatically boosted, making of this tool an indispensable enforcement method.

The replacement of Regulation 17 by Regulation 1/2003 in May 2004 also had a radical impact on the application and enforcement of Articles 101 and 102 TFEU. The modernisation reforms had two main consequences. On the one hand, by fully involving the NCAs (and national courts) in the application and enforcement of EU competition law, the Commission was able to enhance the overall enforcement activity while making more efficient use of its resources. On the other hand, a closer look at the reforms – and particularly of Chapter V of Regulation 1/2003 – shows that the (traditional) investigation powers of the Commission have clearly been reinforced and broadened.

In line with the objective of optimising the enforcement of the EU competition rules, the Commission also sought to develop a new range of enforcement methods, beyond the powers and instruments confined by Regulation 1/2003, to complement its new investigative and sanctioning

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1066 Y. VAN GERVEN, “Bringing” 327; B. VAN BARLINGEN AND M. BARENNES, “The European Commission’s 2002 Leniency Notice in practice”, 2005 (3) Competition Policy Newsletter, 6-16, at 6 (hereafter: ‘B. VAN BARLINGEN AND M. BARENNES, “The European”’). These authors comment that ‘[c]ompared to this total of 159 leniency applications received in the three and a half years of operation of the 2002 Notice, the six years of operation of the previous 1996 Leniency Notice saw a total of slightly more than 80 leniency applications’. See also in this regard F. ARBAULT AND F. PEIRO, “The Commission’s new notice on immunity and reduction of fines in cartel cases: building on success”, 2002 (2) Competition Policy Newsletter, 15-22, (hereafter: ‘F. ARBAULT AND F. PEIRO, “The Commission’s new”’). B. VAN BARLINGEN AND M. BARENNES, observe, however that ‘[t]he most important difference [...] is not so much the considerably higher number of leniency applications received under the 2002 Notice, as the fact that the large majority of the leniency applications under the 1996 Notice were made only after the Commission had undertaken inspections and resulted in a reduction of fines. Under the 2002 Notice, on the contrary, more than half of all leniency applications have been made before any inspection took place and in most of these cases conditional immunity from fines has been granted upfront. The 2002 Notice has therefore been much more successful than the 1996 Notice in revealing secret cartels’.

1067 In addition, it is important to recall that before Regulation 1/2003 entered into force a considerable number of Member States had not yet empowered their NCAs to apply EU competition law, and even if they had been ‘[t]heir own inspection powers, as defined in national legislations, were seldom used to detect violations of Articles [101] and [102] TFEU. Cooperation between competition authorities was [therefore] limited’. Y. VAN GERVEN, “Bringing” 327. On the other hand, in the context of the Commission’s inspections NCAs merely played a supportive and assisting role. See supra Chapter 5, section 2.

1068 See e.g. I. S. FORRESTER, “Searches Beneath” 23-24 of the online version of this publication; Y. VAN GERVEN, “Bringing” 327; I. FORRESTER, “Modernization” 83-97.
arsenal. These initiatives range from the revision of its fining system, the improvement of the leniency programme, to the introduction of the settlement procedure for cartel cases. One cannot but accept that these initiatives undoubtedly aimed at ensuring the optimal enforcement of the European competition rules. Still, given that European Member States appear to be moving towards the adoption of individual (criminal and/or administrative sanctions) for (at least) the most damaging competition law infringements, it is open to debate whether the Commission’s initiatives are appropriate to achieve this goal or whether the current administrative system has reached its limit. In order to assess this question this subpart is organised as follows. First, a brief overview of the Commission’s role within the enforcement framework installed by Regulation 1/2003 will be provided (Chapter 6). Second, the current investigative powers of the Commission to detect and gather evidence against cartels under Regulation 1/2003 will be critically reviewed in order to establish whether they are sufficient to tackle cartels (Chapter 7). The next chapter will focus on detection and evidence collection by assessing the (evolution and effectiveness of) the Commission’s key leniency programme as a tool devised to discover and destabilise complex and secret cartels (Chapter 8). Once the instruments and powers to discover and prove the existence of cartels have been carefully assessed, the settlement procedure for cartel cases as a tool to enhance administrative efficiency in cartel proceedings will also be critically addressed (Chapter 9). Finally, it will be time to take a close look at the fining policy of the Commission (Chapter 10).
CHAPTER 6. The (leading) role of the European Commission

Compared to the system of Regulation 17 which provided the Commission with the exclusive power to declare Article 101(1) TFEU inapplicable by granting an exemption pursuant to (now) Article 101(3) TFEU, the role of the Commission in the enforcement of the European competition rules under the system installed by Regulation 1/2003 is certainly not less significant. On the contrary, given the sharing of competences with the NCAs – and the national courts – and their greater contribution, the Commission became capable to prioritise its tasks and conduct its enforcement activities more effectively. Under the current competition enforcement system, the Commission is entrusted with three main functions. Namely, (i) the Commission is an active enforcer of the antitrust rules, (ii) it also retains its traditional leading role as regards the development of the European competition policy, and (iii) it has a special responsibility for the general working of the network. A (brief) discussion of each of these functions is useful to understand why Member States have the increasing tendency to follow the Commission’s example when they attempt to enhance the effectiveness of their individual enforcement systems.

1. The enforcement mission of the Commission

The European Treaties have never regulated in detail what the competences of the Commission are in the field of European competition law and policy. Still, the importance of the role the Commission has long been stated in the former Article 89 EC, today Article 105 TFEU. According to this provision ‘the Commission shall ensure the application of the principles laid down in Articles 101 and 102 TFEU’. This Article adds that the Commission shall investigate cases of suspected infringement of these principles on application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. In addition, Article 103 TFEU stresses that the appropriate regulations or directives to give effect to the principles set out in Article(s) 101 (and 102) shall be laid down by the Council, on a proposal from the Commission. Such regulations or directives shall be designed in particular to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102.

The Commission has indeed proved to be (and to remain) one of the most dynamic enforcers of the EU competition rules. One of the most renowned cases in which the importance of the

1069 Compare Article 9, Regulation 17.
1070 See also discussing this aspect e.g. S. BRAMMER, Horizontal aspects 23 of the electronic version of the publication; “The Commission's Position”; U. BOGE, “The Commission’s Position”; M. SIRAGUSA, “The Commission's Position”.
1072 In addition, the European Parliament must be previously consulted.
1073 Article 103(3)(a) TFEU.
1074 See in general enforcement terms W. WILS, “Ten Years” 12-18; Commission Staff Working Paper, accompanying the communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003, COM (2009) 206 final. The yearly published competition reports of the Commission also constitute significant evidence of its dynamic role. These reports can be found at http://ec.europa.eu/competition/publications/annual_report/index.html. See also further S. BRAMMER, Horizontal aspects 23-24 of the electronic version of the publication; A. SCHAUB, “The Commission's Position” 2, predicting that after the modernisation reforms ‘the Commissions will remain an active enforcer of the EC competition rules’; E. PAULIS, “Coherent” 405. As this commentator stated in this context ‘[i]his autonomous power of direct enforcement is
Commission’s enforcement function – as now established in Article 105 TFEU – was emphasized is the 2000 Masterfoods case. In particular, the ECJ recalled that the Commission is entrusted with the task of ensuring the application of the European antitrust principles. In order to perform this role, is it essential that the Commission is not prevented at any time from adopting individual decisions under Articles 101 and 102 of the Treaty.  

While it is true that the key ruling in Masterfoods was issued before the modernisation reforms, this does not alter its importance with respect to the role of the Commission. Not only has the enforcement function of the Commission been confirmed by later (post modernisation) jurisprudence. More importantly, the enforcement role of the Commission is based on the Treaty itself. Therefore, the replacement of Regulation 17 does not influence or affect the role of the Commission in this regard. On the contrary, the adoption of the modernisation package only boosted the function of the Commission by releasing it from the notification burden and thereby enabling it to focus on the most harming categories of infringements. In addition, and as it will be commented below, the Commission is constantly reviewing and reinforcing its enforcement equipment in order to maximise its enforcement capacity.

2. The Commission as driver of European competition policy

The Commission has always been responsible for the development of the European competition policy. After its first (modest) initiatives under the ECSC Treaty, the Commission enforced the competition rules in accordance with Regulation 17 under the EEC Treaty. Step by step – by means of decisions and, later-on, notices and regulations – the Commission became the settled leader of the EU competition policy. This key role of the Commission has often been confirmed by the Court of Justice, which has repeatedly stressed that the Commission ‘is responsible for defining and implementing the orientation of European competition policy’.

The established role of the Commission as the leader in the development of European competition policy has not been altered by the entry into force of Regulation 1/2003. Although NCAs now

an essential tool to establish competition policy and to contribute to a coherent application of the EC's competition rules’.

1077 See also e.g. A. SCHAUB “The Commission's Position” 238.
1078 See supra Chapter 5, section 2. A. SCHAUB, “The Commission's Position” 238. See, however, W. W. WILS, “Ten Years” 12-13. Interestingly, W. WILS observes that while “[t]he impact of Regulation 1/2003 on the activity of the European Commission has mostly been as expected […] the number of decisions adopted by the European Commission in the last 25 years suggests that the [Commission’s] prediction may have been too optimistic’. He also comments on different explanations for this situation.
1079 See supra Chapter 1, section 2.3. See also stressing this aspect E. PAULIS, “Coherent” 402.
1080 Case C-344/98, Masterfoods Ltd v HB Ice Cream Ltd [2000] ECR I-11369. In addition, it should be mentioned that the Court of Justice also played an essential role by sometimes upholding, sometimes annulling, but always contributing to a better understanding of the competition rules as they affected the everyday life of consumers and undertakings in the nascent common market. See White paper on modernisation, preface para 2. As it is reflected in illustrated in Chapter 10, the role of the Commission of leader of the EU competition policy is also clearly reflected in its fining policy.
1081 See White Paper on modernisation, paras 14 and 83: “[d]ecentralisation must not be allowed to result in inconsistent application of Community competition law. Competition policy will thus continue to be determined at Community level, both by means of the adoption of legislative texts and individual decisions. The Commission, as guardian of the Treaties and guarantor of the Community interest subject to the supervision of the Court of Justice, has a special role to play in the application of Community law and in ensuring the consistent application of the competition rules’; A. SCHAUB “The
fulfil a key role in the enforcement of the EU competition rules and have significant input in the context of the ECN, the important task of defining the EU’s competition policy has not been decentralised by Regulation 1/2003: only the application and enforcement of the EU antitrust rules is now a shared competence. Accordingly, the Commission kept adopting individual decisions and legislative texts, such as regulations, notices and guidelines to clarify how the EU antitrust provisions should be interpreted and implemented under the current system.

Individual decisions have traditionally been a key instrument of the Commission to establish policy principles. They were and still are especially important in cases regarding novel fields or when the assessment of a practice in question requires (extremely) complex economic analyses. Their particular significance lies in the fact that prohibition decisions draw the line between competitive and anti-competitive business behaviour with precedence value for similar future cases. This explains why recital 11 of Regulation 1/2003 emphasises that the Commission may have a legitimate interest in adopting prohibition decisions for infringements that have been committed in the past even if a fine had not been imposed.

While in the directly applicable exemption system, EU competition policy is still reflected in prohibition decisions, Regulation 1/2003 also includes a new type of decisions that could be relevant in this regard: decisions under Article 10 finding that Article(s) 101 (or 102) TFEU is/are inapplicable. These positive decisions establish whether an agreement is compatible with Article 101 as a whole, either because it falls outside the scope of Article 101(1) or because it satisfies the tests of Article 103(3). In contrast to the former decisions exempting an agreement under Article 101(3) TFEU, decisions finding the inapplicability of Articles 101 or 102 TFEU can (only) be taken by the Commission on its own initiative, in exceptional cases of public interest. They aim at ‘clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice’.

Commission's Position” 4 of the online version of this article; S. BRAMMER, Horizontal aspects 38 of the electronic version of the publication.


1083 See White Paper on modernisation, paras 14 and 83.

1084 See also White Paper on modernisation, para 87; E. PAULIS, “Coherent” 405-406, stating that ‘[h]istory has shown that Commission decisions have a strong precedent value beyond the individual case involved’. See also A. SCHAUD “The Commission's Position” 5 of the online version of this contribution. S. SCHAUD observes that '[t]he Commission has always used individual decisions to determine policy directions in new areas. In the field of economic law, cases are essential to the drawing of policy lines. It is only when sufficient experience has been gathered that the adoption of an act of a horizontal nature can be envisaged’. S. BRAMMER, Vertical aspects 39 of the electronic version of this work.

1085 The importance of the publication of the Commission’s decisions has also been stressed in the case law. See e.g. General Court 30 May 2006, T-198/03, Austria Bank Creditanstalt AG/Commission [2006] ECR 1429, paras 78-79; General Court 12 October 2007, T-474/04, Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission [2007] ECR 4225, para 72. See also A. SCHAUD, “The Commission’s Position” 5 of the one version of this contribution. It should be noted that this author discusses the draft regulation.

1086 See also S. BRAMMER, Horizontal aspects 23-24 of the electronic version of the publication; A. SCHAUD “The Commission’s Position” 4-5 of the online version of this article.

1087 White Paper on modernisation, para 89.

1088 Article 10 and recital 14 of Regulation 1/2003.

1089 See recital 14 of Regulation 1/2007.
It is interesting to note that, to date, the Commission has not adopted any decision under Article 10. It could be argued that if more decisions under Article 10 had been adopted, greater legal certainty could have been provided. This vision is, however, not consistent with the general purpose of Article 10 of Regulation 1/2003. Firstly, as Regulation 1/2003 itself states the conditions of application of Article 10 have been strictly defined so that its use is confined to “exceptional cases” in which an incorrect application of the law may lead to an inconsistent result. Not really surprisingly, after more of forty years of application of the EU competition rules, this situation is very unusual. In the exceptional cases where the consistent application of the EU rules is still at risk, Article 10 could be used (i) to “correct” the approach of a NCA or (ii) to send a signal to the ECN about how to approach a certain case. In practice, the constant efforts taking place within the ECN framework to ensure the consistent application of the EU antitrust rules have rendered Article 10 a rather superfluous mechanism.

Secondly, as established in this provision, Article 10 decisions should only be adopted in the public interest and not in the interest of individual companies. Otherwise, they would become a kind of replacement for the old exemption system of Regulation 17.

Furthermore, it must be added that decisions under Article 10 were also perceived as a means to complement guidelines and block exemption regulations. In fact, in a directly applicable exemption system, the overall legislative framework (in whatever form, i.e. regulations, notices, guidelines, etc...) is essential. Or in other words: businesses must also be able to rely on the existing legal framework to assess whether their restrictive practices are lawful both under European and national competition law. In this sense and given the importance of legislation in the new directly applicable exception regime, block exemptions constitute the legislative instrument by excellence, which leaves little scope for Article 10 decision. Furthermore, the Commission has the (sole) power to enact block exemption regulations.

The Commission has recently also deployed major efforts to publish and revise more notices and guidelines. These types of policy documents contribute to provide a general understanding of the Commission’s approach as regards the application of the European competition rules. Especially in the area of competition law where a proper understanding of economics can be decisive, these

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1091 Ibid.
1092 Ibid at 114 stating ‘[t]he extent to which the ECN has proven to be a successful forum to discuss general policy issues was not anticipated at the time of the adoption of Regulation 1/2003. Horizontal working groups and sector-specific subgroups have been set up where the case-handlers of the different authorities have been extremely proactive in exchanging views and learning from each others’ experiences with particular issues or with particular sectors. Against this background, the Commission has had no reasons to proceed under Article 10 to date’.
1093 See also White Paper on modernisation, para 88: ‘[i]t is true that the Commission would no longer adopt exemption decisions under Article 10(3) as it does now, but it should nevertheless be able to adopt individual decisions that are not prohibition decisions. Where a transaction raises a question that is new, it may be necessary to provide the market with guidance regarding the Commission’s approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest’.
1094 See e.g. A. SCHAUB “The Commission’s Position” 5 of the online version of this article.
1095 See White Paper on modernisation, para 85: ‘[g]iven the importance of legislation in the new directly applicable exception system, legal certainty for undertakings demands that an agreement exempted by a block exemption should not then be held contrary to national law’.
1096 This power was originally grated pursuant to Article 1 of Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) [now Article 101(3)] of the Treaty to certain categories of agreements and concerted practices. ([1965] OJ 36/533 (Special edition 1965-66, p. 35).
instruments are particularly well suited, because they clarify the range of factors that are relevant to assess a certain practice. Therefore, even if these types of policy documents are not legally binding, they still constitute extremely useful instruments for both the business community and NCAs. 1097

3. The Commission as a member of the ECN

The ECN provides the infrastructure for the NCAs and the Commission to cooperate closely in the application of the EU competition rules and protect competition in the public interest. 1098 Since the proper functioning of the ECN is based on trust and confidence between and among all the ECN members, in principle, each member of the ECN should have an equal role within the network. 1099 However, as it is be discussed below, the significant supervisory and interventional competences granted to the Commission 1100 clearly indicate that it occupies a predominant place within the ECN. 1101

There are three main mechanisms at the disposal of the Commission to ensure a consistent application of the EU competition rules, namely: (i) the obligation for NCAs to inform it before or without delay after commencing the first formal investigative measure under Articles 101 or 102 TFEU (Article 11(3)); (ii) the obligation of NCAs to inform it at the latest 30 calendar days before an envisaged decision is adopted (Article 11(4)) and (iii) the possibility for the Commission to intervene if there is a serious risk of incoherence, by relieving NCAs of its competence to act (Article 11(6)).

One of the main indications of the leading position of the Commission can be found in the information obligation contained in Article 11(3) of Regulation 1/2003. As examined, the allocation

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1097 See White Paper on modernisation, para 86. This document stresses that even if notices and guidelines are not binding on national authorities, ‘they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out. Provided those individual decisions were upheld by the Court of Justice, then, notices and guidelines would come to form part of the rules that must be applied by national authorities’. In addition, it should be kept in mind that according to the case-law, in adopting Guidelines the Commission imposes a limit on the exercise of its discretion. If the Commission departs from those rules it may be incoherent or inconsistent with general principles of law, such as equal treatment or the protection of legitimate expectations’ (Judgment of the Court 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 Rørindustri and Others v Commission [2005] ECR I-5425, paras 209-211).

1098 See supra Chapter 5, section 2.3.

1099 See joint statement of the Council and the Commission on the functioning of the network of competition authorities of 10 December 2002 (Council of the European Union, doc. no 15435/02 ADD 1, para 7) stating that ‘[c]ooperation between the NCAs and with the Commission takes place on the basis of equality, respect and solidarity’. See also European Competition Network, Frequently Asked Questions, available at http://ec.europa.eu/competition/ecn/faq.html

1100 See supra Chapter 5, sections 2.2 and 2.3. As analysed above, the fact that the Commission lost its monopoly on the application of Article 101(3) TFEU by sharing this task with NCAs and national courts, not only freed up its resources making the whole enforcement system more effective. At the same time, the higher risk of inconsistencies in the application of the last mentioned rule increased the responsibility of the Commission ensuring the consistent and coherent application of the EU competition rules.

1101 See in this sense S. KINGSTON, “A new division” 344 stating that “the Commission draws a “bright line” between application (NCAs involved) and policy (still the Commission’s prerogative). It makes no bones about its intention to stay in sole control of “policy”. The true Community blueprint is still a “hierarchical” institutional architecture with the Commission at superior level responsible for cases with “political, legal or economic significance” and NCAs as auxiliary organs for cases without such importance. In this context, NCAs will be no more than mere “delegates” or administrative extensions of the Commission’. See also E. PAULIS, “Coherent” 412 who emphasises that the Commission should not be a “policeman” of the network as a general rule. F. CENGIZ, “Multi-level Governance” 664. This last author comments that “[t]he ECN, on the other hand, stands on a hierarchical structure, where the Commission enjoys a clearly distinguished managerial position with certain powers not shared with the NCAs”.

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of cases within the ECN is based on the concept of the ‘well-placed’ competition authority. Most frequently, the authority initiating the investigation or receiving the complaint will remain in charge of the case. However, given the parallel competences of competition authorities, it cannot be excluded that multiple authorities simultaneously start an investigation in the same case. If this is the case, Article 11(3) of Regulation 1/2003 is an extremely useful tool as it allows the Commission and other NCAs to be informed about the existence of competition proceedings in other jurisdictions.\textsuperscript{1102} 1103 The fact that one NCA is dealing with a case is sufficient grounds for another NCA, or the Commission, not to continue its investigation of the same infringement. As such, this provision allows to prevent double work but also, and most importantly in this context, it enables the Commission to closely monitor the cases that are being investigated by NCAs. Moreover, the fact that this obligation to provide information only exists for NCAs vis-à-vis the Commission, clearly illustrates the superior position of the Commission. As Article 11(3) states, NCAs of the other Member States may also make this information available to authorities. NCAs can, therefore, decide whether or not to inform the rest of the members of the ECN about their investigatory initiatives. Although NCAs will in most cases conduct this type of horizontal exchange of information,\textsuperscript{1104} the fact that horizontal exchanges, in contrast to vertical exchanges, (only) take place on a voluntary basis shows that the Commission acts as the leader of the network.\textsuperscript{1105}

Likewise, according to Article 11(4) of Regulation 1/2003, NCAs are required to inform the Commission about the adoption of decisions ordering an infringement to be brought to an end; accepting commitments or withdrawing the benefit of a block exemption regulation.\textsuperscript{1106} Moreover, the NCAs must submit the text of the envisaged decision and a summary of the case or any other document indicating the proposed course of action.\textsuperscript{1107} This provision is in effect one of the most crucial tools for the Commission to ensure consistent application of EU competition rules.\textsuperscript{1108} This information obligation towards the Commission ensures that the consistency of European competition law and policy can be preserved, without having to use more intrusive mechanisms to solve conflicts concerning the application of European competition law.\textsuperscript{1109} The wording of Article

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\textsuperscript{1102} See ECN Notice, para 17. ‘The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided to NCAs and the Commission before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation’.\textsuperscript{1103} See also supra Chapter 5, section 2.3.1.2(a).
\textsuperscript{1104} See in this context M. MEROLA AND D. WAEILBROECK, Towards an optimal (Chapter 4) 338-339.
\textsuperscript{1105} S. BRAMMER, Horizontal aspects 40 of the electronic version of the publication; U. BOGE, “The Commission’s Position” 2 and 4 of the on-line version of the article.
\textsuperscript{1106} This should be communicated at least 30 days in advance. Article 11(3) of Regulation 1/2003.
\textsuperscript{1107} In particular, a statement of objections or other documents foreseen by the national law.
\textsuperscript{1108} See Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 252 and 260: ‘[j]overall, it clearly results from the feedback received by the Commission in the context of the consultation for this Report that the mechanisms provided for by Article 11 of Regulation 1/2003 function very well and have led to the largely coherent and consistent application of EC competition rules in the ECN over the last five years. The concerns related to a major risk of incoherent and inconsistent application of EC competition law in a decentralised system that have been raised at the time of the adoption of the modernisation package have certainly not been realised. Only in respect of few individual cases have inconsistencies been alleged by stakeholders’.
\textsuperscript{1109} See i Chapter 5, section 2.2.3 concerning the application of Article 11(6) of Regulation 1/2003. See also White Paper on modernisation, para 105. In the White Paper the Commission explains that ‘the information to be provided by NCAs pursuant to Article 11(3) and (4) of Regulation 1/2003 together with any correspondence that might take place with the national authorities should allow the Commission to ensure consistency and coherence in the enforcement of the EC competition rules. Special mechanisms allowing the Commission to impose solutions in case of a conflict regarding the application of the law would not be required’. See also commenting on this aspect D. GÉRARD, “The ECN” 12 of the online version of this article.
\end{footnotesize}
11(4) of Regulation 1/2003 once again leaves no doubt about the central position occupied by the Commission within the network: the Commission is always able to closely control and monitor the NCAs’ proceedings.\textsuperscript{1110}

This role of the Commission is also confirmed by the ECN Notice which clarifies that ‘the Commission has the possibility to make written observations on the case before the adoption of the decision by the NCA’.\textsuperscript{1111} The practice of submitting observations to the NCAs has in fact been developed over the years in many cases.\textsuperscript{1112} This type of observations are meant to identify issues that may turn out problematic in terms of consistency and that the NCAs may want to reassess.\textsuperscript{1113} Given the not binding nature of these observations, it is for the NCAs to decide whether or not they take into account the Commission’s view and considerations. However, NCAs are well aware of the right of the Commission to relieve them from their jurisdiction to deal with a case if there is a serious risk of incoherence or inconsistency. Although it has been argued that the existence of this right pressures NCAs to adhere to the Commission’s view,\textsuperscript{1114} experience has shown that NCAs duly take the Commission’s view into account in order to preserve the spirit of cooperation which characterises the ECN. In addition, they also benefit from the consistent application of the EU competition rules. It is, therefore, normal that these observations are taken very seriously by NCAs, which will do the appropriate efforts to endorse the Commission’s vision.\textsuperscript{1115} Despite the willingness of NCAs to ensure the coherent application of EU competition law together with the Commission, it cannot be denied that the cooperation framework provided by Article 11 of Regulation 1/2003 reflects that not all the ECN members occupy the same position and fulfil the same function.

Article 11(6) of Regulation 1/2003 constitutes the clearest illustration of the leading position of the Commission. As mentioned above, on the basis of this rule the Commission preserves the right to open proceedings in the same case as a NCA if there is a major risk of divergence. When the Commission initiates proceedings, NCAs are as a rule relieved of their competence to apply the competition rules. This remains possible even at a very late stage and after the submission of a draft...
decision by the NCA in question.\textsuperscript{1116} In other words: the Commission can always take up any case from a NCA in order to ensure coherent application.

It is submitted that the use of this provision to correct the view taken by a NCA in an envisaged decision should be reserved to the most important issues of incoherent application of the EU competition law provisions.\textsuperscript{1117} In addition, if the Commission is going to open an own procedure, the case must have sufficient Union interest.\textsuperscript{1118} Given, the exceptional nature of this provision, until now, it has not been necessary to use the right of evocation in practice.\textsuperscript{1119} Still, the rationale of this provision cannot be overlooked. The fact that the Commission can never be precluded from taking a decision in a given case concerning the application of Articles 101 and 102 TFEU is obviously connected to its leading role with respect to the enforcement of European competition law.\textsuperscript{1120} By (exceptionally) taking over a case of a NCA in case of a risk of severe inconsistence, the Commission is not only able to clarify the direction to be followed in the context of European competition law and policy, but will reinforce its predominant role in the ECN context.\textsuperscript{1121}

4. Concluding remarks

This Chapter has demonstrated that the Commission clearly has a leading position in the context of decentralised EU competition enforcement. This special position is well illustrated by (i) the active enforcement role fulfilled by the Commission, (ii) its traditional function as regards the development of the European competition policy, and (iii) its special responsibility for the general working of the ECN. Taking into account the special position of the Commission, it is logical that its enforcement system is considered by other competition authorities as a guiding model. If NCAs seek to improve the effectiveness of their enforcement systems, they will most likely be influenced by design of the Commission’s regime. The increasing tendency of Member States to follow the Commission’s enforcement approach should thus be understood in this context.

\textsuperscript{1116} F. CENGIZ, “Multi-level Governance”.
\textsuperscript{1117} See also sharing this opinion e.g. M. MONTI, “The Network Concept, Competition Authority Networks and Other Regulatory Networks” in C.-D. EHLMANN AND I. ATANASIU (eds.) \textit{European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities}, at 8, who describes the mechanism of Article 11(6) as a “safety valve” (hereafter: M. MONTI, “The Network”).
\textsuperscript{1118} The Commission enjoys a great margin of discretion to reject, shelve or prioritize cases by virtue of its use of the notion of “Community interest”. See the Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities, available at: \url{http://register.consilium.europa.eu/pdf/en/02/st15/15435-a1en2.pdf}, para 21. See also in this regard D. GERARD, “The ECN” 13. In the context of complaints, it is settled case-law that the Commission is entitled to give different degrees of priority to complaints and may refer to the Community interest as a criterion of priority. Accordingly, the Commission may reject a complaint when the case does not display a sufficient Community interest to justify further investigation. Case C-119/97 P, \textit{Union française de l'express (Ufex), DHL International and Service CRIE v Commission} [1999] ECR I-1341, para 88; Case T-24/90, \textit{Automec v Commission} [1992] ECR II-2223, paras 77 and 85. See also incorporating the case-law Commission Notice on the handling of complaints [2004] OJ C 101/28.
\textsuperscript{1119} The Network Notice (para 54) provides guidance as to the circumstances in which this provision may be applied. Until 2009, when the report on the functioning of Regulation 1/2003 was published, the Commission had been informed of more than 300 envisaged decisions submitted by the NCAs on the basis of Article 11(4). In none of these cases, proceedings have been initiated by the Commission pursuant to Article 11(6) with a view to relieving a NCA from its competence for reasons of coherent application. As discussed in the last Chapter, the great commitment and efforts of NCAs to achieve additional convergence is undoubtedly connected to this fact. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 254-255.
\textsuperscript{1120} See \textit{supra} PART III, SUBPART I.
\textsuperscript{1121} See also E. PAULIS, “Coherent” 405.
On the other hand, the effectiveness of the Commission’s enforcement system cannot simply be presumed or taken for granted, even if the Commission has an unquestionable leading position. In order to establish that the Commission’s system should be considered a blueprint for Member States, the effectiveness and overall appropriateness of each of the Commission’s anti-cartel enforcement tools must be first critically examined. This question will be thoroughly analysed in the next chapters.
CHAPTER 7. The increased investigative powers of the Commission

As it has been discussed in Chapter 5, the modernisation of EU competition law not only entailed the decentralisation of the application of Article 101 TFEU. The key motivation behind the adoption of the modernisation package was to enhance the overall effectiveness of the enforcement of the EU competition rules. As such, the abolishment of the notification system was a crucial initiative. Instead of spending valuable time and resources processing notifications of complex agreements, the reform enabled the Commission to devote more of its resources to combating, detecting and punishing, hard-core cartels.\textsuperscript{1122}

In the proposal for Regulation 1/2003, the Commission referred to its concerns about the increasing difficulty in the detection of violations of the European competition rules and the subsequent need to increase and broaden its investigation powers in order to protect the competitive process effectively.\textsuperscript{1123} This concern – which is also expressly stated in Regulation 1/2003\textsuperscript{1124} – finally led to the revision of the Commission’s investigative tools and investigation powers.\textsuperscript{1125} Under the system installed by Regulation 1/2003, the Commission was provided with a set of investigatory powers designed to enhance the effective detection of suspected competition law infringements and, in particular, to discover cartel activity.\textsuperscript{1126}

The Commission’s formal powers of investigation are set out in Chapter V of Regulation 1/2003. These powers were developed taking Regulation 17 as well as the relevant case-law of the European Courts as point of reference.\textsuperscript{1127} In the modernised enforcement system, just as it was the case under

\begin{footnotes}
\item[1122] See supra Chapter 5, section 2. See also recital 25 of Regulation 1/2003; Y. VAN GERVEN, “Bringing” 328; A. CRAWFORD AND P. ADAMOPOULOS, “Using the instrument of sector-wide inquiries: inquiry into content for 3G services”, 2004 (Number 2) Competition Policy Newsletter, 63-65, at 63 (hereafter: ‘A. CRAWFORD AND P. ADAMOPOULOS, “Using”’); H. VEDDER, “Spontaneous” 9-10. In this regard this author highlights the connection between spontaneous harmonization and effective enforcement of the EU competition rules. More precisely H. VEDDER comments that ‘spontaneous harmonisation has more than anything else resulted in a uniform culture of competition in Europe. This competition culture has consequences for the enforcement of the competition rules. The realisation that “competition mattered” was closely followed by the realisation that the competition rules in place would need to be enforced. It now almost seems as though the absence of a European competition culture was little more than an infant disease that, once it had been cured in the form of spontaneous harmonisation, the Commission was able to address the more important issues such as trying to ensure a more effective enforcement of Community competition law at the European level’.


\item[1124] See recitals 23, 24 and 25 of Regulation 1/2003.

\item[1125] See e.g. D. WOOD AND N. BAVEZEE, “Sector inquiries” 3. See also L. ORTIZ BLANCO, EU Competition Procedure, Oxford, OUP 2012, 1655 p., at 187 (hereafter: ‘L. ORTIZ BLANCO, EU Competition’). L. ORTIZ BLANCO notes that ‘[t]he widening of the Commission investigatory powers was precisely aimed at enhancing methods of discovering cartel activity at all levels of enforcement’. This vision is shared by H. VEDDER (“Spontaneous” 15) who states that ‘modernisation consists of more than just Regulation 1/2003 and the Commission’s efforts at decentralising the application of the Article [101]. Not only is modernisation aimed at the Commission being able to devote more of its manpower to combating hard-core cartels, it also increases the Commission’s powers in the fight against cartels. All in all, the Commission appears to have increased its powers to fight hard core cartels’. ICN, “Agency Effectiveness Project on Investigative Process – Investigative Tools Report” April 2013, at 5, available at http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf. This report clearly emphasizes that “the quality of a competition agency’s enforcement depends heavily on its ability to conduct effective investigations”.

\item[1126] See e.g. Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012, COM (2013) 257 final, para 58; Y. VAN GERVEN, “Bringing” 328-329. See also supra Chapter 3.

\item[1127] See Commission Staff Working Document accompanying the document Report from the Commission on
Regulation 17, requests for information and inspections constitute the key powers of the Commission to fight cartels and other types of anti-competitive behaviour. In the light of modernisation and the more pro-active enforcement approach, the powers of investigation have been significantly reinforced. The main modifications with regard to the Commission’s investigatory powers include (i) the power to interview any natural or legal person who consents; (ii) the power to seal any business premises and books or records (iii) the power to ask any staff member for explanations of facts or documents and (iv) the power to search private homes. In addition, fines for breach of procedural rules and the periodic penalty payments were strongly increased in order to reinforce compliance with the revised Regulation.\textsuperscript{1128}

This chapter explores the instruments available for the Commission under Regulation 1/2003 to ensure that it can obtain all the necessary information to discover and prove the existence of cartels. This analysis will assess whether the current legal framework effectively enables the Commission to carry out its duties in the context of cartel detection and evidence gathering or whether the current legal framework as implemented in practice is not being fully exploited. To this end this chapter is organised as follows. First, the power to conduct sector inquiries will be discussed. Second, the possibility to lodge complaints about suspected infringements of the EU competition rules is examined. Third, Commission’s powers to carry out inspections in business premises and non-business premises, are scrutinised, including a discussion of the limitation concerning the legal professional privilege. Hereafter, the Commission’s competence to request information is analysed. Finally, a close look is taken at the possibility to conduct voluntary interviews.

1. Inquiries into a particular sector of the economy

1.1. Legal basis and purpose

The specific competence of the Commission to initiate a sector inquiry is intrinsically linked to its role as driver and leader of the European competition policy.\textsuperscript{1129} This power was initially established under the first European competition enforcement system installed by Regulation 17.\textsuperscript{1130}

Under Regulation 1/2003, Article 17 establishes the power of the Commission to undertake inquiries. These inquiries can be conducted in particular sectors of the economy where there are indications – such as the trend of trade between Member States, the rigidity of prices or other circumstances – that suggest that competition is being restricted in an economic sector of the internal market.\textsuperscript{1131} \textsuperscript{1132} To that end, the Commission may in the course of that inquiry request the undertakings concerned to supply the information necessary to give effect to Articles 101 and 102 TFEU and may carry out the necessary inspections.

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\textsuperscript{1128} See Article 23 of Regulation 1/2003.
\textsuperscript{1129} See Chapter supra Chapter 6 and Chapter 7, section 1.
\textsuperscript{1130} See Article 12 of Regulation 17.
\textsuperscript{1131} Article 17 of Regulation 1/2003 also empowers the Commission to carry out inquiries into types of agreements across various sectors. According to the Commission Staff Working Paper no inquiry into types of agreements has been conducted in the reporting period. See Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012, COM (2013) 257 final, para 61.
\textsuperscript{1132} In this context it has been argued that the Commission has a wide margin of discretion to decide whether to initiate a sector inquiry. See G. OLSEN AND B. ROY, “The New World of Proactive EC Antitrust Enforcement? Sector Inquiries by the European Commission”, 2007 (21-3) Antitrust, 82-88, at 83 (hereafter: ‘G. OLSEN AND B. ROY, “The New”’).

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Generally speaking, sector enquiries enable the Commission to closely observe and monitor the European economy. In the words of (now) former competition Commissioner N. KROES, the direct monitoring of different industrial and commercial sectors ‘help[s] direct the Commission's attention to where enforcement cases should be opened by uncovering evidence in a systematic and transparent manner, and they shine a spotlight on anti-competitive business practices’. In other words, sectors inquiries may thus serve to pave the way for individual procedures under Regulation 1/2003. Yet, it is important to stress that – in contrast to similar instruments available in national competition enforcement systems – Article 17 does not provide any additional competence to impose sanctions. If the Commission is considering to take further enforcement action it must, therefore, open individual proceedings against the relevant firms under either Article 101 or 102 TFEU. From this perspective, sector inquiries can be described as a “stage one” assessment in which a market is examined with a view to identify the existence of potential competition concerns and possibly prepare for subsequent enforcement initiatives.

In addition to being a way of approaching particular cases, sector inquiries entail an additional benefit. They are an essential instrument to investigate the functioning and peculiarities of a particular sector. By systematically observing a concrete sector of the economy, the Commission is in a position to apprehend the underlying economic situation and improve its in-depth knowledge about a sector. The wide ranging collection of data (which covers the legal environment as well as the business practices contracts, technical elements, and financial conditions), effectively provides the Commission with a comprehensive view and a better understanding of the market. This improved vision is especially valuable as it may guide proposals for legislation and contribute to design the competition law rules and principles that should be applicable in a given sector. From this perspective, sector inquiries also inform the Commission’s policy decisions about the framework for the market concerned, generally contributing to regulate better.

In general terms, sector inquiries have, therefore, different possible outcomes. Most importantly, when the Commission is able to collect enough evidence of activities that amount to an infringement

1133 L. ORTIZ BLANCO, EU Competition 190.
1134 N. KROES, SPEECH/07/186, “Fact-based competition policy - the contribution of sector inquiries to better regulation, priority setting and detection”, delivered at 13th International Conference on Competition and the 14th European Competition Day Münich, March 2007, available at http://europa.eu/rapid/press-release_SPEECH-07-186_en.htm?locale=en; L. ORTIZ BLANCO, EU Competition 190-191. See also Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012, COM (2013) 257 final, para 62. This report points out that since the Commission uses this instrument to improve understanding about a particular sector in order to identifying its main shortcomings, ‘it is an 'upstream' exercise to potential antitrust proceedings in specific cases which may follow’.
1135 L. ORTIZ BLANCO, EU Competition 190-191. In the words of the former Commissioner for competition N. KROES (SPEECH/07/186) ‘[o]ur sector inquiries, are only a step towards action’.
1136 This aspect was emphasised by N. KROES (SPEECH/07/186) who stated that while ‘[the Commission’s] sector inquiries are unique in covering the whole European market, several national competition authorities also have similar instruments in various forms. Some authorities even have the power to impose a wide range of remedies directly within the context of a sector inquiry, which is not possible under European competition law’.
1138 A. CRAWFORD AND P. ADAMOPOULOS, "Using" 64; L. ORTIZ BLANCO, EU Competition 191.
1139 N. KROES (SPEECH /07/186): ‘[a]lthough a sector inquiry gathers evidence that may be relevant for antitrust enforcement, […] this must not be the end of the story. The knowledge gained can fruitfully be used to guide our thinking in merger and state-aid cases. But just as importantly, it can inform and guide proposals for legislation, embedding competition principles and sectoral knowledge in the wider policy work of the Commission’.

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of the EU competition rules, the inquiries commonly lead to the opening of formal proceedings which may finally result in a prohibition decision. In addition, the Commission can also publish a report on the results of its inquiry and invite interested parties to provide comments.\textsuperscript{1140} This possibility enables sector inquiries to help to stimulate debate over a particular market, for instance, with a view to harmonising approaches and ensuring consistency across sectors and among NCAs.\textsuperscript{1141} Finally, sector inquiries also play a key role in policy making. A detailed analysis of the market conducted in the context of a sector inquiry may effectively contribute to improving the regulation of the relevant sector and subsequently lead to the publication of a green or white paper, or a block exemption. In this context, the identification of competition concerns by means of sector inquiries, is most frequently enough to get the companies themselves to solve the problems. Or, in a few words: sector inquiries often lead to changes in business practices.\textsuperscript{1142}

The inquiry into financial services, specifically retail banking, illustrates how the Commission’s approach to sector inquiries can be used to achieve legislative reform objectives. For instance, the inquiry into the retail banking sector was (among others) intended to provide a blueprint for the Commission’s vision of European-wide enforcement regime. Particularly, the Commission considered the inquiry in question as a framework for NCAs and the Commission to guarantee the coherence of the multiple ongoing competition procedures. Moreover, the Commission affirmed that more generally the inquiry was meant to make a significant contribution to the future implementation of the White Paper, Financial Services Policy 2005–2010.\textsuperscript{1143,1144}

1.2. The (increasing) importance of sector inquiries

Although the power to conduct sector inquiries has been at the Commission’s disposal for more various decades, this tool became increasingly popular within the framework of the modernisation reforms. The growing significance of sector inquiries is connected to two (inter)dependent circumstances. On the one hand, the interaction between (the use of) leniency programmes and sector inquiries has clearly influenced the growing role of sector inquiries. In general terms, offering immunity for fines in exchange for cooperation with the Commission under the leniency system is not certainly an appealing option for infringers of Article 101 TFEU if they do not believe that the chances of getting caught are sufficiently high. Accordingly, too much (or even exclusive) reliance

\footnotesize{\textsuperscript{1140} See Article 17 of Regulation 1/2003.

\textsuperscript{1141} A. CRAWFORD AND P. ADAMOPOULOS, (“Using” 64) note the possibility granted on the basis of Article 17 of Regulation 1/2003, allows to provide guidance and legal certainty to companies operating in the market. See also G. OLSEN AND B. ROY, “The New” 86. Interestingly these authors stress that ‘Commission sector inquiries set the agenda for action by national competition authorities that may seek to a greater or lesser extent to “piggyback” on the findings of the sector inquiry. In this way, sector inquiries provide a useful tool for not only the coherent functioning of the Commission but also in facilitating consistency in approach across Europe’.

\textsuperscript{1142} As it will be examined below, very often undertakings offer commitments after the conduction of a sector inquiry in order to meet the Commission’s competition concerns which were found during the inquiry. See further section 1.4 of this Chapter. See also emphasising this aspect N. KROES, SPEECH/07/186. For example, following the sector inquiry into CD prices, which found that three of the “majors” were including minimum advertised prices in some of their cooperative advertising agreements in Germany, the majors ended those activities. The sector inquiry into telecom leased lines produced, or at least coincided with, a significant decrease in the price for international telecom leased lines across the EU (prices have decreased, on average, 30% to 40%). Moreover, the inquiry led to a pro-active stance on the part of the national regulatory authorities (NRAs) with respect to both pricing and providing of leased lines. The NRAs adopted a number of measures, such as wholesale offers to competitors that enhance and maintain competition at the retail level.


on leniency applications to trigger inspections and uncover illegal cartels has an overall negative impact on the detection probabilities which, at the same time, reinforces the internal cartel stability. This implies that while leniency programmes are an extremely useful and effective tool to discover cartels and increase deterrence, they will only preserve their effectiveness if other external factors capable of destabilizing the cartel exist. Proactive tools of detection, such as sector inquiries remain, as a consequence, an indispensable instrument to keep the detection probabilities sufficiently high to ensure the detection of secret agreements outside the (internal) logic of cartel dynamics.\textsuperscript{1145}

On the other hand, while it is true that the power to conduct sector inquiries seemed to be almost falling into disuse, this investigative tool made a strong reappearance under the modernised enforcement.\textsuperscript{1146} With the abolition of the notification and authorization regime, the Commission was endowed with discretion and resources to prioritize its enforcement needs and focus on (the detection and punishment) of the most serious infringements. However, the abolition of the notification system also meant that the Commission lost an important and stable source of information about the market.\textsuperscript{1147} Given these new circumstances, it became necessary to increase and improve knowledge, awareness and understanding of market performance, sector peculiarities and obstructions to competition.\textsuperscript{1148} The importance of this more dynamic approach was also emphasized by (then) Competition Commissioner MARIO MONTI who stated in particular that:

‘[i]n the absence of notifications, the DG will rely more on complaints and own initiative investigation. In order to find infringements, the DG will have to be further involved in the gathering of market information and the monitoring of markets. DG Competition will thus have to move from a re-active to a more proactive attitude’.\textsuperscript{1149}

Overall, sector inquiries fulfill an essential function in a constantly evolving economy, in which early tracking anticompetitive activity is imperative.\textsuperscript{1150} While adopting effective enforcement initiatives is clearly necessary to uncover secret cartel agreements and put an end to harming

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\textsuperscript{1146} According to A. CRAWFORD AND P. ADAMOPOULOS (Directorate-General Competition, unit C-2) sector inquiries (Article 12 of Regulation 17 - now Article 17 of Regulation 1/2003) were not frequently used in the past. However, in 1999-2000 they came back into play with the launch of three sector inquiries in the telecommunications sector. More precisely, on 27 July 1999 the Commission opened inquiries into the telecommunications sector concerning the provision and pricing of leased lines, mobile roaming services, and the provision of access to and use of the residential local loop. See Commission press release of 22 October 1999, IP/99/786, Commission launches first phase of sectoral inquiry into telecommunications: leased line tariffs. See also A. CRAWFORD AND P. ADAMOPOULOS, “Using” 63. See also L. ORTIZ BLANCO, EU Competition 191-192; D. WOOD AND N. BAVEREZ, “Sector inquiries” 3; Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012, COM (2013) 257 final, para 62.
\textsuperscript{1147} See supra Chapter 5, section 2.
\textsuperscript{1148} L. ORTIZ BLANCO, EU Competition 191-192. See also commenting on this aspect G. OLSEN AND B. ROY, “The New” 82.
\textsuperscript{1149} M. MONTI, SPEECH/03/195, “European Competition Policy: Quo Vadis?” XX International Forum on European Competition Policy, Brussels, April 2003. See also M. MONTI, SPEECH/04/477, “A reformed competition policy: achievements and challenges for the future”, Center for European Reform Brussels, October 2004 in which the former competition Commissioner stressed that ‘after the abolishment of the notification system, the Commission will concentrate on the prosecution of infringements on the basis of complaints, leniency applications and ex officio investigations’. According to M. MONTI this is one of the challenges of a pro-active enforcement of competition law’. See also stressing this aspect D. WOOD AND N. BAVEREZ, “Sector inquiries” 3-4.
\textsuperscript{1150} A. CRAWFORD AND P. ADAMOPOULOS, “Using” 63.
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economic behaviour, handling cases on an individual basis does not allow the Commission to influence emerging anticompetitive strategies in an optimal manner. By conducting sector inquiries, the Commission is capable to react as soon as possible to competition concerns and make sure that economic activity is not hindered by anticompetitive restraints. In the view of the Commission, sector inquiries are an especially appropriate mechanism to investigate cross border market competition problems and analyse sector wide practices that fall outside the scope of an individual case.

In the process of monitoring and assessing the European economy, the Commission typically focuses its attention on two specific types of markets. Firstly, sector inquiries are seen as a suitable tool to monitor the evolution and development of competition in novel markets. Secondly, they are also considered particularly suitable in oligopolistic markets. From an effective enforcement perspective, this approach is fully appropriate given that collusion is most likely to arise in sectors with a very low number of market operators.

1.3. Competences of the Commission during sector inquiries

During a sector inquiry, the Commission is fully entitled to exercise many of the investigation powers that it can use during the investigation of individual cases concerning alleged violations of Articles 101 or 102 TFEU. This possibility was also provided by Article 12 of Regulation 17.

The Commission may, thus, require companies to provide all necessary information, interview natural or legal persons, and conduct dawn raids or other inspections of business premises (but notably not the homes or other private premises of officers or employees). The relevant undertakings are obliged to answer factual questions and to provide the documents requested by the Commission, even if this information constitutes evidence of their involvement in an infringement of the EU competition rules. Non compliance with the Commission decision, or the provision of incorrect, incomplete, or misleading information, may lead to fines of up to 1% of the firm’s global

1151 See A. CRAWFORD and P. ADAMOPOULOS, “Using” 63, pointing out that ‘[i]n the antitrust field, one of the main goals is to react as early as possible to competition problems’.
1152 D. WOOD and N. BAVEREZ, “Sector inquiries” 3; L. ORTIZ BLANCO, EU Competition 192.
1153 Locating anticompetitive activity in new markets is a clear priority for two main reasons. The first reason is related to the key role of new markets for the further development and growth of the European economy. Given the central importance of novel markets, obstacles which may hinder their expansion should be removed as soon as possible in order to reinforce the importance of the European economy in a global context (A. CRAWFORD and P. ADAMOPOULOS, “Using” 63). The second reason is connected to the special nature of new or emerging markets which makes them inherently vulnerable to competition hazards that may hinder their evolution. Innovative technologies, networks or dynamics may constitute an important threat to (older) technologies existing in the market. Naturally, new players in the market holding the new technology do not have any direct incentives to enable non-discriminatory third-party access to the new network. See in this context N. KROES, SPEECH/07/186; D. WOOD and N. BAVEREZ, “Sector inquiries” 3, commenting that sector inquiries ‘are also considered an appropriate instrument for monitoring the development of competition in sectors where business practices are not yet established and competition may be shaped through one-shot “winner takes all” agreements, such as in the new media/3G content sector’; A. CRAWFORD and P. ADAMOPOULOS, “Using” 63.
1154 See supra Chapter 2, section 5. See also L. ORTIZ BLANCO, EU Competition 191-192; D. WOOD and N. BAVEREZ, “Sector inquiries” 3.
1155 Article 18 of Regulation 1/2003.
1156 Article 19 of Regulation 1/2003.
1157 Article 20 of Regulation 1/2003.
1158 This subject will be discussed in detailed in section 4 of this Chapter.
The Commission is also entitled to impose a periodic penalty payment of up to 5% of a firm’s average daily turnover in order to compel undertakings to comply with a decision ordering to supply information or to submit to an inspection.\textsuperscript{1159} \textsuperscript{1160} \textsuperscript{1161}

The specific competences of the Commission during a sector inquiry are not subject to the (previous) formal opening of an individual procedure in which specific investigative measures may be exercised.\textsuperscript{1162} This implies, on the other hand, that in order to launch an investigation inquiry into a sector of the economy, the Commission must have adopted a decision on the basis of Article 17(1) of Regulation 1/2003.\textsuperscript{1163} If the Commission decides to use additional investigative measures (such as its power to request information or the power to conduct inspections of business premises) within the framework of a sector inquiry, the requirements which are applicable for each individual investigative measure must also be satisfied.\textsuperscript{1164}

The power of the Commission to conduct sector inquiries under Regulation 1/2003 is essential from an effective enforcement perspective.\textsuperscript{1165} Although the use of inspections and request for information in the course of a sector inquiry may be seen as invasive from the undertaking’s point of view, the effectiveness of such power could be jeopardised if it would not include the right of the Commission to conduct inspections or to make information requests. (Unannounced) inspections are especially important when the Commission suspects during a sector inquiry that practices prohibited under the European antitrust provisions, are taking place. Since obtaining evidence is particularly difficult in price fixing, market sharing and other types of horizontal cartels, unannounced inspections play a particularly relevant role in this area of enforcement. Planning unannounced inspections is in this context (often) used to prevent undertakings from concealing, withholding or destroying documentation relating to a possible violation.\textsuperscript{1166} Similarly, the possibility to make requests for information should be welcomed. The Commission acknowledges that replies to information requests may demand considerable resources and time. Still, the scope of questionnaires addressed to firms does not go beyond what is necessary to fully understand the

\textsuperscript{1159} See Article 23 of Regulation 1/2003. This subject will be examined in detailed in Chapter 10.

\textsuperscript{1160} See Article 24 of Regulation 1/2003.

\textsuperscript{1161} See further infra sections 3 and 4.

\textsuperscript{1162} See also Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012, COM (2013) 257 final, paras 68-69.

\textsuperscript{1163} The publication of decisions regarding the opening of a sector inquiry is not required pursuant to Article 30 of Regulation 1/2003. However, it must be adopted by the full Commission after the opinion of the Advisory Committee has been issued (see Article 17(2) of Regulation 1/2003).

\textsuperscript{1164} Compare L. ORTIZ BLANCO, EU Competition 192; H. ANDERSSON AND E. LÉGNERFÄLT, “Dawn Raids in Sector Inquiries — Fishing Expeditions in Disguise?”, 2008 (8) ECLR, 349-445 (hereafter: ‘H. ANDERSSON AND E. LÉGNERFÄLT, “Dawn Raids”’). These authors criticise dawn raids conducted in the context of sector inquiries as being arbitrary and disproportionate measures. More specifically, they comment that the inspection of an undertaking indicates that the Commission has a real suspicion. Considering that the objective of sector inquiries is not to target companies suspected wrongdoing, dawn raids are not appropriate in this context. These authors, however, appear to disregard the fact that regardless the general objective of sector inquiries, if the Commission is planning to launch an inspection on the basis of Article 20, all the conditions for its application should be met. This means namely that to order a mandatory inspection in the sense of Article 20(3) the Commission must indicate the subject matter and purpose of the inspection, the date on which it is to begin, the applicable sanctions and the right to judicial review. These requirements guarantee that the inspection is proportional and non-arbitrary (see further infra section 3.1.2. Contrary to the opinion of these authors, there is no reason to distinguish inspections conducted in the content of a sector inquiry from other inspections conducted by the Commission.


\textsuperscript{1166} Ibid.
markets concerned and the relationships between the market operators. In addition, the Commission considers that without this key data, the findings of the sector inquiries would be vaguer and potentially lead it to erroneous or distorted conclusions.\footnote{Ibid. However, even if unannounced inspections and requests for information are key conditions for the effectiveness of sector inspections, the Commission acknowledges that the use of these rights is carefully considered during each particular sector inquiry. The general context and circumstances of the inquiry in question as well as the type of information the Commission needs for its investigation play decisive roles.}

The first inquiry initiated by the Commission with unannounced inspections was the pharmaceutical sector inquiry. This sector inquiry clearly illustrates the benefits of using the possibilities to conduct inspection and make information requests. In this inquiry, most of the documentation analysed – which specifically concerned the use of intellectual property rights, litigation and settlement agreements covering the EU – was by nature highly confidential. Since this information could be easily withheld, concealed or destroyed, the Commission considered that having direct access to all such information was crucial. Based on the information and knowledge acquired during the sector inquiry the Commission was able to identify various competition concerns and, subsequently, launch other individual investigations. In addition, the information collected enabled the Commission to organise additional unannounced inspections at several pharmaceutical companies in November 2008.\footnote{Commission Staff Working Document accompanying the document Report from the Commission on Competition Policy 2012, COM (2013) 257 final, para 68. See also Commission Press Release, IP/08/734 of 24 November 2008.}

1.4. Experience under Regulation 1/2003

Recent experience of the Commission conducting sector inquiries has been very positive. The most important sectors which have recently been subject to an inquiry are the energy sector, the sector of retail banking, the business insurance sector and the pharmaceutical sector.\footnote{In addition to the sector inquiries commented below, the Commission has also conducted other (formal and also informal) sector inquiries in the past. Such inquiries concern: ‘(i) interconnection tariffs applied between fixed and mobile telecoms operators and prices for calls from fixed to mobile networks (1998). The Commission sent questionnaires to fixed and mobile telecoms operators in all member states. (ii) The provision and pricing of leased lines (October 1999). Questionnaires were sent to national competition authorities, telecoms regulators and incumbent telecoms operators across the EU, new entrants that provide and/or purchase leased line services, as well as a number of big business users of leased lines. The inquiry lasted for more than three years. (iii) National and international mobile roaming services (January 2000). The inquiry followed a number of informal complaints regarding the consistency of wholesale and retail prices charged under mobile roaming agreements. Almost 200 questionnaires were sent to national competition authorities and telecoms regulators, as well as to mobile network operators and service providers. (iv) The provision of access to and use of the residential local loop (July 2000). Requests were sent to incumbent telecoms operators. (v) The vertical relationships between the five major record companies and their retailers (January 2001). The inquiry was suspended seven months after it was launched after changes to the majors’ business practices. (vi) The compatibility of the DVD regional coding system with the EC competition rules (2001)’. See D. WOOD AND N. BAVEREZ, “Sector inquiries” 4-5. More information these sector inquiries can be found at http://ec.europa.eu/competition/antitrust/sector_inquiries.html.}

The inquiry in the energy sector was launched in June 2005\footnote{Commission Decision of 13/06/2005 initiating an inquiry into the gas and electricity sectors pursuant to Article 17 of Council Regulation (EC) No 1/2003 Cases COMP/B-1/39.172 (electricity) and 39.173 (gas), OJ C144/13. See also Commission, MEMO/05/203 (“Energy sector competition inquiry – FAQ”); Commission, IP/05/716 (“Competition: Commission opens sector inquiry into gas and electricity”).} following criticisms voiced by new market entrants and consumers about the development of wholesale gas and electricity markets and limited choice for consumers.\footnote{Initial results were presented in the form of an Issues Paper in November 2005 (the Issues Paper is available at http://ec.europa.eu/competition/sectors/energy/inquiry/issues_paper15112005.pdf. See also Commission, IP/05/1421, (“Energy: Member States must do more to open markets; competition inquiry identifies serious malfunctions“);} The final report identified important deficits in the gas and...
electricity markets and concluded that consumers and businesses were losing out because of inefficient and expensive market structures. Specific problems related, among others, to high levels of concentration in a high number of national markets, an absence of transparent, available market information, vertical integration of supply (customers being tied to suppliers through long-term downstream contracts), lack of equal access to, and insufficient investment in infrastructure. In order to deal with these issues a number of investigations were launched in the electricity and gas markets, which finally led the Commission to adopt a number of important individual decisions in 2008 and 2009. On the basis of one of the decisions, which involved structural commitments addressing horizontal and vertical concerns, the Commission effectively opened two separate markets to competition. The same sector inquiry also enabled the Commission to fine two undertakings (E.ON and GDF Suez) €553 million each for market-sharing in French and German gas markets. Moreover, the comprehensive knowledge gained in the course of the sector inquiry of the energy market, also served the Commission to improve and review the regulatory framework for energy liberalisation.

The sector inquiry on retail banking was opened in June 2005. Interim reports were published on payment cards in April 2006 and current accounts and related services in July 2006. The final report of the Commission of 2007 identified a number of competition concerns in the markets for payment cards, payment systems and retail banking products. Specific issues included highly concentrated markets in many Member States, large variations in interchange fees for payment

Commission, MEMO/05/425 ("Competition: Commission sector inquiry reveals serious problems in energy market"). In February 2006 a preliminary report was published which launched a public consultation Commission, IP/06/174 ("Competition: energy sector inquiry confirms serious problems and sets out way forward"); Commission, MEMO/06/78 ("Energy sector competition inquiry – preliminary report – frequently asked questions"). A great majority of contributions pointed out the need for reinforced regulatory measures. Only incumbent – vertically integrated – operators opposed further measures, notably ownership unbundling.


See Commission, MEMO/08/132 ("Antitrust: Commission welcomes E.ON proposals for structural remedies to increase competition in German electricity market").

Summary of Commission Decision of 26 November 2008 (Cases COMP/39.388 — German Electricity Wholesale Market and COMP/39.389 — German Electricity Balancing Market [2009] OJ C 36/8; see also Commission, IP/08/1774 ("Commission opens German electricity market to competition"). In a different case in the same sector, an undertaking has also offered structural commitments which met the Commission’s concerns. See Summary of Commission Decision of 8 July 2009 (Case COMP/39.401 — E.ON/GDF) [2009] OJ C 248/5. See also Commission, IP/09/1099 ("Antitrust: Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets").


The interim report on payment cards is available at [http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_1.pdf](http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_1.pdf); see also Commission, IP/06/999 "Commission holds public hearing on competition in retail banking".

The interim report on current accounts and related services is available at [http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_2.pdf](http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_2.pdf); see also Commission, IP/06/999 ("Commission holds public hearing on competition in retail banking").

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cards, barriers to entry in the markets for payment systems and obstacles to customer mobility.\textsuperscript{1180} This inquiry led to various outcomes. The findings of the sector inquiry helped to enforce existing antitrust cases – notably in the payment cards field – and new areas of investigation emerged, for both the Commission and NCAs. Some market operators offered voluntary reforms following the publication of preliminary findings on payment cards in 2006.\textsuperscript{1181} Several of the market barriers highlighted in the inquiry, have been or are being tackled in the context of the creation of the Single Euro Payment Area.\textsuperscript{1182} Finally, the enhanced understanding of the market obtained contributed to a number of competition policy initiatives.\textsuperscript{1183}

In June 2005, the Commission decided to initiate a sector inquiry in the \textit{business insurance} industry.\textsuperscript{1184} Building on the interim report on the inquiry of January 2007, an intensive public consultation and advanced fact-finding,\textsuperscript{1185} the final report found two main concerns.\textsuperscript{1186} First, it identified long-standing and widespread industry practices in the reinsurance and coinsurance markets involving the alignment of premiums, which may result in increased prices for large risk commercial insurance. Second, the Commission showed concerns concerning the transparency of remuneration and conflicts of interest in insurance brokerage which may lead to higher prices and limited choice.\textsuperscript{1187} Finally, the sector inquiry provided relevant information for the review of the Insurance Block Exemption Regulation.\textsuperscript{1188}

In January 2008, the Commission launched an inquiry in the \textit{pharmaceutical sector} to explore why less novel medicines were brought to market and why the entry of generic medicines appeared to be delayed in certain cases. In particular, the inquiry examined whether agreements between undertakings operating in this sector (such as settlements in patent disputes), blocked or led to


\textsuperscript{1181} Commission, IP/06/496 (“Commission sector inquiry highlights competition concerns in payment cards industry”); Commission, MEMO/06/164 (“Competition: Commission’s sector inquiry into the payments cards industry – frequently asked questions”).

\textsuperscript{1182} Commission, IP/07/114 (“Commission sector inquiry finds major competition barriers in retail banking”).

\textsuperscript{1183} The different initiatives on the area of retail financial services (such as the Green Paper on Retail Financial Services in the Single Market (COM (2007) 226)) can be found at \url{http://ec.europa.eu/internal_market/finservices- retail/policy/index_en.htm}


\textsuperscript{1185} The complete interim report is available at \url{http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_24012007.pdf}. During the public consultation the interim report was widely commented by industry stakeholders. The programme and videos of the public hearing can be found at \url{http://ec.europa.eu/competition/sectors/financial_services/inquiries/business.html}


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delays in market entry.\textsuperscript{1189}\textsuperscript{1190} According to the Commission's final report, which was published in spring 2009, competition was not working effectively. Both company activity and regulation contributed to this. In addition, the report pointed out several specific delaying strategies.\textsuperscript{1191} As a follow up, the Commission has strengthened its scrutiny of the pharmaceutical sector under the EU antitrust rules. This also includes constant monitoring of settlements between originator and generic drug companies.\textsuperscript{1192} The report also calls on Member States to introduce legislation to facilitate the uptake of generic drugs.

2. Complaints

The detection and investigation of serious (and often concealed) infringements of Article(s) 101 (and 102) TFEU can be facilitated when undertakings and consumers have the possibility to provide competition authorities information about potential anti-competitive practices. The Commission strongly encourages citizens and undertakings to contact public enforcers if they suspect the existence of an infringement of competition law.\textsuperscript{1193}

Citizens and undertakings can follow two different paths to inform the Commission about an EU competition law violation. First, they can submit a formal complaint pursuant to Article 7(2) of Regulation 1/2003. In accordance with Articles 5 to 9 of Regulation 773/2004, formal complaints must satisfy certain requirements. Second, individuals and firms can provide market information that does not have to comply with the requirements applicable to complaints under Article 7(2) of Regulation 1/2003. To this end, the Commission has created a specific website to collect information from citizens and undertakings about suspected competition infringements.\textsuperscript{1194} This second possibility is certainly welcomed as it implies that, even if a given undertaking or individual does not wish to lodge in an “official” complaint within the meaning of Article 7(2) of Regulation 1/2003 – and to comply with all the relevant requirement – this type of complaint may be the starting point of an ex-officio investigation when the information submitted is useful.\textsuperscript{1195} In practice, the possibility to contact the Commission with respect to potential cartel infringements


\textsuperscript{1190} In the Preliminary Report the Commission reached the main conclusion that activities and practices of the originator industry caused generic delay and contributed to the creation of difficulties in innovation. The report also highlighted the existence of other potential factors, such as regulation in the sector. The Preliminary Report can be found at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf. After the preliminary findings were presented in a preliminary report, the Commission launched public consultations to receive feedback from stakeholders. See http://ec.europa.eu/competition/consultations/2009_pharma/index.html


\textsuperscript{1192} For an overview of the Commission’s on the monitoring of patent settlements see http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/.

\textsuperscript{1193} Commission, Notice on the handling of complaints [2004] OJ C 101/65, para 3.

\textsuperscript{1194} Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 4. Information about suspected infringements can be supplied to the following address: http://europa.eu.int/dgcomp/info-on-anti-competitive-practices or to: Commission européenne/Europese Commissie Competition DG B - 1049 Bruxelles/Brussel.

\textsuperscript{1195} Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 32.
has been especially productive: informal complaints and/or other information tips have led to the
detection of a considerable number of cartel violations.\footnote{The role of complaints as a cartel detection tool was particularly valuable before the introduction of the Commission’s Leniency Programme. After the leniency policy was introduced, cartel infringements have been most frequently detected on the basis of this tool. However, complaints as a mechanism of detection remain greatly useful when cartels are very stable and, therefore, unlikely to break down. In this situation, complaints made by cartel clients can indeed lead to fruitful results.}

Article 7(2) of Regulation 1/2003, on the other hand, regulates the so-called formal or official complaints. Only legal and natural persons who can show a legitimate interest can lodge in this type of complaint.\footnote{Cf. Article 5(1) of Regulation 773/2004. Member States are deemed to have a legitimate interest for all complaints they choose to lodge. Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 33.}

The European Courts have clarified the meaning and interpretation of the condition of a “legitimate interest”. The EU case law suggests that undertakings (themselves or through associations that are entitled to represent their interests) can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests.\footnote{Case T-114/92 Bureau Européen des Médias de l’Industrie Musicale v Commission [1995] ECR II-147, para 28. See also Judgment of the Court of 28 March 1985, Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission [1985] ECR 1105; Judgment of the Court of First Instance of 4 March 2003, Case T-319/99, Federacion Nacional de Empresas (FENIN) v Commission and Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 35. In contrast, the Commission is not entitled to pursue a complaint from an association of undertakings whose members were not involved in the type of business transactions subject to the complaint. CFI 16 September 1998, Joined Cases T-133/95 and T-204/95, International Express Carriers Conference (IECC) v Commission [1998] ECR II-3645, paras 79-83. See also Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 35.}

This approach confirms the practice of the Commission in accordance to which a legitimate interest can, for instance, be claimed by competitors who have been damaged by the activity subject of the complaint, by companies excluded from a distribution system or by the parties of the agreement or practice at the core of the complaint.\footnote{Consumer associations can equally submit complaints to the Commission. CFI 18 May 1994, Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission [1994] ECR II-285, para 36. In the same line local or regional public authorities may have a legitimate interest in their capacity of buyers or users of goods or services affected by the conduct complained of. Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 39.}

The Commission also considers that particular consumers who are buyers of products or services which are the object of an infringement may have been harmed and thus be in a position to show a legitimate interest.\footnote{CFI 7 June 2006, Joined cases T-213/01 and T-214/01, Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission [2006] ECR II-1601.}

Conversely, the Commission does not consider that persons (or organisations) that wish to come forward based on general interest considerations, without showing that they have been adversely affected by the potential infringement, have a “legitimate interest”.\footnote{Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 38.}

Pursuant to Article 7(2) of Regulation 1/2003, a complaint about an alleged infringement can only be made with a view to bringing the infringement to an end under Article 7(1) of Regulation 1/2003. A formal complaint has to comply with Form C mentioned in Article 5(1) of Regulation 773/2004, which is annexed to that Regulation.\footnote{The complaint must be submitted in three paper copies as well as, if possible, an electronic copy. In addition, the complainant must provide a non-confidential version of the complaint (Article 5(2) of Regulation 773/2004).} In particular, Form C requires complainants to submit extensive information with regard to their complaint. In addition, they should provide the relevant

\footnotesize{1196 The role of complaints as a cartel detection tool was particularly valuable before the introduction of the Commission’s Leniency Programme. After the leniency policy was introduced, cartel infringements have been most frequently detected on the basis of this tool. However, complaints as a mechanism of detection remain greatly useful when cartels are very stable and, therefore, unlikely to break down. In this situation, complaints made by cartel clients or victims can indeed lead to fruitful results.


1199 Consumer associations can equally submit complaints to the Commission. CFI 18 May 1994, Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission [1994] ECR II-285, para 36. In the same line local or regional public authorities may have a legitimate interest in their capacity of buyers or users of goods or services affected by the conduct complained of. Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 39.


1202 The complaint must be submitted in three paper copies as well as, if possible, an electronic copy. In addition, the complainant must provide a non-confidential version of the complaint (Article 5(2) of Regulation 773/2004).}
supporting documentation (reasonably) available to them and indications as to where other relevant documentation (that is not available to them) can be found by the Commission.\textsuperscript{1203}

There is, however, no obligation for the Commission to conduct an investigation in each case or, subsequently, to take a decision concerning the (non-)existence of an infringement of Article 101 or 102 TFEU. As such, the Commission has a significant margin of discretion to set its enforcement priorities\textsuperscript{1204} and is entitled to prioritize complaints by referring to the Union interest.\textsuperscript{1205} This implies in turn that the Commission may reject a complaint when it considers that the case does not show sufficient interest to justify a deeper investigation.\textsuperscript{1206} 1207 Yet, the Commission must assess carefully the factual and legal information provided by the complainant in order to assess the Union interest.\textsuperscript{1208}

The possibility to reject complaint and to set priorities is reasonable in the light of the limited resources of the Commission. Although, the assessment of the Union interest depends on the circumstances of each individual case,\textsuperscript{1209} in the specific area of cartels is it particularly unlikely that the Commission decides to turn down a complaint if there is evidence pointing out the existence of an international operating cartel. This approach is confirmed by the fact that, in the assessment of the Union interest, the Commission ‘is required to assess in each case how serious the alleged infringements are and how persistent their consequences are’\textsuperscript{1210} and ‘may have to balance the significance of the alleged infringement as regards the functioning of the [internal] market’.\textsuperscript{1211}

\textsuperscript{1203}Pursuant to Article 5(1) of Regulation 773/2004, the Commission may in certain cases dispense firms of the obligation to provide information in relation to part of the information required by Form C. In the Commission’s view this possibility can facilitate complaints by consumer associations which do not frequently have access to specific pieces of information. Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 31.


\textsuperscript{1205}Ibid. See also confirming this possibility recital 18 of Regulation 1/2003 and Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 45.


\textsuperscript{1207}When the Commission rejects a complaint by decision pursuant to Article 7(2) of Regulation 773/2004, it must state the reasons in accordance with Article 296 TFEU in a way that is appropriate to the act at issue and takes into account the circumstances of each case. A decision to reject a complaint is subject to appeal before the European Courts (Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission [1983] ECR 3045).


\textsuperscript{1209}Commission, Notice on the handling of complaints 2004 [2004] OJ C 101/65, para 43. This implies that the Commission may take into account a number of criteria of assessment which is not limited. Given that the factual and legal circumstances may differ considerably from case to case, it is acceptable to apply new criteria (Case C-119/97 P, Union française de l’express (Ufex) and Others v Commission [1999] ECR I-1341, paras 79-80). Furthermore, the Commission is entitled to give priority to a single criterion (Case C-450/98 P, International Express Carriers Conference (IECC) v Commission [2001] ECR I-3947, paras 57-59).


\textsuperscript{1211}The case-law has also established other factors that are relevant for the assessment of the Union interest. For example (i) the Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts (T-24/90, Automec v Commission [1992] ECR II-2223, paras 88 et seq); (ii) the stage of the investigation may also be taken into account (Case C-449/98 P, International Express Carriers Conference (IECC) v Commission [2001] ECR I-3875; para 37), (iii) the Commission may reject to investigate a complaint where the practices in question have ceased or when the undertaking agreed to change its conduct (Case C-119/97 P, Union
Given the harmful effects of cartel agreements and their threatening nature for the attainment of the objectives of the EU competition law system, consistent evidence suggesting the existence of widely operating cartels should be (and normally is) classified as a top priority in the context of complaints.

In addition, the Commission clarifies in its Notice on the handling of complaints that a complaint can be rejected on the ground that the conduct complained of does not infringe the EU competition rules. As demonstrated in Chapter 4, cartels are considered to consistently infringe 101 TFEU as whole. As a result, it is also highly improbable that a substantiated cartel complaints are rejected on this ground.

3. The power to conduct (unannounced) inspections in business premises and non-business premises

The more proactive approach to competition law enforcement is largely dependent on efficient and effective investigatory tools. One of the most powerful instruments available to the Commission is its competence to conduct (unannounced) inspections. Recent experience with competition law enforcement shows that by relying on investigations at business and non-business premises, the Commission has been able to detect, gather evidence and punish a whole range of serious infringements of EU competition law, including cartels. This section will discuss the power of the Commission to conduct inspections at business and non-business premises.

3.1. Inspections of business premises

3.1.1. Legal basis and substantive requirements

The Commission has wide authority to investigate possible violations of the European antitrust provisions. The inspection powers of the Commission, also known as dawn raids, were regulated for the first time in the former Regulation 17. Particularly, Article 14 of Regulation 17 entrusted the Commission with broad powers to inspect the business premises of companies that were suspected of violations of (now) Articles 101 and 102 TFEU. After the modernisation reforms took place,

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1213 See e.g. H. ANDERSSON AND E. LEGNERFÄLT, “Dawn Raids” 135.

1214 The term “dawn raid” typically refers to unannounced inspections. In this regard, it is interesting to note that as A. JONES AND B. SUFRIN comment that ‘although popularly known as dawn raids, unannounced inspection take place during normal business hours’. A. JONES AND B. SUFRIN, EU competition law - Texts, cases and materials, Oxford, OUP 2011, 1266 p., at 1046 (hereafter: ‘A. JONES AND B. SUFRIN, EU competition 2011’).

Article 14 of Regulation 17 was replaced by Article 20 of Regulation 1/2003. This provision constitutes the current legal basis for the Commission’s inspections. More specifically, this article sets out the particular powers of inspection (para 2), the details of the procedure for inspections (paras 3 and 4), including the cooperation obligation of the officials of authorities in the Member States in whose territory an inspection is to be conducted (paras 5 and 6), as well as some aspect concerning procedural guarantees of the Member States, especially the requirement to obtain a judicial decision authorising the search (paras 7 and 8).

The Commission’s competences in the context of inspections under Article 20 of Regulation 1/2003 are largely similar to those previously granted under Article 14 of Regulation 17. Although the powers of the Commission under Regulation 17 were in fact broad and served well the effective enforcement of the cartel prohibition, Regulation 1/2003 made clear that the detection of infringements of the competition rules was and is still growing ever more difficult. Therefore, ‘in order to protect competition effectively, the Commission's powers of investigation need[ed] to be supplemented’. Following this reasoning, Regulation 1/2003 not only maintained and enhanced the existing powers, but also incorporated a number of modifications designed specifically to reinforce the Commission’s enforcement ability, especially in the area of cartels. Examples of these amendments are the new power to seal any business premise as well as books and records, and the formalised right to ask for explanations as regards books, records or other relevant documents.


1217 Recital 25 of Regulation 1/2003. See also M. MONTI, SPEECH/00/295, stating that ‘in a global economy where infringements become more and more sophisticated, it is of paramount importance that the Commission is properly equipped with investigative powers that allow it to effectively detect infringements of the Community competition rules. To do so, we must make the Commission's inspection powers more biting’. See further supra Chapter 2. See also C. LISTER, “Dawn Raids” 45-48. Interestingly, this author pointed out in the context of Regulation 17 that ‘[t]he Commission evidently believes that Regulation 17 grants it “nearly all” of the investigatory powers it requires’. The expression “nearly all” clearly indicates that the Commission was aware of the fact that additional competences might be necessary in the future.

1218 I. S. FORRESTER, “Searches Beneath” 23 of the online version); Y. VAN GERVEN, “Bringing” 327 -328. In VAN GERVEN’s view, that ‘[o]ne objective of the reform is that the European Commission should concentrate its efforts on the most serious violations of Articles 81 and 82 EC, such as price-fixing and market sharing. Supplementary inspection powers will help to detect “hard-core” secretive cartels. The aim of the powers of the Commission is to enable it to carry out its duty under the EC Treaty of ensuring that the rules on competition are actually applied in the common market.’ See also Regulation 1/2003, recital 25; supra Chapter 2.

1219See Regulation 1/2003, Article 20(2)(d); compare former Article 14 of Regulation 1/2003. This power will be commented below.

1220 Ibid.

1221 See also emphasising the importance of the modifications e.g. I. S. FORRESTER, “Searches Beneath” 23 of the online version. However, it is interesting to note that other rights suggested by the Commission during the process of reform were not finally adopted. Particularly, the Commission proposed that ‘[i]n order to increase the effectiveness of its enquiries the Commission should also be empowered to summon to its own premises any person likely to be able to provide information that might be helpful to its enquiries, and to take minuted statements. This possibility could be used with respect to the undertakings that are the subject of the procedure: it would serve to complement Article 14 by allowing persons to be questioned who were not present at the time of the investigation. It could also be used with
3.1.2. Formal requirements

Commission inspectors are authorized to carry out all necessary investigations in order to establish an infringement of the European competition rules. An inspection by the Commission must always be conducted on the basis of a written authorisation or of a formal decision ordering the inspection. These two sorts of inspections are alternative options. As was established by the Court of Justice in National Panasonic, the Commission is free to decide whether to conduct an inspection upon production of a written authorisation or on the basis of a decision, depending upon the specific features of each case. Similar to the power to make requests for information of Article 18 of Regulation 1/2003, the power to conduct inspection does not establish a process in two phases. The Commission is entitled to conduct an inspection directly based on a decision, without having previously attempted to carry out the inspection based on a written authorization.

Given that companies must only submit to inspections ordered by decision, the Commission commonly issues a decision when it fears or suspect the existence of a very serious infringement of the EU competition rules, such as a cartel activity. Likewise, a decision ordering an inspection is likely to be issued when the undertaking in question has previously offered resistance or has refused respect to complainants and third parties’. See Commission, White Paper on modernisation [1999] OJ C132/1, paras 112-114. See also A.-H. Bischke, “Part 4: Council Regulation No.1/2003 On The Implementation Of The Rules On Competition Laid Down In Articles 81 And 82 Of The Treaty – Article 20 The Commission’s powers of inspection” in G. Hirsch, F. Montag and F.-J. Säcker (eds.) Competition Law: European Community Practice and Procedure, Sweet & Maxwell, 2008, 2753 p., at 1755 (hereafter: ‘A.-H. Bischke, “Part 4: Council”).

122 C. Lister, “Dawn Raids” 54. This commentator stresses that “the term "necessary" has been interpreted broadly for purposes of article 14 to mean any investigations relevant to the enforcement of the Community's competition policies”. (Refering to JOSUA, “Information in EEC Competition Law Procedures”, 1986 (11) ELRev, 409, at 411. Still, as it will be examined below, in order for an inspection to be considered necessary, the Commission must possess information providing reasonable grounds for the existence of an infringement.

122 See Article 20(3) of Regulation 1/2003.

122 See Article 20(4) of Regulation 1/2003.


122 This differs from the two-stage procedure which was applicable to requests for information under Regulation 17. See on the distinction of these two rules Case 136/79, National Panasonic (UK) Limited v Commission, [1980] ECR 2033, paras 9-12. More precisely, the Court ruled that ‘although article 11 of regulation no 17 makes the exercise of the Commission’s power to request information from an undertaking or association of undertakings subject to a two-stage procedure, the second stage of which, involving the adoption by the commission of a decision which specifies what information is required, may only be initiated if the first stage, in which a request for information is sent, has been carried out without success, Article 14 of the same regulation on the investigating powers of the Commission contains nothing to indicate that it may only adopt a decision ordering an investigation within the meaning of article 14(3) if it has previously attempted to carry out an investigation by mere authorization’. See also P. Berghe and A. Dawes, “Little pig, little pig, let me come in”: an evaluation of the European Commission’s powers of inspection in competition cases”, 2009 (30-9) ECLR, 407-423, note 27 (hereafter: ‘P. Berghe and A. Dawes, “Little pig”’: L. Ortiz blanco and K.J. Jørgens, “Antitrust” 298.


122 See further infra section 3.1.3 in this Chapter.

122 See also e.g. A.-H. Bischke, “Part 4: Council” 1758.
to cooperate with the Commission. As a general rule, and even though conducting an inspection based on a simple authorisation remains possible, the Commission will therefore be “prepared” and will have adopted a decision, especially when it wishes to safeguard the unexpected or surprise effect of the inspection.

The European competition system does not contain a specific provision on the exact level of suspicion that is required in order to issue a decision ordering surprise investigations. However, the European case-law clearly indicates that, for the purposes of establishing that the coercive measures which are sought are not arbitrary, the Commission is required to show, in a properly substantiated manner, that it is in possession of information and evidence providing reasonable grounds for suspecting an infringement of the competition rules by the undertaking in question.

The Court of Justice may be called upon to review a decision adopted under Article 20(4) of Regulation No 1/2003 for the purposes of ensuring that it is in no way arbitrary. Or in other words: the Court of Justice must verify that the decision has not been adopted in the absence of facts capable of justifying an inspection. In this regard, it must be borne in mind that inspections are intended to enable the Commission to gather the evidence which is necessary to check the actual existence and scope of a – factual and legal – situation concerning which the Commission already possesses certain information. In the course of that review, the ECJ must confirm that there existed reasonable grounds for suspecting that the firms concerned committed an infringement.

Regardless of the legal basis chosen to conduct the inspection, it is mandatory for the Commission to specify the purpose and the subject matter of the inspection. The document enlightening the

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1230 See also e.g. L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 298; A.-H. BISCHKE, “Part 4: Council” 1758; P. BERGHE AND A. DAWES, “‘Little pig’” 410. Additionally, these last authors observe that ‘[f]aced with the refusal of an undertaking to submit to an inspection decided by mere authorisation, the Commission may then adopt a decision ordering the inspection. Since this can be rapidly implemented (see for instance the Commission’s practice regarding requests for information), opposing the inspection in the first place does not allow the company to buy much time. However, this refusal remains legitimate in light of the intrusion that an inspection may constitute’.

1231 Y. VAN GERVEN, “Bringing” 331-333. This author correctly comments that even though ‘[t]oday, the Commission will normally present itself at the premises of a company with a decision […] Regulation 1/2003 maintains the possibility to conduct an inspection by simple authorization. Inspections by authorization may for instance be used in case of a visit to the premises of a leniency applicant, who can be expected not to oppose the inspection in view of its duty to cooperate with the Commission’s investigation’. See also A. JONES AND B. SUFIRN, EU competition (2011) 1046. These commentators also point out that ‘[t]he most notorious form of Commission inspection is where the officials arrive without warning armed with a decision’. They add that although unannounced inspections take place during normal business hours, there maybe simultaneous surprise arrivals at undertakings across the EU. For example, when the Commission suspects the existence of a hardcore cartel. The polypropylene cartel investigation for instance involved 10 simultaneous dawn raids.

1232 See Articles 20(3) and (4) of Regulation 1/2003.


1234 See Articles 20(3) and (4) of Regulation 1/2003. See also Commission, “Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20 (4) of Council Regulation No 1/2003”,
subject-matter and purpose of the inspection can be seen as the statement of reasons, which is essential to justify the Commission’s decision. The ECJ attaches great significance to this requirement and has frequently stressed that “[t]he Commission's obligation to specify the subject-matter and purpose of the investigation constitutes a fundamental guarantee of the rights of the defence of the undertakings concerned”. It is therefore logical that ‘the scope of the obligation to state the reasons on which decisions ordering investigations are based, cannot be restricted on the basis of considerations concerning the effectiveness of the investigation’.

In specifying the subject-matter and purpose of the investigation, the Commission is not obliged to reveal or communicate to the targeted firms all the information at its disposal concerning the presumed violation. This includes, for instance, the precise definition of the relevant market, the period when the infringements were supposedly committed or a precise legal analysis of the presumed infringements. The Commission must, however, clearly indicate the presumed facts that it intends to investigate and is also obliged to indicate as precisely as possible the evidence sought. In this sense, the requirement to specify the subject matter and purpose of the inspection aim to avoid “fishing expeditions”, i.e., the possibility of carrying out inspections in the hope of finding evidence of an antitrust infringement without a prior reasonable suspicion. This requirement is thus justified as it enables companies to be in a position to assess whether the inspection is well-founded.

Revised on 18/03/2013, available at [http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf](http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf). The explanatory note clarifies that “[t]he Inspectors cannot be required to expand upon the subject matter as set out in the decision or to justify the decision in any way. They may however explain procedural matters, particularly with regard to confidentiality, and the possible consequences of a refusal to submit to the inspection”.


1239 Joined cases 97/87, 98/87 and 99/87, Dow Chemical Ibérica SA and others v Commission, [1989] ECR 3165, para 8; Joined cases 46/87 and 227/88, Hoechst AG v Commission [1989] ECR 2859, para 41; Case T-339/04, France Télécom SA v Commission [2007] ECR II-521, paras 56-60; see also P. BERGHE AND A. DAWES, ‘“Little pig”’ 409; OECD, Latin American Competition Forum, Session III: Unannounced Inspections in Antitrust Investigations, Issues Paper by the OECD Secretariat 3-4 September 2013, (DAF/COMP/LACF/2013/36) Lima, Peru, at 10; available at [http://www10.iadb.org/intal/intalcdi/PE/2013/12980a04.pdf](http://www10.iadb.org/intal/intalcdi/PE/2013/12980a04.pdf). In this paper the importance attached by the ECJ to this requirement is emphasised. F. P. MAIER-RIGAUD AND H. FRIEDERISZICK, “Triggering” 95. According to these authors “[t]he suspicion of cartel activity must therefore be sufficiently specific as to enable the Commission to name (i) the behaviour in question, (ii) the competition rules violated, and (iii) the (groups of) products or services concerned”. This view seems, however, wider (or at least vaguer) than the vision of the European Courts as set out in the case-law. Particularly, in Dow Benelux the ECJ held that “[t]he Commission may use evidence obtained in the course of the investigation only for the purposes of proving that particular infringement” (Case 85/87, Dow Benelux NV v Commission [1980] ECR 3137, para 10).

1240 Furthermore, the ECJ recognises that protection against arbitrary or disproportionate intervention is a general principle of Community law. See Joined cases 46/87 and 227/88, Hoechst AG v Commission, [1989] ECR 2859, para. 19; see also Joined cases 97/87, 98/87 and 99/87, Dow Chemical Ibérica SA and others v Commission [1989] ECR 3165, para 45. See also J. S. VENIT “EU Competition Law-Enforcement and Compliance: An Overview”, 1996-1997 (65) Antitrust L. J., 81-104, at 95 (hereafter: ‘J. S. VENIT “EU Competition Law-Enforcement”’), stressing that “[t]he Commission may use evidence obtained in the course of the investigation only for the purposes of proving that particular violation, and it may not go on a “fishing expedition” for evidence of competition law violations generally”. However, it is important to keep in mind that “the Commission is not barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is necessary to protect professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules in the common market.
The essential character of the requirement to specify the subject matter and purpose of the inspection has also been recently emphasised in the *Nexans* case. The *Nexans* judgment concerned an appeal brought by Nexans and Prysmian in respect of the inspections conducted by Commission officials at the premises of Nexans (in France) and Prysmian (in Italy) in the context of a suspected cartel in the power cables sector. The Commission decisions adopted pursuant to Article 20(4) of Regulation 1/2003 were phrased in relatively broad terms, specifying the subject matter of the investigation as ‘the supply of electrical cables and material associated with such supply, including, amongst others, high voltage underwater electrical cables and, in certain cases, high voltage underground electric cables’. In addition, in the course of the inspections, the Commission took forensic copies of the undertakings’ computer hard drives and placed these in sealed envelopes in order to review the files at the Commission’s premises, rather than examining the documents contained on these hard drives on site. The Commission also questioned a Nexans employee during the raids. Nexans and Prysmian challenged the inspection decision before the General Court on various grounds.

With respect to the scope of the inspection decision, the General Court emphasised the importance of drafting an inspection decision carefully. The Commission decision must sufficiently indicate the “essential characteristics” of the subject matter and purposes of the inspection. This obligation is a fundamental requirement in order to both show that the investigation is justified and to enable those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence. In addition, the Court held that “[a]lthough, the Commission is not [always] required to delimit precisely the market covered by its investigation, it must identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its co-operation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules”. The General Court recalled that, contrary to the Commission’s submissions, the Commission is required to ‘restrict its searches to the activities […] relating to the sectors indicated in the decision ordering the inspection’. Consequently, if the Commission locates information which is not relevant to these sectors, it is required ‘to refrain from using that document or item of information for the purposes of its investigation’. Finally, based on an assessment of the information that the Commission had at its disposal at the time of the adoption of the inspection decision, the Court concluded that the Commission did not demonstrate that it had reasonable grounds for ordering an inspection that covered electric cables other than high voltage cables.

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1242 In is also interesting to note that the Commission’s inspections were triggered by information received in the context of a leniency application relating to high voltage electric cables. Case T-135/09, *Nexans France SAS and Nexans SA v Commission*, para. 3. The ruling of the General Court in this case has been confirmed by the Court of Justice in Judgment of the Court of 25 June 2014, Case C-37/13 P, *Nexans SA and Nexans France SAS v Commission*.
1243 Judgment of the General Court of 14 November 2012, T-135/09, *Nexans France SAS and Nexans SA v Commission*, para. 39; Joined cases 97/87, 98/87 and 99/87, *Dow Chemical Ibérica SA and others v Commission*, [1989] ECR 3165, para 26. On the basis of the facts at hand, the Court concluded that the inspection decision covered “all” electric cables rather than high voltage cables. Neither did the Commission indicate which products may fall within the category of ‘materials associated with such supply’. Expressions such as ‘including amongst others’ and ‘in certain cases’ indicated that the reference to high voltage cables was in fact an example (para 50). Nevertheless, the Court concluded that the Commission satisfied the obligation to specify the subject matter because the decision ‘enabled the applicants to assess the scope of their duty to cooperate’ (para 54).
1244 See also Case 85/87, *Dow Benelux NV v Commission* [1980] ECR 3137, para 10, in which the ECJ held that ‘[i]t is not indispensable for a decision ordering an investigation to delimit precisely the relevant market, to set out the exact legal nature of the presumed infringements and to indicate the period during which those infringements were committed’. See also P. BERGHE AND A. DAWES, “‘Little pig’” 409.
1245 See also *Case 85/87, Dow Benelux NV v Commission* [1980] ECR 3137, para 10, in which the ECJ held that ‘[i]t is not indispensable for a decision ordering an investigation to delimit precisely the relevant market, to set out the exact legal nature of the presumed infringements and to indicate the period during which those infringements were committed’. See also P. BERGHE AND A. DAWES, “‘Little pig’” 409.
1246 *Ibid*, paras 64-65. According to the General Court ‘[a]ny broader powers would be ‘incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society’.
In addition to the abovementioned requirements concerning the purpose and subject matter of the inspection, when an inspection is conducted on the basis of a written authorisation according to Article 20(3), this document must also specify the penalties provided for in Article 23 of Regulation 1/2003 in case of non compliance with the obligations imposed by Article 20 of Regulation 1/2003. The Commission must also give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted in good time before the inspection.\textsuperscript{1248}

When the inspection is ordered on the basis of a decision adopted according to Article 20(4), the decision must not only specify the subject matter and purpose of the inspection, and the penalties provided for in Articles 23 and 24 of Regulation 1/2003, but also appoint the date on which the inspection in question is to begin and indicate the right to have the decision reviewed by the ECJ. When the Commission intends to adopt such decisions, it must consult the competition authority of the Member State in whose territory the inspection is to be conducted.\textsuperscript{1249}

3.1.3. The (importance of the) distinction between a written authorisation and a decision ordering an inspection

As mentioned above, the Commission’s inspectors can either exercise their powers based on a written authorisation pursuant to Article 20(3) or on a decision based on Article 20(4) of Regulation 1/2003. The distinction between a written authorisation and a decision was also included in Articles 14(2) and (3) of Regulation 17.

There is one key difference between an inspection ordered pursuant to a written authorisation and one ordered by decision. According to settled case law, when an inspection is based on a simple written authorisation, companies are not legally obliged to submit to the inspection in question.\textsuperscript{1250}


\textsuperscript{1248}Article 20(3) of Regulation 1/2003. See also A.-H. BISCHKE, “Part 4: Council” 1758. This author adds that the ‘authorisation for inspection pursuant to Art. 20(3) must be in writing. […] The officials of the Commission and other accompanying persons authorised by it must exercise their powers as set forth by the written authorisation, and must present their official identity cards. The written authorisation must be signed by an authorised person, who is usually the General Director of the Directorate-General, or one of his/her representatives authorised by the Commissioner responsible for investigations concerning competition’.

\textsuperscript{1249}In addition, when an inspection is ordered by decision it must be communicated to the undertakings under Article 297 TFEU before the inspection is conducted. In practice, that happens immediately before entering the premises of the undertaking in question before the beginning of the inspection by presenting a certified copy of the decision. The Commission officials must show their ID cards in order to identify themselves. A.-H. BISCHKE, “Part 4: Council” 1758-1759.

\textsuperscript{1250}Judgment of the Court of 23 September 1986, Case 5/85, AKZO Chemie BV and AKZO Chemie UK Ltd v Commission, [1986] ECR 2585, para 20. (‘The purpose of that [Article 14(3) of Regulation 17] is to enable the
Instead, there are simply asked to submit voluntarily. Therefore, firms have the possibility to oppose to an inspection without risking a sanction penalising such opposition. If companies would not have the right to oppose – when the inspection is based on a simple written authorisation – the Commission would be in a position to use its investigation powers without offering the procedural guarantees which are available when it adopts a decision. In effect, in contrast to a written authorisation, which lacks binding character, a decision ordering an inspection can be subject to judicial review by the Court of Justice.

Notwithstanding the non-binding character of a written authorisation, it is important to keep in mind that once an undertaking decides to voluntarily submit to an inspection based (only) on a written authorisation – and, thus, allows the inspectors to conduct the raid – it must fully cooperate, just like when a decision is adopted pursuant to Article 20(4) of Regulation 1/2003. This obligation can be inferred from Article 20(3) of Regulation 1/2003, which stipulates that an undertaking may be fined if it provides incomplete or misleading information in the course of an inspection.

In contrast, if the inspection is ordered on the basis of a decision adopted pursuant to Article 20(4) of Regulation 1/2003, there is not only an obligation for the undertakings concerned to (passively) submit to the inspection. As the European Courts established in Orkem, undertakings are under an obligation to cooperate actively in the investigative measures adopted in the course of the inspection. This implies more precisely that, as the ECJ specified in Hoechst, when investigations are carried out with the cooperation of the undertakings concerned by virtue of an obligation arising


1251 See e.g. P. BERGHE AND A. DAWES, “‘Little pig’” 410. See also A.-H. BISCHKE, “Part 4: Council” 1758.
1252 Article 20 of Regulation 1/2003.
1253 See further on the obligation to cooperate actively infra (next paragraph).
1254 See also e.g. Y. VAN GERVER, “Bringing” 331-333; A.-H. BISCHKE, “Part 4: Council” 1758.
1255 Case 374/87, Orkem v. Commission [1989] ECR 3283, paras 21, 22 and 27. In this case the Court held that ‘Regulation No 17 does not give an undertaking under investigation any right to evade the investigation on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, it imposes on the undertaking an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation’. It is interesting to note that the duty to cooperate in the context of investigations already existed under the ECSC Treaty (see Judgment of 16 of December 1963, Case 18/62, Barge v High Authority [1963] ECR 259, para 278: ‘It is for the business concerned to enable the High Authority to carry out its duties by voluntarily furnishing it with the information it needs’). However (and remarkably), the question whether investigation requires a business merely to submit passively or to cooperate to some degree has long been subject of discussion in the literature. In 1983, W. KREIS correctly argued that ‘[t]he argument that Article 14 [of Regulation 17] merely requires businesses to submit passively but that it does not grant any right of search takes account of the interests of businesses alone and is self-contradictory. If it were valid, the authorities would be virtually unable to investigate anything at all, since on the one hand the documents would not be produced for them and on the other hand they would not be allowed to search for them’. In addition, ‘a clear pointer to the duty to cooperate is contained in Article 14(2), which stipulates that the books, etc., requested must be produced in complete form, thus requiring active collaboration; and in Article 14(1)(c), since oral explanations cannot be provided unless there is cooperation on the part of the business’. H. W. KREIS, “EEC Commission Investigation Procedures in Competition Cases”, 1983 (17) Int'l L., 19-60, at 43-44 (hereafter: ‘H. W. KREIS, “EEC Commission”’)). See also sharing this (now established) view e.g. A. GLEISS AND M. HIRSCH, “Article 14 of Regulation No. 17”, Kommentar Zum Ewg-Kartellrecht, Heidelberg 1978, at 512.
under a decision ordering an investigation, companies must *inter alia* provide the Commission’s inspectors with the documents they request, grant access to premises or offices they decide, and show them the contents of any piece of furniture or cabinets as well as the electronic data base systems.\(^{1256}\) On the other hand, Commission’s inspectors are not authorised to enter premises or furniture by means of force, oblige the staff to give them such access, or conduct searches without the authorisation of the management of the undertaking.\(^{1257}\) Instead, when the officials of the Commission find that an undertaking opposes to an inspection ordered by decision, Article 20(6) of Regulation 1/2003 provides that the Member State concerned must afford them the necessary assistance to gain entry by force to the firm’s premises.\(^{1258}\)\(^{1259}\) If necessary, the national authorities may request the assistance of the police or of an equivalent enforcement authority in order to make the inspection possible.\(^{1260}\) The conditions under which the national authorities must offer assistance to the Commission are a matter of national law.\(^{1261}\) In this regard, P. BERGHE AND A. DAWES stress that although making the European procedure subject to national law requirements may seem to contradict the supremacy of European law, this is not the case. In order to support this statement these authors provide three arguments. First, this can be considered as an application of the principle of national procedural autonomy.\(^{1262}\) Second, this can be seen as a recognition of the European legislator of the importance of fundamental rights which are an integral part of the European legal system.\(^{1263}\) Third, this follows from the fact that national courts are not competent to review the legality of the Commission inspection decision, which guarantees the uniformity and primacy of


\(^{1258}\) Although such assistance is necessary only when a company shows its unwillingness to cooperate, the Commission may request the Member States’ assistance as a precautionary measure, in order to overcome any opposition of the undertaking as soon as possible. See Joined cases 46/87 and 227/88, *Hoechst AG v Commission*, [1989] ECR 2859, para 32 (concerning the former equivalent of Regulation 17). This possibility is also one of the reasons which justifies the obligation of the Commission to inform the competition authority of the Member State in whose territory the inspection is to be conducted before taking the decision to conduct an inspection on the basis of Article 20(4) of Regulation 1/2003.

\(^{1259}\) According to P. BERGHE AND A. DAWES (“”Little pig”” 410-411), this is a consequence of both the supremacy of European law over national law and the duty of loyal co-operation. Member States that refuse to provide the required assistance may be subject to an infringement procedure under Article 258 TFEU (former Article 233 EEC). Arguably, if Member States consider that the decision ordering the inspection (and requiring them to provide assistance in conducting it) is illegal they may lodge an action for annulment before the European Courts. In practice, given the average time to complete a judicial review before the Community Courts, this would mean that the inspection would not go forward at all.


European law. 1264

In Roquette Frères, the Court analysed a French rule according to which, when the Commission requests assistance from the national authorities, prior authorization of the national court was necessary in order to access the premises of the relevant undertaking. In this case, the Commission asked the French authorities to take the necessary measures and obtain judicial authorization preventively in order to avoid that a potential opposition of the undertaking could jeopardise the whole inspection. Although the undertaking cooperated during the inspection, it also showed reluctance regarding taking copies of certain documentation. Consequently, it brought an appeal against the authorization issued by the national court. The ECJ ruled on the scope of the review of a national court when the Commission issues a request for assistance and asks to obtain access to the premises.1265

The ruling of the Court in Roquette Frères – which was developed under Regulation 17 – has been codified in Articles 20(7) and 20(8) of Regulation 1/2003. The Court made clear that the conditions of assistance prescribed by national law may not render the Commission’s action ineffective and must respect general principles of European law.1266 This implies that if the assistance by the national authorities provided for in Article 20(6) requires authorisation from a judicial authority according to national rules, such authorisation must be requested.1267 In order to avoid any delays in the investigation when facing resistance, such authorisation may also be requested as a precautionary measure.1268 1269 If the competent national authority deems the authorization necessary, it must control the authenticity of the Commission decision according to Article 20(8), and must ensure that the coercive measures envisaged are neither arbitrary nor excessive, having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission for explanations concerning the grounds for suspecting an infringement as well as on the seriousness of the suspected infringement.1270 The national judicial

1267 Article 20(7) of Regulation 1/2003.
1268 Ibid. See also Joined cases T-289/11, T-290/11 and T-521/11, Deutsche Bahn AG and others v Commission, paras 111-114. In the Deutsche Bahn judgment, regarding the appeal against three Commission inspection decisions, the General Court conducted a detailed and exhaustive analysis of the Commission’s conduct during the inspections as well as of the legality of inspection decisions. With its analysis the Court not only confirmed the Commission’s discretion in the conduct of on-site inspections. Furthermore, the Court held that the fundamental rights established in Articles 7 and 47 of the EU Charter and Articles 6 and 8 ECHR do not require the issuance of a national search warrant and judicial supervision prior to the inspections since, in the Court’s view, Regulation 1/2003 offers appropriate safeguards and the mechanisms of judicial review before the EU Courts is always available (ex post). It should be noted that this case has been appealed. See further e.g. I. VANDENBORRE AND T. GOETZ, “EU Competition” 511; L. IDOT, “Confirmation des pouvoirs de la Commission en matière d’inspections”, 2013 (Novembre-11) Europe, 39-40; A. M. TER HAAR, noot onder Deutsche Bahn e.a./Commission, 2014 (62-1) SEW, 41-44 ; G. DI FEDERICO, “Deutsche Bahn: What the Commission Can and Cannot do in Dawn Raids”, 2014 (5-1) Journal of European Competition Law & Practice, 29-31.
1269 From a global perspective, a warrant issued by a judge or a court is needed to conduct a surprise search in most jurisdictions. A number of competition authorities are competent to issue search authorisations. See OECD, “Unannounced Inspections” 4 (para 2). In the European Union, in all Member States, either a court warrant or an inspection decision granted by the competition authority is required in order to conduct an inspection in business premises. In the UK court warrants are very frequently but not always required.
1270 Article 20(8) of Regulation 1/2003. As commented above, this rule is based on the European case-law. See Case C-94/00, Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes,
authority may, however, not call into question the necessity for the inspection or request the information of the Commission’s file. The lawfulness of the Commission decision can only be subject to review by the Court of Justice.\footnote{1271}

3.1.4. The powers of the Commission during inspections

Article 20(2) of Regulation 1/2003 regulates the specific powers of the Commission’s officials and other persons who have been authorised by the Commission to conduct an inspection. The ECJ has frequently acknowledged that ‘the list of powers conferred on the Commission’s officials by Article 20(2) thereof show that the scope of investigations may be very wide’.\footnote{1272} It is irrelevant for the extent of the powers of inspection whether the inspection in question is based on a written authorisation or is ordered by decision.\footnote{1273}

The inspectors of the Commission are empowered (a) to enter any premises, land and means of transport of (associations of) undertakings; (b) to examine the books and other records related to the business; (c) to take or obtain in any form copies of or extracts from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking for explanations on facts or documents relating to the subject matter of the inspection and to record the answers. The Commission may request the active assistance of officials of the competition authorities of the Member States in whose territory the inspection is conducted.\footnote{1274} In this case these officials will

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\textit{and Commission} [2002] ECR I-9011, para 54, 61 and 79. More specifically, the Court stated in this case that in reviewing the proportionality of the coercive measures, as a general rule, the assistance provided by the national authorities may not go beyond what is necessary to overcome the firm opposition to co-operate and for the inspectors to carry out their inspections (para 58). A national court is thus entitled to deny the coercive measures applied for ‘where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the inspection (para 80)’. In this context it has been argued that ‘[o]ne may regret, […] the limited character of the information to be provided’ (P. BERGHE AND A. DAWES, “’Little pig’” 411). However, this comment does not seem to take into account that if a national court finds that it has insufficient information, it must request additional information from the Commission before denying the grant of coercive measures (\textit{Roquette Frères}, para 94.). The Commission has the obligation to co-operate in good faith and to provide the necessary clarifications to the national court (\textit{Roquette Frères}, para 93). In addition, the national court’s powers of review are (only) designed to deny requests of the Commission which are manifestly disproportionate or arbitrary.\footnote{1275} Article 20(8) of Regulation 1/2003. See also Case C-94/00, \textit{Roquette Frères SA} [2002] ECR I-9011, para 44. Before the entry into force of Regulation 1/2003 the ECJ had already ruled that ‘[t]he review carried out by the competent national court, which must concern itself only with the coercive measures applied for, may not go beyond an examination […] to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation. Such an examination exhausts the jurisdiction of that court as regards the review of the justification of the coercive measures applied for in pursuance of a request by the Commission for assistance under Article 14(6) of Regulation No 17’. See also See also Y. VAN GERVEN, “”Bringing”” 331-333; P. BERGHE AND A. DAWES, “”Little pig”” 410-411.\footnote{1276} Joined cases 46/87 and 227/88, \textit{Hoechst AG v Commission} [1989] ECR 2859, para 26. See Case C-94/00, \textit{Roquette Frères SA} [2002] ECR I-9011, para 44.\footnote{1277} Still, the question whether the undertakings concerned decide to cooperate or not will be decisive. Only when undertakings (i) oppose to an inspection ordered by decision adopted pursuant Article 20(4) of Regulation 1/2003 or (ii) decide to cooperate freely in the context of an inspection based on a simple written authorization, but produce the required books in incomplete or provide incomplete or misleading information, the Commission will be entitled to enforce its competences by imposing sanctions. This implies that in the case of investigations based on a simple written authorization, when undertakings decide not to cooperate, the Commission cannot make use if its powers (see supra section 3.1.3 of this Chapter. In the discussion of the specific investigation powers below this aspect must be kept in mind.\footnote{1278} See supra 3.1.3 of this Chapter.}

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have the same powers\textsuperscript{1275} as the Commission inspectors.\textsuperscript{1276}

3.1.4.1. The right to access any premises, land and means of transport

Under Article 20(2)(a) of Regulation 1/2003 – former Article 14(1)(d) of Regulation 17/62 – Commission officials are authorized to enter any premises, land and means of transport of (associations of) undertakings.

The importance of this right has often been stressed by the European Courts. In\textit{Hoechst} the ECJ affirmed that this right ‘is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings’.\textsuperscript{1277}

Article 20(2) of Regulation 1/2003, and in particular the right of the Commission’s officials to enter any premises or even means of transport, imply that those officials may look at all the objects in those places and demand to be shown anything (such as information or items) they designate.\textsuperscript{1278} This is possible even when such items are not already known or fully identified. In the Court’s view ‘[that right] would serve no useful purpose if the Commission’s officials could do no more than ask for documents or files which they could identify precisely in advance. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude’.\textsuperscript{1279}

The right to access premises relates to all the companies’ offices which contain information concerning the subject matter of the Commission’s investigation.\textsuperscript{1280} This right cannot be interpreted

\textsuperscript{1275} The fact that officials of NCAs can make use of the same powers as the Commission in the context of assistance should be welcomed since the scope of the inspection powers of competition authorities is, at times, more limited. For example, while all competition authorities have the possibility to make copies of documents during inspections, not all of them can seize original documents during inspections. ECN, Investigative Powers Report (2012) 13. See also at a global level OECD, “Unannounced Inspections” 10; ECN, Investigative Powers Report (2012) 13.

\textsuperscript{1276} Article 20(5) of Regulation 1/2003.


\textsuperscript{1278} Joined cases 46/87 and 227/88,\textit{Hoechst AG v Commission} [1989] ECR 2859, para 27; Case 85/87,\textit{Dow Benelux NV v Commission};\textit{Dow Chemical Ibérica, SA, and others v Commission} [1989] ECR 2859, para 20. Advocate General Mischo particularly stated that if the right of the Commission's officials to enter any premises or even means of transport, would not imply ‘the right to look at all the items in those places and demand to be shown anything they designate, what purpose would there be in giving them a right of access? Let us imagine, for example, that while looking out of the window, the Commission's officials suddenly notice that workers are in the process of loading files on to a lorry. They must in such a case have the right to send one of their number to that place to demand that the operation be stopped and that the documents in question be shown to him’.


\textsuperscript{1280} Article 20(2)(a) of Regulation 1/2003.
in a way that undertakings could simply limit an inspector’s power to access their premises. The scope of the investigation, as indicated in the decision, is thus not limited geographically. In particular, when an undertaking is required to allow the Commission officials access to all its premises, land and means of transport, access should be provided in its entirety.

Under Regulation 1/2003 the Commission is not required to state the actual location of the premises in its decision. In the Commission’s view, the right to access is not restricted to the undertaking’s own real property. The fact that premises are owned, rented or simply occupied by the undertaking is therefore irrelevant. Offices are considered “premises of undertakings” within the meaning of Article 20(2) of Regulation 1/2003 to the extent that the undertaking’s business activity is carried out in them. This view is fully appropriate as it ensures the effectiveness of inspections. Otherwise, firms can be in a position to (partially) evade investigations by housing their business activities in premises which, under civil law, belonged to other company. It would also mean that the obligation of undertakings to cooperate could be simply circumvented.

In Akzo, the Commission ordered Akzo Chemicals BV to submit to an investigation concerning its activities in certain salt markets. In this context, the Commission inspectors requested access to the office of Mr Vogelaar, the director’s office. However, the general manager did not comply with this request and stated that ‘Mr Vogelaar had no office in Amersfoort’. After imposing a periodic penalty payment in order to compel Akzo to submit to the investigation, a member of legal department indicated that such office was not situated in Amersfoort, but in Arnhem. In order to justify the initial refusal to comply, Akzo Chemicals argued that access could not be granted to the office of the director since such office belonged to other undertaking (Akzo NV). In the Commission’s view, ‘[w]ithout any doubt, the function of designated director formed part of the business of an undertaking’. Consequently, Mr Vogelaar's office in Arnhem was part of the premises subject to the Commission investigation, irrespective of any arrangements concerning such office between Akzo Chemicals BV and Akzo NV.

In this context, the General Court has ruled that, even after ascertaining that the premises where the Commission’s officials are entering, belonged to a different undertaking (to which the investigation

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1281 L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 313-314. These authors comment that ‘undertakings are not entitled to deny officials access to their premises or means of transport by claiming inviolability of their premises’.
1282 See in this context Commission Decision of 14 October 1994 imposing a fine pursuant to Article 15(1)(c) of Council Regulation No 17 on Akzo Chemicals BV [1994] OJ L 294/31. The Commission added in this decision that ‘[t]his is indeed understandable since, particularly in the case of large undertakings with a complex structure, it is frequently impossible to check beforehand where all the business premises of relevance to the investigation might be situated. In this respect, the Commission inspectors rely on the cooperation and information given by the relevant undertaking’. See L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 313-314. In effect as L. ORTIZ BLANCO states the Commission’s inspector have overriding powers to select the premises, dwellings, land or vehicles in which they wish to carry out the investigation; if no specific premises are indicated in the substantive article of the decision there is no limitation of the scope of the decision. See also A.-H. BISCHKE, “Part 4: Council” 1755.
1283 Commission Decision of 14 October 1994 imposing a fine pursuant to Article 15(1)(c) of Council Regulation No 17 on Akzo Chemicals BV [1994] OJ L 294/31, point 18. See also e.g. A.-H. BISCHKE, “Part 4: Council” 1755; L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 313-314. This authors point out that in course of the investigation of infringements of the competition rules, the Commission may possibly wish to see the documents of third party complaints or of customers or suppliers. In such instances, it is unlikely that the Commission conducts an unannounced inspection. Most probably it will instead contact the concerned business in advance and issue a request of information.
1286 Ibid, points 8 and 10.
1287 Ibid, points 18-19.
In order to safeguard the effectiveness of the powers of inspection, it is essential that the Commission has tools to enforce its investigative powers and can oblige firms to comply with their obligations. To this end, companies which deny access to the undertakings premises, can be sanctioned with the penalties established in Articles 23 and 24 of Regulation 1/2003. Alternatively, the Commission can decide to fine an infringement of procedural obligations by qualifying the behaviour in question as an aggravating circumstance in the calculation of the fine imposed for the substantive infringement.

Furthermore, not only a direct and clear denial to grant access to an undertaking’s building, installations, or furniture which may contain business information, may be sanctioned. Concealed or (more) discrete denials to grant access, that is, all possible excuses which are meant to hinder or cause a delay in the inspection, may be punished. In the Ukwa case, Mr Birch, chairman of the firm, not only did not submit to the investigation; he even refused to read the decision ordering an inspection and stated that ‘he found it offensive that the Commission should arrive to undertake such an operation without prior notice’. Mr Birch argued that ‘Ukwal had no legal personality, it being simply an office grouping the interests of certain companies. For this reason, the papers in the offices of Ukwal belonged to the members individually and collectively. Some of these members [were] based outside the Community. After requesting the assistance of national authorities, and subsequently obtaining an order from the High Court ordering an inspection, the undertaking’s behaviour was fined by increasing the basic amount of the substantive fine by 10%.

In the Bitumen NL case, the undertaking Koninklijke Wegenbouw Stevin refused to grant the Commission’s officials access to its premises for forty-seven minutes, arguing that the officials had to wait until its external legal counsel arrived. Subsequently, it denied access to the office of one director. In these circumstances, the Commission had to request the assistance of the national authorities. The undertaking’s behaviour was fined by increasing the basic amount of the substantive fine by 10%. 

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Court in London, Ukwal, submitted to the investigation’. The Commission sanctioned Ukwal by imposing a fine of €5.000.

In Mewac, when the Commission arrived at the undertaking’s premises in Marseilles to carry out an investigation, the Secretary-General of Mewac was in Paris. He was contacted by telephone and informed about the purpose of the inspection. However, he stated that since he was not present and he was the sole representative of the firm in Marseilles, he could not grant access to any documents until he returned (i.e. on the following day at 8.30 a.m). After confirming the refusal to comply with the inspection, the officials requested the assistance of the French authorities. The Commission considered that ‘[i]n the present case, there was no material reason why the Commission decision could not be implemented: the Commission officials could have been joined either promptly by any legal representative or adviser designated by the Conference or, later in the day, by the Secretary-General himself or his Paris-based lawyer’. A fine of €4.000 was imposed on Mewac.

3.1.4.2. The power to examine the books and other records related to the business

The power to examine books and other records related to the business was also included in Article 14 of Regulation 17. The concept “books and other records” has been interpreted broadly under both regulations. Companies must make all the documentation relating to the subject matter of the investigation available to the Commission. In particular, the Commission inspectors are entitled to examine all documents or records relating to the company’s business. This includes documents, such as travel tickets and expense reports, minutes of meetings, appointment schedules, internal and external correspondence, records of telephone calls, photographs, slides and films. Computer records, electronically stored documentation and printouts of e-mails, magnetic tapes, other types of sound recording media and computer programs also fall under this concept.

Undertakings, which have an obligation to fully and actively cooperate in the investigation, must take the necessary steps to make sure that the Commission’s officials get complete access to the relevant books and records. This obligation implies that firms must indicate the location and open the relevant cabinets in order for the Commission to obtain all the necessary information. As such,

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1291 IV/32.448 and IV/32.450 – UKWAL [1992] OJ L 121/45, paras 3-4. More precisely, in its legal assessment the Commission stated that since ‘Ukwal is an association of undertakings [...] it is obliged to submit to any Commission decision [...] and to allow access, under the conditions specified in that decision, to documents physically in its possession, including those entrusted to it by its members. The fact that some of the members of Ukwal are not based in Member States of [...] does not relieve Ukwal [...] from the obligation to comply. Ukwal's denial of entry to the authorized Commission officials was a clear and flagrant breach of the obligation imposed by Article 18 (1) and (3)' (paras 5-6).


1295 Article 20(2)(b) of Regulation 1/2003. See also stressing this point H. W. KREIS, “EEC Commission” 38-39. In this context, H. W. KREIS correctly pointed out that “[t]he argument that it applies only to documents covered by the obligation upon undertakings to preserve business records [instead of all the records which a business keeps for business purposes] is untenable. If that were the case, pieces of evidence such as minutes, correspondence or internal memos on restrictive practices could not be checked, since they are certainly not covered by any obligation to preserve them for a fixed period. In addition, in view of the differences in Member States’ national law, this criterion is inappropriate since it would inevitably lead to discrimination on grounds of nationality’.


1297 See infra section 3.3.2 of this Chapter.
not providing a document requested by the Commission or providing only partial access, may be considered as providing incomplete books and be consequently sanctioned.\textsuperscript{1298}

In \textit{Industrial Bags}, the undertakings Bischof and Klein acknowledged that, in the course of the inspection, a document which had been selected by the inspectors had been destroyed, despite the latter’s constant warnings. This behaviour was considered “tantamount to blatantly obstructing the Commission in carrying out its investigations”\textsuperscript{1299} and was consequently sanctioned by increasing the basic amount of the fine by 10\%.\textsuperscript{1300}

Comparably, in \textit{Professional Videotapes}, two different types of obstructive behaviour took place. On the one hand, Sony representatives refused to answer oral questions. On the other, a worker shredded documents from a file labelled "Competitors Pricing".\textsuperscript{1301} With respect to the shredding of documents, Sony argued that it was done by a junior employee, who acted contrary to the firm’s antitrust compliance policy. In the Commission’s view the undertaking has the obligation to control its employees and to ensure that they do not hamper the Commission’s. These two (aggravating) circumstances led to an increase in the basic amount of the fine by 30\%.\textsuperscript{1302}

In addition, as was commented under the previous heading, the Commission inspectors’ right is not limited to asking for documents or files which they can identify in advance; they also have the power to search for various items of information which are not yet known.\textsuperscript{1303} This possibility is justified for a number of reasons. Firstly, as a general rule, the Commission is not capable of specifying in advance the documents which it attempts to find. Only during the course of the inspection, the Commission will be able to establish which (categories of) documents are of interest for the investigation.\textsuperscript{1304} Secondly, given the secret nature of cartel agreements, it would be unviable to require the Commission to obtain an official or public record, as they usually do not exist. This would constitute an obstacle for the effective use of the investigation powers against cartels. Thirdly, this possibility enables the Commission to collect the information necessary within the framework of the investigation when undertakings are unwilling to cooperate or adopt an obstructive attitude.


\textsuperscript{1299} Case COMP/38354 — \textit{Industrial bags} [2007] OJ L 282/41, para 790 of the non-confidential version of this decision.

\textsuperscript{1300} Case COMP/38354 — \textit{Industrial bags} [2007] OJ L 282/41, para 795 of the non-confidential version of this decision. Alternatively the Commission could have fined this behaviour on the basis of the former Article 15(1)(c) of Regulation 17, which penalised incomplete production of the required business records or refusal to submit to an investigation ordered by decision.

\textsuperscript{1301} Commission Decision of 20 November 2007 (Case COMP/38.432 – \textit{Professional Videotapes}), [2008] OJ C 57/10, para 219 of the non-confidential version. While Sony did not contest these facts, it argued that given the alleged absence of effects that its behaviour had on the Commission's investigation that its conduct could amount to obstruction and be considered an aggravating circumstance. The Commission hed that “For the aggravating circumstance of “refusal to cooperate with or obstruction of the Commission in carrying out its investigations” (point 28 of the 2006 Guidelines) to be applicable, it is sufficient that the conduct maintained by the undertaking be deliberately obstructive, irrespective of any effects it may have had on the course subsequently taken by the proceedings. Clearly, Sony's behaviour necessarily disrupted the proper conduct of the investigation and hindered the Commission’s inspectors in the exercise of their investigatory powers’ (paras 220-221).


\textsuperscript{1304} L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 316-317. As these commentators observe in certain cases, the Commission will be able to identify the document which it is looking for, for instance when an undertaking has come forward on the basis of the leniency system. Nevertheless, they seem to oversee the fact even though the information provided by the whistle blower is essential, frequently the Commission frequently finds additional evidence during its inspections which help it proving additional elements. This aspect will be analysed in Chapter 8.
Additionally, it is important to keep in mind that from the moment that an inspection based on a written authorisation starts with the consent of undertakings, the procedure is similar to the one of inspections ordered by decision. This implies that undertakings may not interrupt the inspection or reject to hand over a certain document. The argument that they cooperated voluntarily and, therefore, should have a right to interrupt the inspection or provide incomplete information, is not accepted. If undertakings had the right or possibility to produce books or records only partially, the Commission could make erroneous assumptions which would also hinder the investigation. Whether the information provided is complete can be judged on the basis of the objective fact that certain books or records are incomplete, but also by considering the attitude of the undertaking. For instance, a “go slow” behaviour can be considered as a violation of the rule to produce all books and records in a complete form.\footnote{See e.g. Commission Decision of 20 December 1979 imposing a fine on \textit{Fabbrica Pisana}, Pisa, pursuant to Article 15 of Regulation No 17 [1980] OJ L 75/30; Commission Decision of 20 December 1979 imposing a fine on \textit{Fabbrica Lastre di Vetro Pietro Sciarra}, Rome, pursuant to Article 15 of Regulation No 17 [1980] OJ L 75/35; Commission Decision of 28 March 1972 relating to a proceeding under Article 23 of Council Regulation (EEC) No 1/2003 (Case COMP/39.793 -- \textit{EPH and others}) [2012] OJ C 316/10. This last mentioned decision will be examined below. For some literature see e.g. L. ORTIZ BLANCO and K.J. JØRGENS, “Antitrust” 351-352: see also G. PERETZ, T. WARD AND R. KREIBERG, “Enforcement” 1212-1213; F. ARBAULT AND B. SAKKERS, “Cartels” 899-900.)\footnote{See e.g. Y. VAN GERVEN, “Bringing” 329-331; H. W. KREIS, “EEC Commission” 38-39. D. KOVÁCS, “Fiat lux...? - The European Commission's updated explanatory note on dawn raids”, 2014 (35-4) \textit{ECLR}, 162-166. at 162 (hereafter: ‘D. KOVÁCS, “Fiat”’). (This author highlights that the “so-called "E-Dawn-Raids" have become an increasingly important instrument in the European Commission’s toolbox, especially since sensitive information is—nowadays more than ever—likely to be stored in emails and electronic documents than hard-copy files”). A. RILEY, “Modernisation Part One” 608.} The Commission imposed on \textit{Fabbrica Pisana} a fine of €5000.\footnote{The Commission added that ‘[h]owever, in the case in question, \textit{Fabbrica Pisana} had had prior notice of the investigations to be carried out on 3 May and 10 July 1978 and was thus fully in a position to make the necessary arrangements to designate competent representatives’. Commission Decision in \textit{Fabbrica Pisana} [1980] OJ L 75/30 P, recital 10.} In \textit{Fabbrica Pisana}, the Commission considered that the undertaking submitted documentation which was “clearly incomplete”. \textit{Fabbrica Pisana} argued that it had fulfilled its obligation to submit the required documents to the inspectors by generally stating that “all the undertaking's records were at their disposal”.\footnote{Compare Article 14 of Regulation 17.} However, the inspectors had only examined records kept in various departments, but not those in the "administration department", where the files concerning the agreement between glass manufactures in Italy were kept. In \textit{Fabbrica Pisana}’s view, this occurred because the manager was absent and the Commission's inspectors did not examine the records of the administration department. The Commission rejected these arguments and considered that the obligation to supply all documents does not merely involve an obligation to give access to all files but also requires firms to produce the documents demanded. Furthermore, only the undertakings being investigated are responsible for designating their representatives.\footnote{Compare Article 14 of Regulation 17.} The Commission’s competence to the examination of only “written
forms” of records, would put at risk the effectiveness and purpose of the investigation.\textsuperscript{1311} Therefore, although the former Article 14 of Regulation 17 did not specifically state that non-written information could be examined, in practice the Commission examined business records kept in any medium.\textsuperscript{1312}

The current enforcement practice of the Commission shows that the possibility to examine books and business records regardless of the medium on which they are stored, is especially important for electronically stored documents, such as e-mails, and other electronic records related to the business. In March 2013, the Commission published an updated version of its ‘Explanatory Note to an Authorisation to Conduct an Inspection in Execution of a Commission Decision under Article 20(4) of Council Regulation No 1/2003’.\textsuperscript{1313} The fact that the most recent modifications of this document mainly deal with issues which have resulted from the increasing use of forensic IT, illustrates the ever-increasing focus of the Commission on the inspection of electronic documentation.\textsuperscript{1314}

Until 2014, Forensic IT has regularly been used by the Commission in over fifty cases; an average of seven to eight times per year.\textsuperscript{1315} Although it is already implied in the wording of Article 20, the Explanatory Note highlights that the Commission’s inspectors are entitled to search the IT

\textsuperscript{1311}This aspect was acknowledged by H. W. KREIS, (“EEC Commission” 38-39) as early as 1983. More specifically this author pointed that if the records kept for business purposes would not include other types of sound recording media and computer programs, ‘the Commission's investigative powers would very soon be confined within such narrow limits that the purpose of the investigations, i.e., to reach a comprehensive clarification of the relevant subject matter, would be permanently affected’. Furthermore, this commentator correctly added that ‘there is no obvious reason why a tape recording should not be regarded as a business record simply because it is not a written record. This is true not only of the recording of business discussions, but also, for example, of tape recordings which are sometimes made, at the request of the business involved, during the investigations themselves. In all these cases, a record open to investigation exists, even if it has not yet been transcribed into written form. Examination of such records, particularly those produced through electronic data processing, would of course require special technical knowledge on the part of the Commission officials responsible for carrying out the investigation’. See also J. S. VENIT “EU Competition Law-Enforcement” 95.\textsuperscript{1312} J J. S. VENIT “EU Competition Law-Enforcement” 95; H. W. KREIS, “EEC Commission” 38-39; A. RILEY, “Modernisation Part One” 608.

\textsuperscript{1313}Hereafter, the “Explanatory Note”. The Explanatory Note is available at: http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf. This Note is meant to provide guidance to undertakings which are subject to inspections. By conducting the recent update the Commission wishes to maintain the transparency of the process during inspections. It is, however, important to recall that, as the Commission has frequently stressed, the Explanatory Note only has an informative nature and is without prejudice to the formal interpretation of the investigation powers. Despite this exclusive informative character, compliance with the Explanatory Note is essential for undertakings being subject to an inspection and more specifically with respect to E-Dawn Raids. The Explanatory Note is handed over by the Commission’s staff to the representatives of the undertaking before the inspection starts. See also commenting on the importance of the Explanatory Note D. KOVÁCS, “Fiat” 162; L. PIAZZA, “The Revision of the Commission Explanatory Note on European Commission Surprise Inspections”, 2013 (4-5) Journal of European Competition Law & Practice, 421-422, at 421-422 (hereafter; ‘L. PIAZZA, “The Revision”’).\textsuperscript{1314} The most important aspects of the Commission’s powers during E-Dawn Raids elucidated in the Explanatory Note concern the scope of inspections, the methods used by the Commission, the cooperation obligation, the powers to seize storage media, the cleansing of IT after the inspection, and the power to continue the examination of data at the Commission’s premises after the finalisation of the Dawn Raid. See Explanatory Note, paras 10–14. See also D. KOVÁCS, “Fiat” 162.

\textsuperscript{1315} D. KOVÁCS, “Fiat” 162. This commentator also observes that “[i]t […] hardly comes as a surprise that update of the Explanatory Note coincides with the introduction of certain software search tools such as, e.g. Nuix®”. Since the Explanatory Note was published, the IT procedures described in it have already been used in the Commission’s inspections. See e.g. the inspections in the Oil and Biofuel sector (Commission, MEMO/13/435 (“Commission confirms unannounced inspections in oil and biofuels sector”)) and the Sugar sector (Commission, MEMO/13/443 “Commission confirms unannounced inspections in the sugar sector”). Following these inspections – and in order to meet the concerns of undertakings on the technical aspects of examining electronic data during inspections – the Commission also uploaded a demonstration video on these questions. The video is available at http://ec.europa.eu/competition/antitrust/information_en.html.
environment and a wide range of storage media of the undertaking in question. The concept “IT environment” should be interpreted widely, covering all data which can be accessed from the undertaking’s premises. The Commission also clarified the meaning of the term “storage media” by enumerating a whole range of hardware, such as laptops and desktops, tablets, mobile phones, CD-ROM, DVD, and USB-keys, etc. In addition, the Note provides further guidance as to the inspection methods. Both built-in search tools and dedicated soft- or hardware may be used by the Commission’s inspectors.

In the context of E-Dawn Raids, the principle of active cooperation covers a number of specific obligations, such as temporary blocking of email accounts or disconnection of running computers from the network, removing and re-installing of hardware drives from computers and the provision of “administrator access rights” support. The inclusion of – and additional emphasis on – the obligation of full cooperation in the Explanatory Note may have been motivated by the (relatively) recent EPH case in which the Commission imposed fines of €2.5 million on two Czech energy companies on the basis of Article 23(1)(c) of Regulation 1/2003.

In EPH two incidents relating to the handling of e-mails occurred during the inspection of premises of the Czech companies, EPH and EPIA, active in the electricity and lignite sectors. The inspection was carried out in the period 24-26 November 2009. On the first day of the inspection, the

1316 Explanatory Note, para.10
1317 Consequently, just as it is the case in the examination of non electronic records, access to the IT environment goes beyond the geographical scope of an undertaking’s premises. As D. KOVÁCS rightly points out ‘the Commission will not accept the location of a server outside the company under investigation as a valid defence not to access the data saved thereon’. D. KOVÁCS, “Fiat” 163; referring to BURRICHTER AND HENNING (eds.) IN IMMENGA AND MESTMÄCKER, EU-Wettbewerbsrecht, 5th edn (Beck Verlag, 2012), art.20 VO 1/2003, para. 59; L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 315-316. These authors also acknowledge that ‘the limitation of the inspection to the premises in Article 20(2) does not necessarily mean that the records susceptible to inspection under 20(2)(b) have to be in the premises if they are accessible from there. This would apply to the information stored in a computer system: when undertakings use computers to access information stored on a server situated elsewhere this information would also be considered as coming within the scope of the inspection. Failure to comply in this respect on the pretext for example that no one is available on the premises who is able to operate the electronic system would be regarded as incomplete production of the requested business records, liable to penalty under Article 23(1)(c)’. However, it has been claimed that ‘[s]uch a broad reading of the inspectors’ powers, […] raises serious concerns as to information located on servers outside the European Union. It remains doubtful if the European Commission does indeed have jurisdiction to inspect or to collect any such data’. D. KOVÁCS, “Fiat” 163 referring to DE BRONNET, Europäisches Kartellverfahrensrecht, Carl Heymanns Verlag 2012), Article 20 Regulation 1/2003, para 24.
1318 More precisely, the Commission uses the expression “and so on”. This expression clearly indicates that the enumerated storage media is not exhaustive. This is also logical considering the wide wording of Article 20(2) of Regulation 1/2003. Any kind of storage media falls under the scope of application of Article 20(2) of Regulation 1/2003.
1319 See Explanatory Note, para 10. The Explanatory Note calls all these mechanisms “Forensic IT tools”. Built-in search tools have been used in inspections for years and include for example Windows Search functions as well as keyword searches on WinWord and the Microsoft Explorer using the “Ctrl” and “F” key combination. See D. KOVÁCS, “Fiat” 163 referring to SAUER, ORTIZ BLANCO AND JÖRGENS IN ORTIZ BLANCO, European Competition Procedure (2013), para. 8.43. In addition, the Explanatory Note (para 10) also refers to “their own dedicated software and/or hardware”. According to DG Competition’s staff, this entire section of the Explanatory Note is mainly dedicated to the introduction of Nuix® software (see L. PIAZZA, “The Revision” 422; N. JALABERT-DOURY AND D. VAN ERPS, “Digital evidence gathering : An up-date”, 2013 (2) Revue Concurrences, 213-219, at 213 et seq.
1320 See Explanatory Note, para 11. This paragraph also clarifies that “[w]hen such actions are taken, the undertaking must not interfere in any way with these measures and it is the undertaking’s responsibility to inform the employees affected accordingly. The Inspectors may ask to use hardware (hard disk, CD-ROM, DVD, USB-key, connection cables, scanner, printer and so on) provided by the undertaking but cannot be obliged to use the undertaking’s hardware’.
1322 Despite the length of the inspection, it appears that Commission inspectors were particularly searching for digital records and books. Sealing particular premises or rooms was not necessary since by blocking e-mail account the Commission could obtain the necessary information. See also infra next note.
Commission inspectors requested to block e-mail accounts of certain persons until further notice. This was done by setting a new password, which only Commission inspectors knew. However, on the second day of the inspection, the Commission inspectors found out that the password for one account had been modified in order to allow the account holder to access the account. On the third day, the inspectors discovered that one employee had requested the IT department to divert all incoming e-mails to the accounts of key persons away from these accounts to a computer server. As a consequence, the incoming e-mails did not appear in the inboxes concerned and inspectors were not able to search them. In its decision the Commission reiterated that undertakings have the obligation to actively cooperate in all respects. This means that exclusive access to accounts for inspectors must be ensured. The Commission found that the unblocking of the e-mail account was committed by negligence and that the diversion of incoming e-mails was committed intentionally and qualified these two incidents as a single overall infringement.

Even if the inclusion of the obligation for undertakings to cooperate actively during investigations in the Explanatory Notice reinforced this obligation and its practical meaning, it is obvious that the full obligation to cooperate applied to modern technologies entails that undertakings must guarantee access to the electronic data processing system to the Commission’s officials. Therefore, if necessary, the undertakings concerned must enlighten the Commission officials about the structure of the electronic data processing system and disclose the necessary access codes or passwords in order to enable them to analyse the undertaking’s database.

The most important limit as regards the scope of the Commission’s investigatory powers pertains to documents of a non-business nature, i.e. documents not relating to the market activities of the undertaking. As a general rule, a document will be considered a business record if it is found on the premises and/or in the files of an undertaking. The Commission officials in charge of the investigation are under an obligation not to examine business records, or to stop examining such records, if they are (in their opinion) not related to the subject matter of the investigation. Still, in

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1323 Case COMP/39.793 — EPH and others [2012] OJ C 316/8, para 7 (of the summary decision). According to the Commission ‘[t]his is a standard measure taken at the beginning of inspections, to ensure that inspectors have exclusive access to the content of e-mail accounts and prevent modifications to those accounts while they are searched’. This measure can be compared with the sealing of offices. While sealing prevents tangible or material books or records from being destroyed or concealed, blocking e-mail accounts ensures that non-tangible e-mails are not deleted, concealed or tampered. The accounts are unblocked as quickly as possible and at the latest when the inspectors leave the premises on the last day of the inspection (non-confidential version of the decision, para 40).

1324 Case COMP/39.793 — EPH and others [2012] OJ C 316/8, para 8 (of the summary decision). It appeared that a subordinate in the IT department had gained access to the password and had given it to an employee in order to grant him access again. The non-confidential version of the fine decision states that a log-file shows that the e-mail account which was supposed to be blocked had been continuously accessed. EPIA and EPH claim that the employee’s access to his blocked e-mail account was an unfortunate incident, since the head of the IT Department Mr assumed that the Commission ‘would subsequently notify all four persons, including the employee in question, about the blockage of their e-mail accounts or at least provide instructions for their notification’. According to EPIA and EPH the employee was not aware about the ongoing inspection and the blockage of his account. See the non-confidential version of this decision, paras 28-29, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39793/39793_489_4.pdf.

1325 Case COMP/39.793 — EPH and others [2012] OJ C 316/8, para 9 (of the summary decision) and paras 33-34 of the non-confidential decision. According to this version of the decision EPIA and EPH explained that this measure was taken to avoid a repetition of the incident regarding the blocking of e-mail accounts.


1327 Ibid, para 13 of the summary decision. This decision has been confirmed on appealed.


order to definitely establish that a precise document relates to the subject matter of the inspection, the officials must have previously examined them. The Commission must obviously observe certain limits in the collection of documents, but those limits do not apply to what inspectors may examine. This first step is in fact essential to select the information which is relevant to the subject matter of the investigation. Furthermore, it is for the Commission, and not for the companies under investigation, to establish which books and business records must be analysed and which copies or extracts are to be taken. Firms can thus not assume that the undertaking’s obligation to cooperate in the investigation is limited to supplying the information which they consider relevant for the investigation. If it were left to companies to decide what inspectors may and may not see, they could simply obstruct inspections. If after examination, the document proves to be completely private or does not concern the subject matter of the inspection, the Commission’s inspectors will not examine it in greater detail or take copies.

3.1.4.3. The right to take copies or extracts from books or records

The central purpose of the Commission’s inspections is to collect documents and information concerning the restrictive behaviour described in the subject matter of the authorisation or decision ordering the inspection. Although the Commission is not authorised to confiscate undertaking’s documents, according to Article 20(2)(c) of Regulation 1/2003 it is entitled to make copies of books or records in any form.

With respect to Article 14(1)(b) of Regulation 17/62 – the predecessor of Art. 20(2)(c) – there was certain disagreement as regards the (existence of the) possibility to save electronic copies of electronic data. By specifying that the officials of the Commission are empowered to take or obtain copies of or extracts from such books or records “in any form”, Regulation 1/2003 finally put an end to this – questionable – discussion. As indicated by the words “in any form” contained in Article 20(2)(c), the Commission’s officials are not only authorised to take “hard” photocopies of

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1330 Case T-135/09, Nexans France SAS and Nexans SA v Commission, para 64. ‘[…] when the Commission carries out an inspection at the premises of an undertaking under Article 20(4) of Regulation No 1/2003, it is required to restrict its searches to the activities of that undertaking relating to the sectors indicated in the decision ordering the inspection and accordingly, once it has found, after examination, that a document or other item of information does not relate to those activities, to refrain from using that document or item of information for the purposes of its investigation’.

1331 Case 155/79, AM & S Europe Limited v Commission [1982] ECR 1575, para 17. In this case the Court ruled that ‘since the documents which the Commission may demand are, as Article 14 (1) confirms, those whose disclosure it considers “necessary” in order that it may bring to light an infringement of the Treaty rules on competition, it is in principle for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it’. See also e.g. Y. VAN GERVEN, “Bringing” 329-331.

1332 See e.g. Commission Decision of 7 October 1992 (Case IV/33.791 - CSM - ex IV/33.638 - Sugar) [1992] OJ L 305/16. (“The Commission does not call into question that in the first instance it is up to the company itself to assess its authorities in the framework of a verification in the case of dispute. However, at issue is the question how an undertaking should assert its rights. The answer is that the undertaking cannot make matters into its own hands but must apply to the Court of First Instance of the European Communities, which alone is competent to supervise the Commission's conduct”). This case is commented below. See also A.-H. BISCHKE, “Part 4: Council” 1757-1758.

1333 See Article 20 of Regulation 1/2003. See also J. S. VENIT “EU Competition Law—Enforcement” 95-96; See also L. ORTIZ BLANCO AND K.J. JORGENSEN, “Antitrust” 327.

1334 According to A.-H. BISCHKE (“Part 4: Council” 1756-1757), the Commission’s right to save copies of electronic data electronically was unjustified because it went beyond the wording of this provision and infringed the principle of an investigation in situ.

1335 See also Y. VAN GERVEN, “Bringing” 329-331. Compare A.-H. BISCHKE, “Part 4: Council” 1756. Interestingly, this author argues that ‘Article 20(2)(c) could provide the legal basis for taking copies electronically’ (emphasis added). The wording of this provision clearly indicates that this is certainly possible.
that applies to the collection of so-called forensic evidence by Commission’s inspectors. According to the Note, the power contained in Article 20(2)(c) includes examining electronic information and taking of electronic or paper copies of such information. The undertaking’s storage media under examination may be kept by the inspectors until the end of the inspection. In other words: the Commission can seize technical equipment such as laptops and mobile phones of company staff. At the end of the inspection, the undertaking’s data will be removed from the Commission’s IT tools. This ensures that the Commission does not keep any information which is not necessary to continue the procedure. In cases where the Commission cannot finish its inspection on the undertaking’s premises during the day, it can follow the ‘continued inspection’ or ‘sealed envelope’ procedure, whereby the data is placed onto an encrypted storage device and sealed in an envelope.

In Nexans, on the third day of the inspection, the inspectors examined the content of the hard drive of an employee and recovered a number of files, documents and emails, which appeared to have been deleted after the start of the investigation. They made two copies of a number of files. Those copies were placed in envelopes which were sealed and then signed by one of the applicants’ representatives. The inspectors took those envelopes back to the offices of the Commission. A copy was given to Nexans’ lawyers. The envelopes were opened at the Commission’s premises a month after the dawn raid, in the presence of Nexans’ lawyers. The contents were examined, and the inspectors printed out those documents which they considered relevant for the scope of the investigation. The parties challenged among other certain aspects of the dawn raid procedure.

Interestingly, A.-H. Bischke (“Part 4: Council” 1756) argues that even though ‘the Commission has been authorised to take copies irrespective of the medium’ [... ] it is consistent with the principle of proportionality to print out a minor amount of data instead of storing a large amount if only a minor amount of data is important’. The specific meaning on the term “important” used by this author is unclear. Yet, it does not seem appropriate to limit the Commission’s power to seize documents to documentation which closely concerns the subject matter of the investigation. In order to be able to make a substantiated and well-documented analysis concerning the existence of a possible violation of the EU competition rules, the Commission most probably needs to seize documents of a general character relating the business activities of the undertaking concerned. See also L. Ortiz Blanco and K.J. Jörgens, “Antitrust” 317; infra this section.

Explanatory Note, paras 9-10 10 stating, inter alia, that in order search the IT environment and storage media of the undertaking the Inspectors may use built-in (keyword) search tool as well as their own dedicated software and/or hardware, that is ”Forensic IT tools”. Forensic IT tools enable the Commission to copy, search and recover data on the one hand, while respecting the integrity of the undertakings’ systems and data on the other.

See also D. Kovács, “Fiat” 163-164. Even though this author observes that the term ”storage media” should be construed broadly, he notes that ‘given the importance of such technical equipment for the running of the daily business of an undertaking, it seems rather controversial to give the European Commission such far-reaching competences at its hands. In particular, it is noteworthy in this context that the Authority is not under an obligation to give any reason for its decision to keep a data carrier’. Still, since the Commission is indeed aware of the importance technical equipment, it seems unlikely that it will seize such equipment for unreasonable periods (see Explanatory Note, para 12 stating that the storage media may also be returned earlier, for instance after a forensic copy of the data under investigation has been made. Such forensic copy is considered an authentic duplicate of the original data and enables the Commission’s inspection to go on with the inspection). In addition, it should be taken into account that the Commission is obliged to specify the subject matter and the purpose of the inspection. If the Commission considers that it is necessary to seize technical equipment, it must be assumed that this action is directed to investigate a possible infringement of the EU antitrust rules, which is at the same time set out in the decision.

Explanatory Note, para 13. The removal of the undertaking’s data is one of the innovative aspects of the update which can be seen as an unofficial codification of the procedure followed by the Commission in practice. See D. Kovács, “Fiat” 164; L. Piazza, “The Revision” 423

If this occurs, the undertaking will be provided with a duplicate. The Commission commits to return the sealed envelope to the undertaking or to invite the undertaking to attend the opening of the sealed envelope at the Commission premises and assist in the continued selection process. Explanatory Note, para 14.

The facts of this case were briefly commented above.
Particularly, the applicants claimed, *inter alia*, that the Commission did not have the right to examine certain documents in its own offices in Brussels and keep them up until the time of the examination. Rather, the documents should have been examined that at the premises of Nexans France and copies of those the documents relevant for the purposes of the investigation should have been taken. On hearing the arguments, the General Court followed the Commission’s view that the actions for annulment under the inspection decision were inadmissible. The contested acts were qualified as ‘intermediate measures paving the way for the adoption of a fining decision’. Such intermediate measures are not challengeable in so far as they are not capable of producing binding legal effects capable of affecting the applicant’s interests by bringing about a distinct change in their legal position. The Court, therefore, concluded that the legality of those acts could only be examined in the context of an action for annulment of a decision imposing a penalty under Article 23(1) or in the context of an action challenging the final decision finding an infringement of Article [101](1) TFEU.

As commented above, the documentation which is copied or seized must be directly or indirectly related to the subject matter and the purpose of the inspection, *i.e.* the two factors which delimit the scope of the inspection. The real limitation to the Commission’s inspectors does not directly regard the access and examination of the information but its collection and potential use in a process. In principle, if inspectors collect documents or take copies of records which, in the view of the undertaking, do not concern the subject matter of the investigation, the undertaking may ask the Commission to return the copies of the documents in question. Nevertheless, the Commission will most likely not return the documentation if it considers that it may still be relevant for the conduct of the investigation.

The Commission logically attaches great importance to the right to take copies and/or extracts. This can be illustrated by the proceedings against Sanofi-Aventis.

In this case the Commission opened a formal investigation to assess whether Sanofi-Aventis, a company operating in the pharmaceutical sector, illegally obstructed an inspection of its premises. In January 2008, Commission officials – accompanied by officials from the French inspections service – went to the company’s headquarters in France and copies of those documents relevant for the purposes of the investigation should have been examined at the premises of Sanofi-Aventis.

The contested acts implementing the decision ordering an inspection were inadmissible. As regards the acts implementing the decision ordering an inspection, a decision on the merits may only occur if and when the Commission’s fining decision will be appealed (as is commonly the case). Still, while the Commission’s right to seize documentation is in effect limited by the purpose of the investigation, in certain occasions, it may appear necessary to collect general (or more indirect) information regarding the undertaking and its economic activities in the relevant economic sector, in order to be able to make a well documented analysis of the case.

1343 Ibid., para 134.
1344 Ibid., para 119. The Court also stressed that it follows from Article 20(2)(c) of Regulation 1/2003 that the taking of copies of a business record, regardless of its medium, constitutes a measure implementing the decision ordering the inspection pursuant to Article 20(4) of Regulation 1/2003 (paras 120-121).
1346 *Nexans appealed to the ECI, which confirmed the General Court’s judgement (Case C-37/13 P, *Nexans SA and Nexans France SAS v Commission*). As regards the acts implementing the decision ordering an inspection, a decision on the merits may only occur if and when the Commission’s fining decision will be appealed (as is commonly the case). Still, while the Commission’s right to seize documentation is in effect limited by the purpose of the investigation, in certain occasions, it may appear necessary to collect general (or more indirect) information regarding the undertaking and its economic activities in the relevant economic sector, in order to be able to make a well documented analysis of the case.*
1348 See e.g. Case IV/33.791 - CSM - ex IV/33.638 - Sugar [1992] OJ L 305/16. In this case ‘CSM asked the Commission to return the copy of a business document concerning sugar-beet prices which the Commission officials had taken during the investigation. […] The Commission provisionally refused this request since the inquiries in the proceeding which led to the investigation at the premises of CSM have not yet been completed. It could not, consequently, be established with certainty that the document was not relevant to the investigation. In any case, the document is not, according to the Commission, one that is obviously not related to the subject matter of the investigation as specified in the decision of 6 December 1990’. See also L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 327.
1349 It must be kept in mind that the initiation of proceedings does not imply that the Commission has evidence of an infringement.
competition authority – conducted a dawn raid in the headquarters of Sanofi-Aventis in France.\textsuperscript{1351} During the inspection, certain documents, which were relevant for the Commission's inspection, were identified. Although Sanofi-Aventis did not oppose to the inspection from the outset, it refused to let the Commission officials examine and take a copy of the documents, unless the French authorities produced a national search warrant, which was subsequently produced.\textsuperscript{1352} In order to overcome the company’s opposition and carry out their inspections, the Commission had to invoke the assistance of the national authorities.\textsuperscript{1353}

Similarly, in CSM\textsuperscript{1354} the undertaking under investigation only allowed the Commission to take the necessary copies after having previously refused to let it do so. It was only on the second day of the investigations, and after receiving a decision imposing periodic penalty payments, that the undertaking finally allowed Commission officials to make copies. In this case, the Commission firmly stated that '[t]he obligation incumbent on an undertaking to submit to an investigation ordered by a decision […] is not satisfied even if the undertaking's refusal to let officials charged with the investigation by the Commission to exercise their powers is only temporary. Any other interpretation would jeopardize the effectiveness of the investigation’.

3.1.4.4. The competence to seal business premises and books or records

The power of the Commission to seal any business premises and books or records has been officially introduced by Regulation 1/2003. However, under former Regulation 17, the Commission frequently made use of the possibility to seal any business premises in so far Member States were able to provide support to this end. The difference is that now, the power is expressly conferred on the Commission, and the undertaking can be fined on the basis of Article 23(1)(e) of Regulation 1/2003 for breaking the seals.\textsuperscript{1355}

Seals are meant to ensure that no documentation that may be used as evidence is destroyed during the investigation.\textsuperscript{1356} Sealing business premises and books or records is imperative when the investigation of a case takes longer than one day and the Commission officials see themselves obliged to interrupt the investigation and leave the premises of the undertaking.\textsuperscript{1357} This possibility should thus be seen as a justified extension of the Commission’s power to access and examine documentation in business premises when the actual inspection cannot be finalised within normal business hours and there is a need to ensure that no evidence disappears overnight.\textsuperscript{1358}

\textsuperscript{1351} Interestingly, this inspection formed part of the general inquiry carried out by the Commission in the pharmaceutical sector. See supra section 1 of this Chapter.
\textsuperscript{1352} See Commission, MEMO/08/357 “Commission opens formal proceedings against sanofi-aventis for possible procedural infringement”.
\textsuperscript{1353} A few months later the Commission finally closed the case without adopting an infringement decision. It was reported that the Commission was confident that Sanofi-Aventis fully understood its legal obligations and had decided to refocus on its on-going sector inquiry. M. TER HAAR, “Obstruction” 254; M. FAVART, “The European Commission closes its investigation on an alleged obstruction of an inspection in the pharmaceuticals sector (Sanofi-Aventis)’, 2008 (October), e-Competitions; P. BERGHE AND A. DAWES, “‘Little pig’” 413.
\textsuperscript{1356} Competition Proposal for a Council Regulation on the implementation of the competition rules under Art. 81 and 82 EC Treaty [2000] OJ C365/284 (Article 20); Regulation 1/2003, recital 25.
\textsuperscript{1357} The need to be able to seal was also emphasised in the Commission Proposal for a Council Regulation on the implementation of the competition rules under Art. 81 and 82 EC Treaty [2000] OJ C365/284. See also L. ORTIZ BLANCO AND K. J. JÖRGENS, “Antitrust” 327-328 stating that that ‘until now dawn raids have tended to last only one day or 2 which means that there was a risk that incriminating documents might be removed. Unless appropriate safeguards are put in place, longer inspections appeared somewhat pointless’.
\textsuperscript{1358} According to the Commission, ‘[s]eals should normally not be affixed for more than 72 hours’. See Regulation 1/2003, recital 25. In this regard L. ORTIZ BLANCO comments that ‘it is not entirely clear whether the seal should not be
The breaking of seals affixed by the Commission can be sanctioned on the basis of Article 23(1)(e) of Regulation 1/2003. Breaking of seals within the meaning of this provision includes all actions which put at risk the objective of fixing the seals in the sense of Article 20(2). Once a seal has been broken, the exact identity of the person who manipulated the seal – especially the fact whether it is an employee of the company or not – is irrelevant.\textsuperscript{1359} The decisive aspect is that the company, which is responsible for the integrity of the seals, has failed to prevent the breaking of the seals.\textsuperscript{1360}

The Commission has adopted two well-known decisions fining undertakings for the breaking of seals. The two first decisions imposing fines based on Article 23(1) of Regulation 1/2003 in the \textit{E.ON Energie} and \textit{Suez Environnement} cases constitute, therefore, important precedents.

In \textit{E.ON}, the Commission conducted an inspection at the premises of E.ON’s in Munich and, before leaving, the officials placed all the selected documents in a room with a seal affixed to the door.\textsuperscript{1361} The next day, the seal was still on the door but the message ‘void’, a marking that shows on an affixed seal when it is removed, appeared over its surface.\textsuperscript{1362} In addition, the seal had been displaced over two millimetres upwards and sideways. The inspectors were unable to ascertain whether the stored documents were still there, since they had not been properly catalogued yet.\textsuperscript{1363} The Commission considered the breach of the seal as a serious violation and found it necessary to impose a deterrent fine, namely €38 million, pursuant to Article 23(1)(e) of Regulation 1/2003.\textsuperscript{1364} In its decision the Commission took account of other ‘alternative scenarios’ which may have been the cause of the condition of the seal. Relying on a number of expert opinions, E.ON claimed that certain circumstances, such as the use of an out-of-date seal, air humidity, vibrations or the use of Synto (a cleaning product), could have caused creeping of the seal, creating the ‘impression of damage’.\textsuperscript{1365} However, the Commission concluded that none of the factors submitted by E.ON could have had a significant influence on the state of the seal and that the breach of the seal happened, at the very least, through negligence.\textsuperscript{1366} E.ON subsequently appealed the fining decision before the General Court. E.ON’s arguments concerned, most importantly, the burden of proof, the existence of the “alternative scenarios” and application of the principle of proportionality.\textsuperscript{1367} The General Court rejected all E.ON’s arguments. According to the Court, since the applicant had been clearly informed of the significance of the seal and of the consequences of a breach, E.ON was

\begin{footnotesize}
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\item See Judgment of the General Court of 15 December 2010, Case T-141/08, \textit{E.ON Energie AG v Commission} \citeyear{2010 ECR II-5761, para 260}.
\item Pictures of such seals, and their appearance when they are removed or tampered with, are available at \url{http://ec.europa.eu/avservices/photo/photo_reportage_en.cfm?id=2409}
\item See \textit{Case T-141/08, E.ON Energie AG v Commission} \citeyear{2010 ECR II-5761, paras 4-9}.
\item \textit{COMP/B-1/39.326 — E.ON Energie AG}, \citeyear{2008 OJ C 240/6}.
\item See \textit{Case T-141/08, E.ON Energie AG v Commission} \citeyear{2010 ECR II-5761, para 45-57}.
\item In the course of the proceedings, E.ON submitted three expert studies. The Commission also requested two expert opinions and information from the manufacturer of the seal.
\item \textit{Ibid}, para 37.
\end{enumerate}
\end{footnotesize}
required to take all the necessary measures to prevent any tampering with the seal. Therefore, the Commission was entitled to consider, at the very least, that the seal had been negligently broken. The General Court also found that the fine imposed by the Commission was not disproportionate to the infringement (it represented 0.14% of E.ON's turnover) given the serious nature of breaking a seal, the size of the company and the need to ensure that the fine dissuaded other companies from considering that it might be advantageous to tamper with a Commission seal during inspections. E.ON further appealed to the ECJ. E.ON's appeal was dismissed in its entirety.

Comparably, in April 2010 during an investigation conducted at the offices of Lyonnaise des Eaux (LDE), a subsidiary of Suez Environnement in Paris, the Commission decided to affix seals to an office door. After the seals were affixed pictures were taken by the Commission officials, and the legal director of LDE placed an A4-size paper indicating that the door should not be opened under any circumstances. However, the door was unlocked and no further measures were taken in order to prevent access to the office. When the officials returned the next day, they found that a seal had been displaced a couple of millimetres and showed the message ‘open/void’. In these circumstances, LDE opened an internal investigation and the staff member responsible for the breach of seal was identified. The employee in question stated that the breach was committed by accident: he did not notice the seal or the warning sign and, when searching for a colleague, he partially opened the door. LDE submitted this testimony to the Commission, as well as recordings from two surveillance cameras showing that the employee had arrived at the sealed office at 10 am and departed at 10.03 am. Statements of other employees, who testified that they had seen the seal intact earlier that same morning were also provided to the Commission. In its decision, the Commission considered that it was at the very least a case of negligence as LDE had simply not taken all necessary preventive measures. In this instance, it stated that the door should have been locked to prevent such a breach of a seal. In May 2011, the Commission adopted a decision fining Suez Environnement and LDE for €8 million.

### 3.1.4.5. The right to ask for explanations on facts or documents

According to Article 20(2)(e) of Regulation 1/2003, Commission officials are authorized to ask the representatives of undertakings for oral explanations and record the answers. This competence is designed to enable the Commission officials to facilitate, simplify and speed up the conduct of inspections. In complex cartel cases where the parties adopt sophisticated measures to conceal any traces of their unlawful conduct, the role of this power is particularly important as factual questions...
enable the Commission, *inter alia*, to obtain access to and understand relevant information. In this context, inspections can in practice be easily obstructed if businesses decide to remain “silent”. 1379

It has been argued that the right of the inspectors to ask questions during inspections has been significantly extended with the entry into force of Regulation 1/2003. 1380 Pursuant to the former Article 14 of Regulation 17, Commission officials were empowered ‘to ask for oral explanations on the spot’. Many practitioners considered that such questions should relate only to the content of the business records that were examined. 1381

The doubts as to the scope of this right were not dispersed in *National Panasonic* where the Court gave some consideration to this power. Particularly, the ECJ held that ‘officials of the Commission undertaking an investigation are empowered to require explanations of specific concrete questions arising out of the books and business records which they examine’. 1382 Although the Court acknowledged that officials are not entitled to ask general questions, 1383 the issue of whether inspectors could go beyond the possibility to ask questions about the documents under examination and generally enquire about the subject matter of the inspection remained (for some) an uncertain matter. 1384

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1380 See e.g. Y. VAN GERVEN, “Bringing” 329-331: ‘[f]inally, the right of the inspectors to ask questions during inspections has been significantly broadened. While under Regulation 17/62 the inspectors were only allowed to ask questions that related to documents found during a raid, Article 20(2)(e) grants the inspectors a general right of interview that is only limited by the scope, i.e. the subject-matter, of the inspection. In other words, the right to ask questions has been de-linked from the documents seized’. See also A.-H. BISCHKE, “Part 4: Council” 1757.

1381 The Commission appeared to be aware of the strict interpretation given to the right to require explanations. See White Paper on the modernisation, para 112. See also J. S. VENIT “EU Competition Law-Enforcement” 96. This author commented that ‘[w]hile the point is undecided, most practitioners would probably take the view that such questions should relate only to the content of the business records examined (for example, the explanation of the organization of the company’s business records and the meaning of abbreviations) and that the target’s representatives are under no obligation to answer general questions relating to the facts under investigation. This interpretation is consistent with the importance of documentary, as opposed to testimonial, evidence in Commission proceedings and with the structure of Regulation 17, which provides for a mechanism by which the Commission can address specific questions to, and seek written explanations from, companies under investigation (see Article 11)’.


1383 Ibid, para 15. In this regard A.-H. BISCHKE (“Part 4: Council” 1757) argued that in the White paper on modernisation (para 113) on modernisation, the Commission demanded a general right to pose questions. He comments that ‘[t]he promulgator of the regulation correctly did not follow that proposal, and thus the representatives of the Commission are not empowered to ask ‘any’ questions. However, this interpretation is incorrect. The White Paper on modernisation (para 113) proposed a right to ask questions that are ‘justified by and related to the purpose of the investigation’ was proposed. The wording of this proposal makes clear that the Commission did not wish to be entitled to generally ask questions.

1384 Although it is true that certain discussion existed in this regard, as the Commission recognised, the view that ‘this right was if anything an ancillary right at least under Regulation 17’ seems to be more appropriate (see Commission, Directorate-General Competition, “Dealing with the Commission Notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty”, 1997 Brussels/Luxembourg, at 39–40 available at http://aei.pitt.edu/36273/1/A2484.pdf, hereafter: ‘Commission, “Dealing with Notifications”’). This interpretation appears even more correct in the light of the undertakings’ obligation to cooperate actively. In fact, this obligation implies that undertakings must ensure that the Commission is properly informed. See also L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 328; H. W. KREIS, “EEC Commission” 39-43. Interestingly, this last author affirms that this vision is also confirmed by the fact that ‘[i]n a case dealt with in 1974, a business […] allowed the Commission officials unrestricted access to its premises and also produced documents, but at the same time categorically refused to answer any of the questions put by the Commission officials. The Commission interpreted this as a refusal to submit to the investigation and, in its decision, required the business, upon request, to give oral explanations on the spot relating to the subject matter of the investigation’ (referring to unpublished decision of Apr. 29, 1974, IV/AF 256). According to him, the Commission took the same approach in further decisions (referring to unpublished Article 1 Decision of June 22, 1979, IV/AF 420 (‘und die von den genannten Beamten verlangten Erklärungen zum Gegenstand der
The new wording of Article 20(2)(e) of Regulation 1/2003 unequivocally states that in the course of an investigation, authorised Commission officials are empowered to ask the undertaking’s representatives or other employees any questions that are justified by, and relate to, the purpose of the investigation, and to demand a complete and specific answer. Questions may concern practical matters such as, the organization and the structure of the business, the storage of documentation, the nature of the bookkeeping, the identity and precise responsibilities of the employees, the meaning of abbreviations, questions about authors of documents, etc.\textsuperscript{1385} The right of the inspectors to ask questions is thus only limited by the scope (that is, the subject matter) of the inspection.\textsuperscript{1386}

Even though the amended version of Article 14 only seems to codify the powers of the Commission under Regulation 17, this clarification must still be welcomed given the debate on the concise scope of this power. A narrow interpretation of this power would not only run counter to the spirit of the inspection powers of the Commission, but would also, more generally, go against the rationale of Regulation 1/2003.\textsuperscript{1387} The Commission’s practice shows that when investigations include open communication between representatives of undertakings and Commission officials, achieving the objective of the inspection is considerably easier.\textsuperscript{1388} Furthermore, a great majority of the Commission investigations involve complex economic facts and circumstances which require further elucidation. When businesses provide limited explanations, this not only results in delays, but may lead to misinterpretations which impair the objectivity and reliability of the Commission’s judgement. It is, therefore, in the interest of both undertakings and the Commission to help ensure the objectivity of the inquiries by making an adequate use of the possibility to ask for (and provide) oral explanations.\textsuperscript{1389}

Nachprüfung abzugeben’); Article 1, decision of 11 December 1979, IV/28.627 (‘ainsi que de donner sur place toutes les explications orales nécessaires à la vérification’); Article 1, decision of 26 November 1980, IV/AF 465 (‘and they shall give such immediate explanations relating to the subject matter of the investigation as may be required’).
\textsuperscript{1386} This was the actual proposal included in the White Paper on the modernisation, para 113.
\textsuperscript{1387} See supra Chapter 5, section 1.
\textsuperscript{1388} This is in effect (part of) the reasoning lying behind the Leniency Programme (see further infra Chapter 8). In fact, one of the conditions that must be satisfied in order to qualify for immunity or a fine reduction is that the applicant must ‘cooperate genuinely, fully, on a continuous basis and expeditiously’. This entails, inter alia, that they must remain at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts and making current employees and directors available for interviews with the Commission (Leniency Notice 2006, point 12(a)). All cases in which leniency has been granted show, thus, the essential importance of communication. See also e.g. Case COMP/39.796 - Suez Environnement [2011] OJ C 251/4, in which constant communication between the legal chief of the undertaking and the Commission took place. In this case the Commission indeed accepted that the cooperative spirit of the company facilitated the inspection considerably (para 102).
\textsuperscript{1389} It has been commented that there is a risk that the right to ask for explanations could be used to conduct general interrogations within the undertaking concerned (L. Ortiz Blanco and K.J. Jorgens, “Antitrust” 329; A. Jones and B. Sufrin, \textit{EU competition} (2011) 1070). However, this risk should not be a major subject of concern. As previously pointed out the questions asked by the Commission’s officials must relate the subject matter and the purpose of the investigation. Although inspectors are certainly entitled to demand oral explanations where these arise directly out of the documents produced, and they may ask for more extensive explanations, this possibility ensures the effectiveness of the investigation. In addition, as pointed out by the Commission, this power should not be used to pressure the officials of a firm into making oral [incriminating] admissions. The power to ask questions is limited by the privilege against self-incrimination. See also A.-H. Bischke, “Part 4: Council” 1757. Last but not least, the explanations provided in the context of an investigation by persons who were not authorized to provide information can be rectified or amended. This possibility constitutes an additional guarantee. See further infra this section.
In this context, one may wonder who may provide the explanations required by the Commission’s officials. This is a matter that must be decided by the undertaking, which has the responsibility of designating and authorising the appropriate representatives to deal with the requests of the Commission’s inspectors.\textsuperscript{1390} The appointed – and, therefore, authorised – person(s) should be well informed and should be able to provide the inspectors with the necessary assistance.\textsuperscript{1391} Managerial staff authorized to represent the business are generally the persons who are in contact with the Commission officials.\textsuperscript{1392} Still, this does not mean that the Commission is not allowed to question other employees who have not been directly authorised to provide explanations. The difference is that if such person does not feel qualified to give the requested explanations, considering the circumstances of the case, the Commission officials will ask them to call in other employees or representatives who possess the relevant expertise and knowledge. Only when this last request is refused, and thus a full and correct explanation is not provided, the Commission may consider the situation as a refusal to submit to the investigation. Still, Article 4(3) of Regulation 777/2004 stipulates that when explanations have been provided by a member of the staff who had not been authorised by the undertaking to give information, the recordings of the answers and explanations can be rectified, amended or supplemented by undertakings representatives. To this end, the Commission must set a deadline within which the undertaking may correct the employee’s explanations.\textsuperscript{1393}

Experience shows that the power to ask questions has been and is a necessary and effective instrument in Commission inspections. In \textit{Gas insulated switchgear}, the Commission was even able to establish on the basis of firms statements (and other documentary evidence), that a cartel agreement existed and included the mutual respect of most of the EEA market by the Japanese and the Japanese market by the Europeans. The Commission commented in its decision that one of the cartel participants clearly admitted that ‘[the] worldwide sharing of projects relied on the ‘common understanding’ that (a) the Japanese should not quote for projects in Europe and vice-versa, and (b) Japan and the European countries where the European cartel members had their stronghold were reserved to the cartel members concerned, without interference by the others’. This information was later confirmed by other companies involved in the agreement.\textsuperscript{1394} The effective character of this instrument is undoubtedly related to the Commission’s power to impose fines and/or periodic penalty payments if undertakings fail to comply with the obligations described above. In accordance with Articles 23 and 24 of Regulation 1/2003 sanctions can be imposed when authorised staff provides an incorrect, misleading, and/or incomplete reply, or refuse to reply to a question. When non-authorised staff provides an incorrect answer and the company representative fails to correct the explanations, sanctions may also be imposed.

\textsuperscript{1390} See e.g. H. W. Kreis, “EEC Commission” 39-43; L. Ortiz Blanco and K. J. Jörgens, “Antitrust” 328. These authors comment that it is generally advisable to appoint one representative or member staff of the undertaking to act as the contact person. See further infra this section.

\textsuperscript{1391} Commission, “Dealing with Notifications” 39.

\textsuperscript{1392} See e.g. H. W. Kreis, “EEC Commission” 39-43.

\textsuperscript{1393} See commenting on this point E. Engelsing and H-H. Scheider, “Article 23” 1786; F. Arbaulet and B. Sakkers, “Cartels” 909; A.-H. Bischke, “Part 4: Council” 1757; L. Ortiz Blanco and K.J. Jörgens, “Antitrust” 330. These last authors comment that ‘exposing the undertaking to the risk of fines for incorrect answers to question which require reflection and internal investigation would appear too severe and not justified’. However, the possibility to correct the information provided minimises this risk.

\textsuperscript{1394} Commission Decision 24 January 2007 (COMP/F/38.899 “Gas insulated switchgear” – GIS), para 125 of the non-confidential version.
Under Regulation 17 an autonomous procedural fine was imposed in the Akzo case. The Commission considered that Chemicals BV did not submit to the investigation – which had been ordered by decision pursuant to Article 14(3) of Regulation No 17 – inasmuch the manager supplied incorrect oral information by stating that there were no offices of Akzo Chemicals BV in Arnhem. 1395

Failure to comply with these obligations may also be punished by increasing the substantive penalty in the context of the calculation of the fine imposed for an infringement of Article 101(1) TFEU.

This approach was followed in Fittings, where the Commission considered that Advanced Fluid Connections provided misleading information and, as a result, increased the basic amount of its fine by 50%. In this case one employee stated that he did not have any telephone contacts with Frabo in the period between 2001 and 2005. However, several telephone bills provided by Frabo showed the contrary. After the Commission submitted the telephone bills for comments, the employee amended and further amended his initial statement, ending up by admitting that he indeed had the firstly denied contacts. 1396

In Professional Videotapes, the Commission took a similar view and increased the basic amount of the fine imposed on Sony by 30%. 1397 In this case, a duly authorized representative of Sony Europe refused to answer the oral questions asked by the Commission without giving any justification for this refusal. Sony firstly argued that its conduct could not amount to an obstruction given the absence of effects of its behaviour on the investigation. 1398 The Commission rejected this view and stated that for the aggravating circumstance of “refusal to cooperate with or obstruction of the investigations”1399 to be applicable, it suffices that the conduct of the undertaking is deliberately obstructive, irrespective of any effects it may have on the proceeding. 1400 In relation to the refusal to answer the Commission’s questions, Sony argued that some questions went beyond the powers established under the former Regulation 17. The Commission took the view that since all questions aimed at obtaining explanations regarding documents found at the premises, they did not exceed the scope of its powers. In any event, Sony’s refusal to answer extended to all questions without a justification being given. In addition, during the proceedings, Sony had not even attempted to substantiate objections against most of the questions. Under these circumstances, the Commission considered the outright refusal all the more unacceptable. 1401

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1398 Ibid, para 220 (of the non-confidential version).
1399 See 2006 Fining Guidelines, point 28.
1400 It continued by stating that ‘Sony’s behaviour necessarily disrupted the proper conduct of the investigation and hindered the Commission’s inspectors in the exercise of their investigative powers’ (non-confidential version of the decision, recital 221). Interestingly, Sony further pointed to the fact that the limitation period (provided for in Article 1(a) of Regulation (EEC) No 2988/74 of the Council, of 26 November 1974) had expired. The Commission took the view that Sony’s argument would only be applicable if the conduct described had been pursued as an autonomous infringement under Article 15(1)(c) of Regulation No 17. The existence of this provision, however, does not prevent the Commission from applying the aggravating circumstance of “refusal to cooperate with or obstruction of investigations […] when imposing fines for an infringement of Article 81 of the Treaty, which is not time-barred”. Case COMP/38.432 – Professional Videotapes [2008] OJ C 57/10, paras 223-224 of the non-confidential version of the decision.
3.2. Inspections of non-business premises

3.2.1. Objective of Article 21

Under Article 21 of Regulation 1/2003 the Commission has the power to enter in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations concerned. This is a new power that did not exist under Regulation 17. Recital 26 of Regulation 1/2003 explains that this notable extension of the inspection powers of the Commission was introduced because practical experience had demonstrated that directors or other employees deliberately stored relevant information – including incriminatory documents – in their private homes. This provision shows, on the one hand, the determination of the Commission to detect and punish cartel agreements and, on the other, the need to ensure that the fight against cartels is not hindered by individuals keeping evidence at home. Article 21 is, therefore, designed to safeguard the effectiveness of inspections by enabling the Commission to find the business information that is relevant to prove a serious violation of Article 101 (or Article 102) TFEU, regardless of where it is kept.

3.2.2. Formal requirements

In order to conduct an inspection in non-business premises, a number of conditions must be met. Firstly, the Commission must have a reasonable suspicion that Article 101 TFEU (or/and 102 TFEU) are being seriously infringed. Secondly, the inspection can only be conducted on the basis of a decision. Finally, in order to execute the Commission decision ordering the inspection, the competent national court must give prior authorisation.

3.2.2.1. Reasonable suspicion of a serious infringement

Not each type of infringement of Articles 101 or 102 TFEU may be investigated by means of inspections under Article 21. This provision only allows the Commission to inspect other premises if it is in possession of evidence providing reasonable suspicion that business related records, which may prove a serious infringement, are kept there. Although Article 21 does not specify when a serious infringement does exist, classic cartel agreements, such as horizontal price-fixing, market-sharing and output-limitation activity, by definition represent serious infringements within the

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1402 In its Commission Staff Working Paper on the functioning of Regulation 1/2003 (para 74) accompanying the Report on the functioning of Regulation 1/2003 the Commission described Article 21 of Regulation 1/2003 as ‘[t]he most significant extension of the Commission investigation powers’.

1403 In the case SAS Maersk Air and Sun-Air versus SAS and Maersk Air, the Commission believed an agreement extended beyond what the parties had notified potentially involving an infringement of Article 101 TFEU. Consequently, an inspection was launched at the premises of the relevant undertakings. A few days later, Maersk Air voluntarily submitted additional information that had been kept at the home of one of its former employees. Moreover, in response to a request for information, SAS “private files” were sent to the Commission. SAS also submitted additional files which were found after the SAS employees returned from their summer holidays. See Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) [2001] OJ L 265/15, paras 7–8. See also Commission, Proposal for a Council Regulation on the implementation of the competition rules under Art. 81 and 82 EC Treaty [2000] OJ C365/284 (Article 20); Regulation 1/2003, recital 26; I. S. FORRESTER, “Searches Beneath” 7 of the online version.

1404 See Recital 26 of Regulation 1/2003.

1405 Article 21(3) of Regulation 1/2003. The obligation to state the reasons for a European Union act derives from Article 296 TFEU.
meaning of Article 21.\textsuperscript{1406} In addition, in view of the general awareness about the illegal and serious nature of this practice, chances are real that evidence and documentation is kept in private premises. The power contained in Article 21 will, therefore, be typically useful to detect and prove the existence of secret cartels.\textsuperscript{1407}

3.2.2.2. Decision ordering an inspection

If the Commission plans to conduct an inspection in private premises, a simple written authorisation does not suffice. In these cases, the Commission must order the inspection by decision.\textsuperscript{1408} The decision must indicate the subject matter, the date and place of the inspection, and the fact that the parties have a right to appeal before the Court of Justice. Notably, the decision must state the reasons which led the Commission to conclude that a suspicion of a serious infringement of Articles 101 or 102 TFEU exists.\textsuperscript{1409} The Commission can issue this type of decision only after having consulted the competition authority of the Member State in whose territory the inspection is to be conducted.\textsuperscript{1410}

3.2.2.3. Previous authorisation by the competent national court

Given the important intrusion into private life, the decision ordering the inspection can only be executed with prior authorisation from the appropriate judicial authority in the Member State.\textsuperscript{1411} This requirement is meant to prevent the national court’s annulment of the Commission’s investigative initiative, on the one hand, and to ensure uniform judicial guarantees, on the other.\textsuperscript{1412} In practice, a NCA that is consulted before adopting the inspection decision, will normally assist the Commission, for instance, by applying for the necessary judicial approval or search warrant.\textsuperscript{1413}

The scope of the power of review of the national court is similar to the one stipulated in Article 20(8) of Regulation 1/2003.\textsuperscript{1414} Therefore, although the national court in question cannot review the legality of the Commission’s decision, the necessity of the inspection or request access to the

\textsuperscript{1406} See supra Chapters 2 and 4.

\textsuperscript{1407} See also L. ORTIZ BLANCO AND K. J. JORGENS, “Antitrust” 332; A.-H. BISCHKE, “Part 4: Council” 1764. This author comments that although horizontal price-fixing, market-sharing and output-limitation agreements, probably represent serious infringements within the meaning of Article 21, an individual analysis of the seriousness in each specific case is required. He adds that ‘due to the serious impact on the fundamental rights of the individual, the requirement of a serious infringement must be interpreted narrowly’. Such case by case analysis and narrow interpretation does not seem, however, appropriate nor efficient in cartel cases. Based on the analysis made in Chapters 2 and 4 it appears more appropriate to conclude that the requirement regarding the existence of a serious infringement is generally satisfied in cartel cases falling under Article 101TFEU.

\textsuperscript{1408} Article 21(2), sentence 1 of Regulation 1/2003. See also Commission Staff Working Paper on the functioning of Regulation 1/2003, para 74.

\textsuperscript{1409} Article 21(2), sentence 3 of Regulation 1/2003.

\textsuperscript{1410} Article 21(3), sentence 1 of Regulation 1/2003.

\textsuperscript{1411} See Commission Proposal for a Council Regulation on the implementation of the competition rules under Art. 81 and 82 EC Treaty [2000] OJ C365/284 (Article 20); see also I. S. FORRESTER, “Searches Beneath” 7 of the online version).

\textsuperscript{1412} See also e.g A.-H. BISCHKE, “Part 4: Council” 1764. As regards the competent national courts it is interesting to note that while in some jurisdictions a court warrant to carry out an inspection of private premises can be sought from a centralised court, in others the authority must go to the local court where the relevant private premises are located. In certain cases, most frequently those involving several parties, this may imply that the competition authority has to go to several courts. See ECN, Investigative Powers Report (2012) 26.

\textsuperscript{1413} Compare Article 21(3) and Article 20(8) of Regulation 1/2003. See supra section 3.1 of this Chapter.
Commission’s file, it must control the authenticity of the Commission’s decision and assess whether the envisaged coercive measures are not arbitrary or excessive.\footnote{1415} When controlling the proportionality of an inspection under Article 21, special consideration should be given to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested.\footnote{1416}

### 3.2.3. Extent of this power

The concept “other premises” within the meaning of Article 21 generally covers private premises, including, for instance, apartments, houses, land as well as means of transport (especially automobiles) of the directors, managers and other members of the staff of the undertakings and associations of undertakings. As is the case under Article 20, the circumstances of ownership or possession are not relevant in the context of Article 21.\footnote{1417}

Officials and other persons authorised by the Commission to conduct the inspection pursuant to Article 21 have the power enter the relevant premises, to examine all business-related files or documents, and to take or obtain copies or extracts.\footnote{1418} However, the powers of the inspectors are more restricted than under Article 20, as they do not have the power to seal up cupboards, rooms or premises, nor are they allowed to ask for explanations.\footnote{1419} One may wonder whether the existence of these restrictions hinders the conduct of inspections. In other words, it should be questioned whether the powers to enter the relevant premises, to examine all business-related files or documents and to take or obtain copies or extracts (without sealing private premises or asking for explanations) suffice in practice to collect the relevant information to demonstrate a cartel infringement. Although the limitations in the scope of the inspection powers may arguably reduce the success of inspections and should thus be restricted, it also appears that the (limited but still broad) scope Commission’s powers in the context of private premises, suffices to carry out its task of finding the relevant evidence.\footnote{1420} In addition, there is no need to mention that – in contrast to business premises – the question of sealing private premises (such as the home of the director of an undertaking) is far more sensitive and controversial from a rights of defence perspective than the same power in relation to business premises.\footnote{1421}

1416 See Article 21(3) of Regulation 1/2003.
1417 See in this regard supra section 3.1 of this Chapter. See also A.-H. BISCHKE, “Part 4: Council” 1764–1765.
1418 Article 21(4) of Regulation 1/2003.
1419 See Article 21 of Regulation 1/2003. See also e.g. L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 332; A. JONES AND B. SUFRIN, EU competition (2011) 1057.
1420 On the other hand, it should be noted that NCAs may have wider powers in the context of inspections of private premises. In several jurisdictions it is possible to seal non-business premises during inspections (e.g. Germany, Hungary, Norway, Sweden, Spain and the UK), while in others it is not possible to use this power (e.g. the Czech Republic, France, Slovakia). In Spain, sealing non-business premises requires the express prior consent of the affected party, or failing this, judicial authorization to do so. In addition, in contrast to the Commission, almost all authorities have the possibility to ask questions related to the subject matter of the inspection during inspections in business premises (see ECN, Investigative Powers Report (2012) 26). Arguably, the lack of uniformity between Commission and Member States may cause considerable uncertainty for undertakings, especially if the Commission requests a NCA to conduct an inspection on the basis of Article 22 of Regulation 1/2003.
1421 This issue will be analysed in the next Chapter.
In case of resistance or opposition to the inspection, the rules of Article 20(6) of Regulation 1/2003 regarding the provision for assistance from national authorities also apply to inspections conducted under Article 21 of Regulation 1/2003. Nevertheless, the powers of the Commission to impose fines or periodic penalty payments under Articles 23 and 24 of Regulation 1/2003 are not applicable. The reasoning lying behind this limitation is linked to the lack of competence of the Commission to impose sanctions on individuals. The specific nature of Article 21 justifies, in principle, the fact that undertakings cannot be held responsible for individual behaviour taking place outside the company. Although this restriction is inherent to the enforcement system of Regulation 1/2003, this situation is at least peculiar considering that, according to the members of the ECN, including the Commission to ensure compliance with the power to inspect non-business premises, powers should be available to effectively sanction failure to submit inspections of non-business premises.

Even if the sanctions established in Articles 23 and 24 are not applicable, given that the decision ordering an inspection can be executed after having obtained judicial authorization, individuals may have to face the consequences stipulated under national law in case of non-compliance with such authorisation. The enforcement of Article 21 depends, in this sense, on the national legal orders. This situation of exclusive reliance on Member States not only may lead to divergences in the enforcement of this provision. As a matter of fact, some national jurisdictions have no sanctions in the case of non-compliance in the course of an inspection in non-business premises (while, remarkably, their laws envisage sanctions in the case of non-compliance with inspections in business premises). In absence of powers to enforce inspections of private premises, not only the enforcement of Article 21 but also inspections conducted at national level are endangered. The limited competence of the Commission to enforce this provision, and more generally to punish individuals, inevitably leads us to the more complex question whether the sanctioning powers of the Commission should be extended as to cover not only undertakings but also individuals.

2.3.4. Practical experience

On 2 May 2007, the Commission launched the first (surprise) inspection at a private premise. This inspection was conducted in the context of the Marine hose cartel investigation. In this case,
Commission inspectors carried out an inspection of the premises of a number of undertakings that were involved in the production of marine hose in France, Italy and the United Kingdom.\textsuperscript{1428} At the same time, a Commission team inspected the home of a director of one firm in the UK. In the course of these inspections, and in particular in the private premises that were examined, key evidence was found that enabled the Commission to establish the existence of a market sharing and price-fixing cartel and, subsequently, to impose a fine of € 131 million on marine hose producers.\textsuperscript{1429}

\section*{3.3. Rights of defence and procedural fairness}

In interpreting the scope and possible limitations of the Commission powers of inspection, special regard must be had to the need to safeguard the rights of defence, which are considered ‘a fundamental principle of the Community legal order’.\textsuperscript{1430} In the \textit{Michelin} judgment, the Court pointed out that the rights of defence must be observed in administrative procedures which may lead to the imposition of penalties. However, if the rights of defence are not respected during preliminary inquiry procedures, they may be irremediably impaired. These procedures include, in particular, investigations which may be key in providing evidence of the unlawful anticompetitive behavior of undertakings. In these circumstances, the rights of defence must be respected from the preliminary inquiry stage.\textsuperscript{1431}

Over the years, the European Courts have defined a number of procedural safeguards for undertakings under investigation. These guarantees include, for instance, the obligation for the Commission to specify the subject matter and purpose of the inspection, the prohibition of arbitrary and disproportionate inspections,\textsuperscript{1432} the legal professional privilege and the privilege against self-incrimination.

\subsection*{3.3.1. Legal professional privilege}

As ‘a necessary corollary of the rights of defence’,\textsuperscript{1433} the Commission must ensure the protection of the legal professional privilege (the ‘LPP’), that is, the confidentiality of written communications between lawyers and clients with regard to the Commission. The legal privilege constitutes an

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1428} See Commission, IP/07/163, “Antitrust: Commission has carried out inspections in the marine hose sector”.
\item \textsuperscript{1429} See Case COMP/39.406 — Marine Hoses, OJ C 168/6, para 6; Commission, IP/09/137, “Commission fines marine hose producers €131 million for market sharing and price-fixing cartel”; see also OFT Press release 70/07 (http://www.oft.gov.uk/news/press/2007/70-07); Commission Staff Working Paper on the functioning of Regulation 1/2003, paras 70-75. The Commission stated in this policy document that ‘[t]his first successful experience has proven that the new investigation tool introduced by Article 21 is very important for the Commission in its fight against cartels which have become more and more complex and where efforts to hide evidence of forbidden activities have significantly increased during the last years’. Also at national level inspections in private premises take place often. For instance, in March 2013, the German competition authority conducted inspections at different premises of sanitary ware wholesalers. The authority suspected the existence of an illegal price fixing arrangement to the detriment of plumbers/installers. A total of 14 locations, including private residences were simultaneously inspected by forty staff members of the Bundeskartellamt assisted by 49 police officers and tax investigation. The press release is available at http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemeldungen/2013/07_03_2013_DU-Sanit%C3%A4r.html.
\item \textsuperscript{1432} These guarantees have been discussed above. See supra section 3.1 of this Chapter.
\end{itemize}
\end{footnotesize}
exception to the Commission wide powers of investigation to uncover infringements of Articles 101 and 102 TFEU.

The principle of legal privilege has been acknowledged by the Court of Justice in the AM&S case.\(^{1434}\) In a nutshell, the privilege of legal protection covers written communications between lawyers and clients,\(^{1435}\) provided that two conditions are satisfied. On the one hand, the communications must be made for the purposes and in the interests of the client’s rights of defence.\(^{1436}\) On the other, the communications in question must emanate from independent lawyers, i.e. lawyers who are not bound to the client by a relationship of employment.\(^{1437}\) More recently, the AM&S jurisprudence has been reaffirmed by the ECJ in the Akzo judgement, in which the ECJ confirmed ‘that written communications between a company-client and its employed in-house lawyer do not benefit from LPP and are thus not protected against disclosure in the context of EU competition law investigations’.\(^{1438}\) As regards specifically the independence requirement, the Court considered that an in-house lawyer in fact occupies the position of an employee which, by definition, implies that he cannot ignore the commercial strategies pursued by his employer which, at the same time, affects his professional independence. Moreover, an in-house lawyer may have to carry out other tasks, such as, the function of competition law coordinator, which may influence the commercial policy of the undertaking. Such functions reinforce the close ties between the lawyer and his employer.\(^{1439}\) Furthermore, in response to the argument that national laws have evolved in the field of competition law, the Court found that no predominant trend towards protection under LPP of correspondence within a company with in-house lawyers could be discerned in the national legal systems. Therefore, the current legal situation in the Member States does not justify a change in the case law towards granting in-house lawyers the benefit of LPP.\(^{1440}\) Akzo Nobel and Akcros also submitted that the limited scope of protection of LPP lowers the level of protection of the rights of defence of


\(^{1435}\) According to the case-law the protection of LPP covers, in principle, written communications exchanged after the initiation of the administrative procedure that may lead to a decision applying Articles 101 and/or 102 TFEU or to a decision imposing a pecuniary sanction on the undertaking. This protection can be extended to earlier written communications if they are connected to the subject-matter of that procedure. Case 155/79, AM & S Europe Limited v Commission [1982] ECR 1575, para 23. According to the European jurisprudence, in addition to written communications with an independent lawyer made for the purposes of the exercise of the client’s rights of defence, the substantive scope of protection of LPP also extends to (i) internal notes which are confined to reporting the text or the content of communications with independent lawyers containing legal advice (see Order of the CFI of 4 April 1990 in Case T-30/89 Hilti v Commission [1990] ECR II-163, paras 13, 16 to 18) and (ii) preparatory documents drafted by the client, even if they are not exchanged with a lawyer nor created this purpose, provided that they were meant to exclusively to seek legal advice from a lawyer (Judgment of the Court of First Instance of 12 December 2007, T-112/05, Akzo Nobel NV and others v Commission [2007] ECR 5049, para 123, upheld on appeal).

\(^{1436}\) In AM&S, the Court also underlined that the professional privilege ‘does not prevent a lawyer’s client from disclosing the written communications between them if he considers that it is in his interests to do so’. Case 155/79, AM & S Europe Limited v Commission [1982] ECR 1575, para 28.

\(^{1437}\) In-house lawyers are in effect explicitly excluded from LPP regardless of their membership of a Bar or Law Society or their subjection to professional discipline and ethics or protection under national law. See Case 155/79, AM & S Europe Limited v Commission [1982] ECR 1575, paras 20, 21, 22, 24 and 27; T-112/05, Akzo Nobel NV and others v Commission [2007] ECR 5049, paras 166-168 (upheld on appeal). Moreover, protection under LPP applies only to lawyers entitled to practise their profession in one of the EU Member States, regardless of the country in which the client lives (Case 155/79, AM & S Europe Limited v Commission [1982] ECR 1575, paras 25-26).

\(^{1438}\) See for the analysis of this question in the case Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, paras 40-41, 44-45, 47-49, 58-59, 95, 106.


\(^{1440}\) Ibid, paras 69-76.
undertakings. Still, it is the view of the Court that any individual who seeks advice from a lawyer must accept the restrictions applicable to the exercise of that profession, such as the rules on LPP.\textsuperscript{1441} Finally, regarding the breach of the principle of legal certainty, the Court held that this principle does not require identical criteria to be applied as regards LPP. The limitation the LPP in the course of a Commission investigation to exchanges with external lawyers does, consequently, not undermine that principle.\textsuperscript{1442}

The standard of protection established by the European Courts in AM&S and later confirmed – and clarified – in Akzo, constitutes, the cornerstone of the law of LPP with respect to the Commission’s proceedings. A number of Member States appear to have aligned their respective national rules with the standards developed by the European jurisprudence (Italy, Spain). However, there are not only commonalities but also significant discrepancies between the scope of LPP under the national and EU laws. It is well known that, in some Member States (such as Belgium, the UK, Ireland, the Netherlands, Portugal and Greece), rules of privilege are wider and also protect communications with in-house lawyers. In contrast, in other EU jurisdictions, the concept of LPP is narrower (Poland, Germany) or even undeveloped (Slovakia, Czech Republic).\textsuperscript{1443} This lack of uniformity among Member States, has led to a fervent discussion in the area of judicial protection. In fact, it is very frequently argued that the protection the rights of defence requires an extension of LLP to in-house counsel.\textsuperscript{1444}

It is true that in-house lawyers can play an important role by providing companies advice as regards competition law compliance. Following the entry into force of Regulation 1/2003 and the decentralisation of the system, that role may have become more important since companies have to carry out self-assessment of their agreements, in particular to establish under Article 101(3) TFEU. Still, the fact that legal advice provided by in-house lawyers is probably more important or in certain cases even necessary under Regulation 1/2003, does not imply that an extension of LLP is justified.\textsuperscript{1445} Moreover, the question of the extension of LLP to in-house lawyers may have far

\textsuperscript{1441} Ibid, paras 92-97.
\textsuperscript{1442} Ibid, paras 100-107.
\textsuperscript{1444} It is however, in my view, difficult to argue that the possibility to obtain counsel from an independent lawyer is not enough to safeguard the rights of defence. Still, it should be admitted that the fact that in the case of inspections carried out at the request of the Commission on the basis of Article 22(2) of Regulation 1/2003, the agents of the national competition authority are to exercise their powers in accordance with their national rules, may create confusion for the undertakings involved in the inspections. For a deeper analysis of the legal privilege see e.g. L. PAIS ANTUNES, “Just Another Brick in the Wall: Communications with In-house Lawyers Remain Unprotected by Legal Privilege at the European Union Level”, 2011 (2-1) Journal of European Competition Law & Practice, 3-9; A. BURNSIDE AND H. CROSSLEY, “AM&S, AKZO and beyond: legal professional privilege in the wake of modernisation”, Paper for the conference Antitrust Reform in Europe: A Year in Practice organised jointly by the International Bar Association (IBA) and the European Commission, March 2005, Brussels; B. VESTERDORF, “Legal Professional Privilege and the Privilege Against Self-incrimination: Recent Developments and Current Issues” in B. HAWK (ed.) Proceedings of the Fordham Corporate Law Institute, Juris Publishing, New York 2005, 779 p., 701-730; E. GIPPINI-FOURNIER, “Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance” in B. HAWK (ed.) Proceedings of the Fordham Corporate Law Institute, Juris Publishing, New York 2005, 779 p., 587-658; A. ANDREANGELI, “The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?”, 2005 (2) The CompLRev, 31-54 (hereafter: ‘A. ANDREANGELI, “The Protection”’).
\textsuperscript{1445} This view was endorsed by the General Court in the Akzo case. More specifically, the Court held that ‘even if the adoption of Regulation No 1/2003 and of the Commission Notice on Immunity from fines and reduction of fines in cartel cases may have increased the need for undertakings to examine their conduct and to define legal strategies in respect of competition law with the help of a lawyer […]’, the fact remains that such exercises of self-assessment and
reaching consequences in the context of inspections conducted to establish the existence of hardcore restrictions, such as cartel agreements, which fall outside the scope of application of Article 101(3) TFEU. The approach adopted by the ECJ is thus fully appropriate as it maintains a uniform standard for proceedings conducted by the Commission while safeguards the purpose of Commission inspections. As established by the Court, in-house lawyers are in effect in a position of occupational dependence and may face a conflict of interest between loyalty towards their employers and respect for deontological standards. But most importantly concerning inspections, internal communications between a company lawyer and his employer are plentiful and often indistinguishable from purely company advice (which differs from legal advice). If the communications between in-house lawyers and other employees became confidential, suitable conditions for concealing documentary evidence could be easily created. In these circumstances, the Commission’s powers would be seriously compromised.

3.3.2. The privilege against self-incrimination

Well-founded claims concerning the privilege against self-incrimination must also be respected by the Commission when it exercises its investigation powers. In this regard, it must be kept in mind that the applicability of this privilege requires the exercise of coercion against the suspect, with the intention of obtaining information from him.1446 This condition relies on the reasoning that the right not to incriminate oneself is intrinsically connected to the will of a suspect to remain silent.1447

As regards the Commission’s powers to make requests for information by decision, it is important to note that, in Orkem v Commission, the Court pointed out that Regulation 17 does not give an undertaking which is being investigated the right to evade the investigation. On the contrary, the undertaking in question is subject to an obligation to cooperate actively. This obligation implies that it must submit all information relating to the subject-matter of the investigation to the Commission.1448 That obligation also applies to requests for information.1449 More specifically, the obligation to cooperate means that the Commission is entitled to compel an undertaking to provide all necessary information concerning the relevant facts. The undertaking may not evade such strategy definition may be conducted by an outside lawyer in full cooperation with the relevant departments of the undertaking, including its internal legal department. In that context, communications between in-house lawyers and outside lawyers are in principle protected under LPP, provided that they are made for the purpose of the undertaking’s exercise of the rights of defence’. Accordingly, the Court concluded that the personal scope of LLP does not prevent undertakings from seeking legal advice and does not prevent their in-house lawyers from taking part in self-assessment exercises or strategy practices. T-112/05, Akzo Nobel NV and others v Commission [2007] ECR 5049, para 173. See for a different opinion A. ANDREANGELI, “The Protection” 39. 1446 Judgment of the Court of Justice of 15 October 2002, Limburgse Vinyl Maatschappij (LVM) and others v Commission, Joined cases C-238/99 P, C-244/99 P, C-245/99, C-247/99 P, C-250/99 P, C-252/99 to C-254/99 P [2002] ECR I-8375, para 275. 1447 Y. VAN GERVEN, “Bringing” 336. 1448 Case 374/87, Orkem v Commission [1989] ECR 3283, para 27; C-301/04 P, Commission of v SGL Carbon AG [2006] ECR I-5915, paras 39–50. Interestingly, in this case the ECJ the annulled the judgment of the General Court in which it decided that the privilege against self-incrimination could also be invoked against a request to provide certain documents relating to meetings between competitors (protocols, working documents, preparatory documents, handwritten notes, etc.) where this would require the undertaking to admit its participation to the infringement (Judgment of the Court of First Instance 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 and Others v Commission [2004] ECR II-1181. 1449 Infra section 4 of this Chapter.
requests on the ground that, by complying with them, it would be required to give evidence against itself.\textsuperscript{1450}

In contrast, the situation is completely different when the Commission seeks to obtain answers or explanations from representatives or members of staff of the undertaking on facts or documents relating to the subject-matter of the inspection under Article 20(2)(e) of Regulation 1/2003.\textsuperscript{1451} In this context, the Court held that in order to avoid undermining the fundamental principle of the rights of defence, 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 on the Commission to prove’.\textsuperscript{1452} It follows that the privilege against self-incrimination is only relevant when an undertaking is answering the Commission’s questions. While there is an obligation for companies to answer factual questions, they are not obliged to answer such questions when this would result in a direct admission on its part of the existence of an infringement. In the European Courts’ view, purely factual questions may concern for instance: (i) ‘the dates, places and names of the firms participating in each of the meetings’, (ii) ‘the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons’.\textsuperscript{1453}

Taking into account these nuances, undertakings may invoke the privilege against self-incrimination in respect of questions that the Commission inspectors may ask during an inspection to company staff.\textsuperscript{1454} The element of coercion is present when answers and explanations are provided in the context of Article 20(2)(e) of Regulation 1/2003 (concerning the power of the Commission to ask for explanations in the context of inspections in business premises), since the Commission may impose fines when companies provide an incorrect or misleading answer or fail or refuse to give a


\textsuperscript{1452} Ibid.

\textsuperscript{1453} Case T-112/98 Mannesmannröhren-Werke AG v Commission [2001] ECR II-729, para 70. In Mannesmannröhren-Werke the Court held that ‘[c]omparable questions were not held to be unlawful by the Court of Justice in its judgment in Orkem. The applicant was therefore under an obligation to provide answers in response to those requests’. See also Judgment of the General Court of 28 April 2010, T-446/05, Amann & Söhne v Commission [2010] ECR II-1255, especially para 329. In this case the privilege against self-incrimination has been applied concerning information requests (under Article 11 of Regulation 17). The Court found that the Commission is entitled, in a request for information under Article 11 of Regulation 17, to ask purely factual questions and to request production of pre-existing documents. However, if the Commission also asks an undertaking to describe the object and the results of a number of meetings, when it suspects that the object was to restrict competition, this amounts to requiring the undertaking to admit its participation in an infringement. An undertaking is not required to answer that type of questions (Mannesmannröhren-Werke, para 71). Still, if an undertaking decides to supply such information, this must be regarded as spontaneous cooperation capable of justifying a reduction in the amount of the fine, under the Leniency Notice (referring to CFI of 6 December 2005, Case T-48/02, Brouwerij Haacht v Commission [2005] ECR II-5259, para 107). It is also follows from the case-law that, in this situation, undertakings cannot claim that their right not to incriminate themselves has been infringed (Case T-50/00, Dalmine v Commission [2004] ECR II-2395, para 46; upheld by the ECJ in Judgment of the Court of 25 January 2007, Case C-407/04 P, Dalmine SpA v Commission [2007] ECR 829).

\textsuperscript{1454}According to Article 19 of Regulation 1/2003 the Commission is entitled to interview any natural or legal person when they consent to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. It is important to distinguish the power of the Commission to take statements according to Article 19 of Regulation 1/2003 from the possibility to ask questions during the Commission inspection under Article 20. Commission statements taken under Article 19 are made by consent and, therefore, voluntarily. Since the element of coercion is thus not present the privilege against self incrimination is not present. See also Y. VAN GERVEN, “Bringing” 337 and infra section 5 of this Chapter.
Accordingly, company representatives or staff members are (only) required to answer factual questions. This level of protection is on the one hand, sufficiently high to safeguard the undertakings’ rights of defence, while ensuring that the Commission is able to gather the relevant information about the agreement in question. If undertakings could refuse to provide objective information or factual explanations based on the argument that the information is self-incriminating, the Commission would no longer be in a position to effectively gather evidence in cartel cases. There is no need to say that in this situation, effective anti-cartel enforcement is directly jeopardised.

3.3.3. Judicial review

A last aspect that should be taken into account is that undertakings may ask for judicial review of the inspection decisions adopted by the Commission. An undertaking against which the Commission has ordered an investigation may bring an action for annulment under Article 263 TFEU against that decision before the European Courts. The legality of the manner in which investigation procedures are carried out (e.g. the asking of oral questions) may be challenged in the course of an action which may, in an appropriate case, be brought for the annulment of the final decision adopted by the Commission pursuant to Article 101(1) TFEU. If the inspection decision is annulled, the Commission will be prevented from using, any documents or evidence which it might have obtained in the course of that investigation for the purposes of antitrust proceeding. If it does, the decision on the infringement might, in so far as it was based on such evidence, be annulled.

4. Requests for information

In accordance with Article 18 of Regulation 1/2003, the Commission is entitled to require (associations of) undertakings to provide all information it deems necessary to exercise its role in the context of competition law and policy.

Requests for information constitute the method most frequently used by the Commission to gather information and, in practice, the number of such requests considerably exceeds the number of inspections.

1455 See Article 23(1)(d) of Regulation 1/2003; see also supra section 3.1 of this Chapter.
1456 The principle developed in Orkem is now reflected in Recital 23 of Regulation 1/2003. This recital states that: ‘when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement’. See also K. DEKEYSER and C. GAUER, “The new enforcement system for Articles 81 and 82 and the rights of defence” in B. HAWK (ed) Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy, Juris Publishing 2005, 795 p., at 560–561.
1459 L. ORTIZ BLANCO AND K.J. JORGENS, “Antitrust” 263
This power can be used at any stage in the Commission's procedure and is not limited to the fact-finding stage. The Commission has discretion to decide whether, and when (and how many times) this power is to be exercised. In fact, it is not unusual for one undertaking to receive several requests for information in the course of the same procedure. This also follows from the fact that requests for information are not precluded after the Commission has carried out an Article 20 inspection and uses its power under Article 18 to obtain the documents that it failed to obtain during the inspection.

The concept of information must be interpreted broadly as including all specific documents, files and business records. The meaning of the term ‘necessary’ was considered by the General Court in SEP. In this case the (now) General Court held that the concept of “necessary information” must be interpreted by reference to the purpose for which the powers of investigation were conferred upon the Commission. The requirement that a correlation between the requests for information and the presumed infringement must exist is met if, at this stage of the procedure, the request can be legitimately considered to be related to the presumed infringement. The question whether particular items of information are considered as necessary can only be evaluated by the Commission in light of the circumstances. Undertakings may thus not refuse to disclose information merely because they disagree with the Commission’s judgment.

It follows from the considerations above that, while it may be difficult to show that certain information does not fall within the scope of what is necessary, the Commission cannot go on a complete “fishing expedition”. The Commission must reasonably suppose that the information requested can help it and be useful to determine whether a potential infringement has taken place. This view is also supported by the fact that the Commission is required to specify ‘the purpose of the [information] request’. In accordance with Article 18 of Regulation 1/2003 the Commission must indicate the facts which it intends to investigate. More precisely, it must give a concise indication of the suspected infringement and of how the firm concerned is believed to be involved in it. On the other hand, the Commission is not obliged to disclose all the facts known or all the grounds for the infringement.

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1463 Ibid.
1468 Regulation 1/2003, Article 18(2) and (3).
Pursuant to Article 18, there are two ways for the Commission to require all necessary information, namely by (i) simple request or (ii) by decision under Article 18(2) or 18(3) respectively. Unlike under the former Regulation 17, the Commission is now entitled to require information from undertakings by decision from the outset.\footnote{1470} The main difference between a simple request and a request ordered by decision is that there is no duty to comply with a simple request. However, it is important to keep in mind that, the (intentional or negligent) submission of incorrect or misleading information in the context of a simple request can be sanctioned with a fine under Article 23(1)(a) of Regulation 1/2003. In particular, the Commission may impose fines not exceeding 1% of the total turnover in the preceding business year.\footnote{1471} Compared to the penalties under former Regulation which could only amount to a maximum of €5000, the currently applicable sanctions are also considerably higher.

Despite the non-compulsory nature of simple request, the fact that the Commission can ultimately request the desired information by adopting a decision under Article 18(3) constitutes an(other) important reason to comply with a simple request.\footnote{1472} The Commission has, however, explained that in practice replies to simple requests are frequently incomplete and/or were provided late. Therefore, the Commission currently considers using decisions to request information pursuant to Article 18(3) more often.\footnote{1473}

When the Commission directly issues a decision to request certain information, undertakings will be obliged to comply with such request and to handover all the information requested within the time limit specified in the Commission’s decision. Not submitting the requested information, supplying incorrect, incomplete or misleading information or not supplying information within the specified time limit may lead to the imposition of procedural fines amounting to 1% of the undertakings’ turnover in the preceding business year. The Commission has expressed its view that the existence of (higher) sanctions in the context of requests for information has improved the effectiveness of requests for information.

The obligatory nature of this requests combined with the penalties for non-compliance stress the need for the Commission to formulate questions and requests for information as precisely as possible in order to enable undertakings to reply clearly and completely. Despite the wide scope of the power to request information, the undertakings’ rights of defence must be respected when formulating such requests. In view of this, the Commission may not frame its questions in such a manner that an undertaking cannot reply without admitting that it has infringed the European competition rules.\footnote{1474} While the Commission is allowed to make factual questions in this regard, non-factual questions which amount to an admission of guilt are not acceptable.\footnote{1475}

\footnote{1470} Article 11 of Regulation 17 established a procedure for information requests in two subsequent phases. First, the Commission had to send an ordinary request to the undertaking. Only when the undertaking did not provide a complete reply the Commission had the right to proceed with the second phase and send an information request by (binding) decision. See also commenting on this point L. ORTIZ BLANCO AND K.J. JÖRGENS, “Antitrust” 263; C. LISTER, “Dawn Raids” 48-53.

\footnote{1471} Article 18(2) of Regulation 1/2003.

\footnote{1472} See also S. FORRESTER, “Searches Beneath” 166.

\footnote{1473} Commission Staff Working Paper on the functioning of Regulation 1/2003, para 82.

\footnote{1474} Compare supra section 3.3.2 of this Chapter.

\footnote{1475} See further supra section 3.3.2 of this Chapter. This has been codified by Recital 23 of Regulation 1/2003. See also Case 374/87, Orkem v Commission [1989] ECR 3283; Case T-39/90, NV Samenwerkende Elektriciteits-
5. Voluntary interviews

Article 19 of Regulation 1/2003 entitled the Commission to take statements meaning that it can conduct interviews with natural and legal persons who may be in possession of useful information concerning an alleged infringement of Articles 101 and 102 TFEU. This power did not exist under Regulation 17 and, from this perspective, considerably widens the Commission’s powers to gather information.

Such interviews can only be conducted as regards the subject matter of the investigation.\footnote{Regulation 1/2003, Article 19(1)}. This requirement prevents the Commission from asking questions and requiring information without reasonably suspecting the existence of an infringement. When an interview is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.\footnote{Regulation 1/2003, Article 19(2)}

It is very important to keep in mind that the Commission can only conduct such interviews when the natural or legal persons give their consent.\footnote{See Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/6, para 48. Before taking such statements, the Directorate-General for Competition will inform the interviewee of the legal basis of the interview, its voluntary nature and the right of the interviewee to consult a lawyer.} In other words, the procedure to take statements is fully voluntary and no sanctions are imposed if a person rejects an invitation to be interviewed and there is no obligation to give reasons for such refusal. One of the most significant differences between the power to take statements of Article 19 (and other evidence gathering methods such as requests for information under Article 18) and the collection of information in the context of inspections under Article 20 is that no penalties are applicable when the person interviewed provides incorrect or misleading information. In practice, the absence of penalties may reduce the effectiveness of this investigation power. Arguably, if the persons being interviewed do not have to fear being sanctioned, they may also be less motivated to provide complete and not misleading statements.\footnote{This aspect has indeed been recognised by the Commission, see Report on the functioning of Regulation 1/2003, para 12.} On the other hand, this limitation is appropriate given the broad scope of application of this power and its voluntary nature. In accordance with Article 19, the Commission has the power to interview any person about the subject-matter of the investigation.\footnote{It is within the discretion of the Commission to decide when to propose interviews. A party may, however, also make a request to the Commission to have its statement recorded as an interview. Such a request will in principle be accepted, subject to the needs of the proper conduct of the investigation. Commission Notice on best practices [2011] OJ C 308/6, para 49.} This means that the Commission can, for instance, interview low range employees (who have no authorization to represent the undertaking) or former employees and natural persons in the context of an inspection of a private premise. If these individuals provide misleading information and the (representative of the) undertaking has no obligation to or can simply not correct it, it would not be appropriate (for the Commission to be able) to fine the undertaking concerned.
On the basis of Article 3 of Regulation 773/2004 the Commission is allowed to record the interview, but it is first required to inform the interviewee of its intention to do so.\textsuperscript{1481} A copy of the record must be provided to the person giving the statement and the Commission must set a time limit within which the interviewee can correct his or her statement, although as discussed above, no sanctions can be imposed for an incorrect statement.\textsuperscript{1482} From the undertakings’s perspective, the power of the Commission to take statements from natural persons such as unhappy employees can be considered problematic, specially taking into account that the company has no right to obtain a copy of the record of the interview. Nevertheless, it should be kept in mind that interviewees are entitled to be accompanied by lawyers\textsuperscript{1483} and that most importantly, they have no obligation to accept invitations for interviews or not to do so without legal advice.\textsuperscript{1484} From the enforcer’s perspective, the availability of the power to take voluntary statements is necessary to complement its power to conduct compulsory interviews in the context of inspections under Article 20 of Regulation 1/2003. Despite the lack of penalties for non-compliance, voluntary interviews can only but enhance the Commission’s ability to collect information and, subsequently, demonstrate infringements.

6. Should the Commission’s set of investigative tools serve as a model for NCAs?

The discussion above has shown that, under Regulation 1/2003 the Commission has been granted the necessary investigatory powers and fact-finding tools to (proactively) detect the presence of cartel activity and to gather the necessary information to prove the infringement. The powers to (i) conduct sector inquiries; (ii) receive and further handle complains; (iii) carry out inspections in business and non-business premises; (iv) request information and (v) conduct voluntary interviews, are frequently used in practice to ensure the detection and demonstrate the existence of cartel infringements.

First, generally speaking the power to conduct sector inquiries enables the Commission to closely observe and monitor the European economy. The need to constantly monitor the economy is imperative when it comes to discovering cartel activity. In order to effectively exercise this power the Commission has also been granted a number of competences and may, thus, compel companies to provide all necessary information,\textsuperscript{1485} interview natural or legal persons, \textsuperscript{1486} and conduct inspections of business premises.\textsuperscript{1487} In case of non-compliance with such measures, the Commission is entitled to impose sanctions. Compared to other detection tools, sector inquiries demand substantial – legal and economic – resources. However, it is crucial that competition authorities undertake proactive detection initiatives (especially with a view to avoid full reliance on leniency programmes). Given the direct and indirect value of sector inquiries in the detection of

\textsuperscript{1481} Regulation 773/2004 3(1); see also Commission Notice on best practices [2011] OJ C 308/6, para 48. The Directorate-General for Competition will further inform the interviewee of the purpose of the interview and of its intention to make a record of the interview. In practice, the Commission informs the interviewee of its intention to record the interview by providing a document explaining the procedure to be signed by the interviewee. In order to enhance the accuracy of the statements, a copy of any recording is made available to the person interviewed for approval.
\textsuperscript{1482} Regulation 773/2004 3(2) and (3).
\textsuperscript{1483} Commission Notice on best practices [2011] OJ C 308/6, para 48. Interviews may take place in or away from the undertakings premises.
\textsuperscript{1484} A. JONES AND B. SUFRIN, EU competition (2011) 1058.
\textsuperscript{1485} Article 18 of Regulation 1/2003.
\textsuperscript{1486} Article 19 of Regulation 1/2003.
\textsuperscript{1487} Article 20 of Regulation 1/2003.
cartel agreements, it is indispensable to invest the necessary resources to conduct such inquiries systematically. Yet, given that resources are limited, inquiries should be conducted selectively, in sectors which are key for European consumers and in which collusion is more likely to arise. This is particularly the case of oligopolistic markets where cartels are prone to be formed. This selective approach contributes to maximizing the benefits and efficiency of sector inquiries. In addition, it is important that competition authorities remain committed not only during the course of the inquiry, but also for the follow-up antitrust cases. This last aspect is decisive from an enforcement perspective. If signs of a potential violation of the EU competition rules are found during an inquiry, such findings must be followed up with individual cases antitrust cases.

Second, the possibility to submit formal and informal complaints to the Commission also plays an important role for anti-cartel enforcement, in particular in the context of detection. Individuals and/or undertakings that have been victims of cartel behavior may have well-founded suspicions about the existence of a cartel agreement and thus may be able to provide valuable information tips. In this sense, the possibility to submit a complaint may trigger a well-targeted inspection and contribute to save resources that otherwise would be spent, for instance, if a sector inquiry is launched. In addition, the possibility for the Commission to reject a complaint on the basis of its prioritization principles also enhances the effectiveness of this mechanism by allowing the Commission to choose the potentially most damaging cases such as international cartels.

Third, the ability to conduct inspections of business and non-business premises is also particularly relevant in the context of cartel activity, especially taking into account that gathering evidence of price fixing, market sharing and other prohibited concerted practices between competitors can be extremely difficult. The valuable character of inspections is related to the fact that, in contrast to information requests, inspections are generally conducted without warning and give no opportunity to the undertaking under investigation to destroy or manipulate books or records or interfere with the evidence gathering process. The Commission has also been granted extensive powers in the context of inspections, which differ in scope depending on the type of premise being searched. With respect to business premises the Commission is allowed to (i) to enter any premises; (ii) to examine the books and other records related to the business; (iii) to take or obtain in any form copies of or extracts from such books; (iv) to seal any business premises and books or records; (v) to ask questions to any representative or member of staff of the undertaking. The two last competences cannot be exercised with respect to inspections in private premises. It is, however, submitted that the more limited scope of the Commission’s powers in the context of private premises should not pose a significant obstacle for the success of the Commission’s inspections and is justified given the sensitive nature of inspections in private premises. In order to ensure compliance with the powers to inspect business premises, the Commission has been provided with effective sanctioning mechanisms. The most notable sanctions include the powers to impose fines on undertakings that: (i) refuse to submit to an inspection; (ii) fail to allow access to required books or other records related to the business in a complete form; (iii) breach seals affixed during the course of an inspection; (iv) and give incorrect, misleading or incomplete answers with respect to questions asked. The Commission can rely on the assistance of Member States to conduct this type of inspections. However, sanctions for non-compliance cannot be imposed with respect to private inspections. One cannot deny that the impossibility to impose penalties constitutes an important hindrance for the

1488 See supra Chapter 2, section 5.
Commission’s investigations. On the other hand, it should be kept in mind that the Commission is only competent to impose sanctions on undertakings which commit violations of EU competition law. Taking this aspect into account it is only logical that punishing individuals in the context of inspections in private premises is not allowed. Yet, this finding can only but stress that EU competition law infringements are committed by natural persons (and not by undertakings) while only companies are fined. This consideration inevitably leads us to the question whether the Commission’s sanctioning powers may need to be extended to secure effective enforcement.\footnote{See further Chapters 8 and 10.}

Four, requests for information are also an important source to gather information and can be an essential investigative tool at any stage of the investigative process. This possibility can be indispensable, for example, to develop a full market analysis in highly complicated markets. Thus, it is important that the Commission has this investigative power and that it can be exercised on a compulsory basis. The fact that the Commission can impose penalties in case of failure to provide the required information or when companies supply incorrect, incomplete or misleading information is thus essential to safeguard the effectiveness of this power.

In the context of the undertakings rights of defense, the limitations of the powers of the Commission to inspect business premises and to request information are strictly circumscribed and do not extend beyond the relevant legislation and case law on Legal Professional Privilege and the privilege against self-incrimination as interpreted under EU law. Such limitations are fully appropriate to guarantee the protection of the rights of defense of undertakings while safeguarding the Commission’s ability to gather the necessary information to prove infringements.

Finally, the Commission is also entitled to conduct interviews with natural and legal persons who may be in possession of useful information. The procedure to take statements is fully voluntary and no sanctions are imposed if a person rejects an invitation to be interviewed. They also have no obligation to give reasons for such refusal. Although the lack of sanctioning powers in this context may undermine the effectiveness of this power, the fact that the Commission has a compelling power to take statements in the context of inspections may compensate this deficiency.

Taken as a whole, the elaborate set of tools available under Regulation 1/2003 for detection and evidence gathering should be seen in light of the increasing difficulties in the area of cartel discovery and finding of evidence. Regulation 1/2003 has granted the Commission intrusive and extensive investigation powers that are fully appropriate to tackle this issue and, thus, to discover and prove the existence of secret cartel agreements. Based on the analysis of the nature and scope of the Commission’s powers and its practical application, it can be concluded that the Commission’s investigative system has the intrinsic potential to be considered a model of inspiration for Member States.
CHAPTER 8. The European Commission’s Leniency Programme

In line with classic economic theory, cartel agreements constitute one of the most serious restrictions of competition and, as a consequence, are clearly prohibited by Article 101 TFEU (Chapter 4). Over the last two decades, the investigation and punishment of cartels has become one of the top enforcement priorities of the Commission (Chapter 5). This explains the Commission’s increasing dedication and commitment to the detection of these anti-competitive agreements. However, competition authorities frequently face serious obstacles in discovering and collecting the necessary evidence to prove the existence of cartels. Precisely because they are prohibited, cartels participants arrange clandestine meetings and communication, which makes this activity foremost uneasy to detect.\(^{1490}\) The particular difficulties linked to the secrecy of cartels, added to the limitations of detection and evidence gathering techniques (Chapter 7),\(^{1491}\) may lead to the perception for cartelists that the probabilities of being effectively discovered and punished is (rather) low. Even if appropriate sanctions are put in place, cartels cannot be deterred if there is no fear of detection.\(^{1492}\) Given that simply increasing the number of proactive detection methods – such as sector inquiries and inspections – is very costly, the uncovering issue can only be solved by offering cartel members incentives that are attractive enough for them to come forward and provide competition authorities information about the existence of the cartel.\(^{1493}\)

Leniency programmes follow this line of reasoning. Competition authorities are aware that undertakings participating in cartel agreements often wish to terminate their involvement and inform

\(^{1490}\) The concerns about the secret nature of cartels and the consequent detection issues are frequently stressed. For instance, in a speech about the need to combat cartels, former Competition Commissioner M. MONTI observed that ‘since, by nature, cartels are secret and therefore difficult to uncover, it is likely that what we are seeing is only the tip of the iceberg’. M. MONTI, SPEECH/00/295. In this same line, the OECD also notes, ‘the challenge in attacking hard-core cartels is to penetrate their cloak of secrecy’ (OECD Reports, “Fighting Hard Core Cartels: harm, effective sanctions and leniency programmes” (2002)). See also e.g. A. STEPHAN, “An empirical assessment of the European Leniency Notice”, 2009 (5) Journal of Competition Law & Economics, 537-561 (hereafter: ‘A. STEPHAN, “An empirical”’); R. INCARDONA, “The Fight against Hard-core Cartels and the New EU Leniency Notice”, 2007 (1-2) The European Legal Forum, 39-42, at 39 (hereafter: ‘R. INCARDONA, “The Fight”’). See also supra Chapter 2.

\(^{1491}\) The competence of the Commission to conduct sector inquiries and its powers of inspection was analysed in Chapter 7, sections 1 and 3. As it is emphasised in this Chapter, the power to conduct inspections at business premises and private homes on the basis of Articles 20 and 21 of Regulation 1/2003 has certain drawbacks. Unless the Commission knows in advance which documents or evidence it can find and where to find them, it will probably have to carefully examine a great amount of documents, files or records before finding the relevant information to prove an infringement. Using these inspection powers can therefore be an expensive method to collect evidence. In addition, it should be kept in mind that, in order to satisfy the requirements to conduct such inspections, the Commission needs to have some information and evidence concerning the infringement in advance, since it must define the subject matter and purpose of the inspection. See further supra Chapter 7, section 3. As to the power to conduct sector inquiries on the basis of Article 17 of Regulation 1/2003, it should be reminded that these inquiries can be conducted in sectors of the economy where there are indications, such as the trend of trade or the rigidity of prices, that competition is being restricted. Although the threshold is, thus, arguably lower than in the case of inspections, it does not need to be mentioned that the cost of launching this type of enquiry is extremely high. This aspect is also pointed out by A. STEPHAN, who comments that “[the characteristic secrecy of cartels] makes their detection difficult for competition authorities, whose investigatory powers are limited by resource constraints. Although something is known about the industry, characteristics that make collusion more likely, it is not cost effective for authorities to police industries for price fixing in the conventional way”. A. STEPHAN, “An empirical” 537-538.


\(^{1493}\) See also e.g. K. BRISSET AND L. THOMAS, “Leniency program: a new tool in competition policy to deter cartel activity in procurement auctions”, 2004 (17-1) European Journal of Law & Economics, 5-19, at 6 (hereafter: ‘K. BRISSET AND L. THOMAS, “Leniency”’).
The adoption of leniency programs has totally changed the approach of competition authorities in the detection, investigation and punishment of cartels. On the one hand, effective leniency systems have the potential to stimulate cartel members to confess their illegal behaviour to the authorities even before an investigation has been opened. This helps competition authorities to uncover infringements that may otherwise remain undetected. On the other hand, the leniency policy can motivate firms which are already under investigation to provide hard evidence on the agreement, hereby contributing to prove (additional aspects of) the infringement.\textsuperscript{1496} Given that a great amount of secret cartels have been detected and punished thanks to this policy, the leniency system is commonly considered as ‘the greatest investigative tool ever designed to fight cartels’.\textsuperscript{1497}

This Chapter discusses the creation and implementation of effective leniency programmes by the Commission. To this end, this section is structured as follows. First, a concise description of the concept of leniency and the economic underpinnings of the program is given. This part also includes an examination of the (pre)conditions for the success of the system. The next sections focus on the Commission’s leniency notice. After a brief discussion on the background of the system, the Commission’s leniency programme is analysed in depth. Two crucial questions underlie this analysis. First, whether the Commission’s system is well-devised and applied to reinforce effective enforcement. Second, whether it is effective in uncovering cartels from a practical point of view. These questions are considered individually for the 1996, 2002 and 2006 Commission’s Notice. By

\textsuperscript{1494} These reasons are generally related the unstable nature of cartel agreements (see supra Chapter 2, section 5). When not all companies are satisfied in terms of profits with the conditions and the implementation of the cartel, the risk that one or more companies deviate from the established terms logically increases.

\textsuperscript{1495} See generally supra Chapter 2. See also recognising this aspect Commission Leniency Notice 1996, para 3.

\textsuperscript{1496} The concrete effects of leniency systems on cartelists depend on the features and the specific design of the programme in question. See e.g. S. HAMMOND, “Cornerstones”. For instance, offering immunity to the first firm reporting the cartel undermines an infringement by inducing what has been described as the “race to the competition authority.” A key characteristic of such programs is that immunity is only available to one party. If the programme also offers leniency reductions for subsequent applicants, more parties may come forward and provide additional evidence. A. STEPHAN, “An empirical” 538.

\textsuperscript{1497} S. HAMMOND, “Cornerstones”. According to S. HAMMOND ‘Leniency programmes have led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in the United States, the United Kingdom, Canada, the European Union and other jurisdictions. In the United States alone, companies have been fined over US$3.8 billion for antitrust crimes since 1997, with over 90 per cent of this total tied to investigations assisted by leniency applicants. The US Department of Justice’s Antitrust Division continues to investigate international cartels and typically has over 50 such investigations open at a time. More than half of these investigations were initiated, or are being advanced, by information received from a leniency applicant’. In this same line, P. D. KLAWITTER also states that ‘Leniency is indisputably the most effective tool in the history of competition law. See “Panel discussion” in C.-D. EHLERMANN AND I. ATANASIU (eds.) European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Hart Publishing, Oxford 2007, 736 p., at 379 (hereafter: “Panel discussion” in Prohibition of Cartels). See stressing the usefulness of the Commission’s programme e.g. N. KROES, Press release IP/06/1705, “Competition: Commission adopts revised Leniency Notice to reward companies that report cartels”, December 2006. The former competition Commissioner firmly stated that “[t]o root out cartels we need heavy sanctions to deter cartels and an efficient leniency policy providing incentives to report them”. See also S. SUURNAKKI AND M. L. TIENNO CENTELLA, “Commission adopts” 7. These authors comment that ‘since adoption of the first Leniency Notice in 1996 […], leniency policy has been one of the central elements in the Commission action against cartels’.
adopting this analytical approach it will also be possible to assess the evolution of the design and application of the system and its effectiveness over time.1498

1. Economic foundations of leniency systems

In the area of antitrust law, “leniency” is a generic concept used to describe a system of partial or total immunity from the penalties that would otherwise have been imposed on a cartel participant in exchange for the freely disclosure of information about the cartel, which satisfies specific criteria prior to or during the investigative stage of the case.1499 A leniency system or programme describes the collection of principles and conditions adopted by an enforcement authority that govern the whole leniency process. More specifically, it stipulates, among other things, the number of possible beneficiaries of the system, the stage of the investigation procedure at which leniency is offered (before or after an investigation), whether a ringleader can qualify for leniency, the fine discounts and the role of the quantity and quality of the information and the timing at which must be provided. Since leniency is used in multiple jurisdictions, the precise features and the design of leniency programmes vary depending on the jurisdiction in question.1500 Some of the most common features are that only the first party approaching the competition authority is eligible to full immunity from sanctions, that subsequent parties self-reporting can still obtain reduced forms of leniency, and that the benefits from reporting tend to be higher the sooner the cooperation takes place.1501

Setting up and maintaining a successful cartel requires intensive and continuous efforts from all the participants.1502 They must be able to select an appropriate equilibrium and agree on complex collusive and mutually consistent strategies which allow the parties to jointly increase benefits and find an acceptable system to reallocate such benefits.1503 Still, even if cartel agreements have been

1498 As P. D. Klawiter states, the success [of leniency programmes] did not happen overnight; it has been an evolution in time. See “Panel discussion” in Prohibition of Cartels 379.
1499 ICN, “Chapter 2”. Leniency-like strategies have, however, been used for centuries is different fields. In politics and sociology, the divide and rule strategy consists in gaining and maintaining power by breaking up existing power structures into smaller pieces that are individually less powerful and taking control over these smaller pieces. The divide and conquer strategy has been widely used throughout history. (The phrase divide et impera was attributed to Philip II of Macedon, king of the Hellenic kingdom of Macedon from 359 BC until 336 BC. Both the Roman and the British empire played small tribes and groups against one another in order to obtain control over their territories. For instance, the Romans implemented this strategy when they invaded Britain in the course of the Gallic Wars in 55 and 54 BC. This rule also enabled The British to consolidate colonial power in India during the first half of the 19th century). In law enforcement, (variants of) lenient treatment in exchange for information valuable to the investigation and subsequent prosecution of illegal conduct has been a classic technique for centuries. Enforcement authorities appear to find this instrument particularly useful in the area or collective organized crime, given that in this context the cooperation of one party may lead to sanctioning multiple wrongdoers.
1502 This aspect has been analysed in detail in Chapter 2, section 5.
successfully concluded and they are expected to be profitable in a near future, this type of cooperation among several companies suffers of an intrinsic instability problem. Each individual cartel member will have a natural tendency to deviate from the agreement and, thereby, increase its own profits.\textsuperscript{1504}

The fact that each participant can deviate from the illegal agreement and “escape with the benefits” places all companies taking part in a cartel in a Prisoner’s Dilemma situation (already without a leniency programme).\textsuperscript{1505} From game theory perspective, the model of a “prisoner’s dilemma” illustrates the choices that competing firms face when designing their market strategy and the respective pay-offs. This model is thus useful to understand what governs the balance between cooperation and competition in business settings.\textsuperscript{1506}

The “prisoner’s dilemma” is traditionally presented as a story about two suspects who are accused by the police of having committed a major crime and a minor crime together. The penalties for the major and minor crimes are two and one years of imprisonment respectively. There is only sufficient evidence to prove and convict them for the minor crime. In order to obtain a confession for the major crime, the police interrogates the suspects in separate rooms. Each prisoner can either confess, thereby implicating the other (D), or keep silent (C).\textsuperscript{1507} If both prisoners “cooperate” with each other by remaining silent (C, C), given the lack of evidence, they can only be convicted for the minor crime and serve each one year. If only one of them confesses and incriminates the other (D, C), in exchange for evidence against the other suspect, he will be rewarded with immunity from prosecution while the other prisoner will serve three years. If both confess (D, D), they will be convicted for both crimes, but in view of the confession they receive a reduction of one year, serving each two years. Since each individual prisoner can improve his situation by confessing, regardless of what the other prisoner does, this setting makes confession a dominant strategy.

Applied to the business context, the game can be envisioned from the perspective of two competing firms in the market which need to decide on a pricing strategy. Here, the low-price strategy is akin

\textsuperscript{1504} This point was firstly (and firmly) made concerning cartels by G. J. STIGLER (“A Theory”). See further supra Chapter 2, section 5. See also G. SPAGNOLO, “Divide et Impera: Optimal Leniency Programs”, Stockholm School of Economics - Consip Spa, and CEPR, January 2005, at 3, available at http://ftp.zew.de/pub/zew-docs/veranstaltungen/mic/papers/GiancarloSpagnolo.pdf, (hereafter: G. SPAGNOLO, “Divide”). G. SPAGNOLO observes that one of the features that makes cartels special is “that cooperation among several agents is required to perform the illegal activity, so that problems of free riding, hold-up, moral hazard in teams, and opportunism in general are pervasive (each individual wrongdoer could "run away with the money" and must be prevented from doing it”). He also comments that not only cartels but also criminal organizations in general suffer this specific governance problem.

\textsuperscript{1505} The prisoner’s dilemma is a model of cooperation and conflict analysed in game theory. The concept of the prisoners’ dilemma was originally developed by RAND Corporation scientists Merrill Flood and Melvin Dresher and was later formalized by the mathematician ALBERT W. TUCKER (A Two-Person”). The prisoner’s dilemma can be classified as a non zero-sum game of complete and imperfect information. Since each of these characteristics will be used in our further developments, it may be of some use to define them more precisely. A game is said to be a non zero-sum game when the gains or losses of one player do not necessarily result in gains or losses for the other player. The sum of the parties’ aggregate gains and losses does not total zero, but varies with the strategies put in place by the different gamers, who can gain or lose altogether. In a game of complete information, all factors of the game are common knowledge. Specifically, each player is aware of all other players, the timing of the game, and the set of strategies and payoffs for each player. In a game of imperfect information, the players do not know exactly what actions other players took up when they have to take their own decision. See T. L. TAYLOR AND B. VON STENGEL, “Game Theory”, Texas A&M University - London School of Economics, CDAM Research Report LSE-CDAM-2001-09, October 2001, at 2-4, available at http://www.cdam.lse.ac.uk/Reports/Files/cdam-2001-09.pdf.

\textsuperscript{1506} See also supra Chapter 2, section 5.

\textsuperscript{1507} In this context “D” stands for “defect” or “deviate” while “C” stands for “cooperate”.
to the prisoner’s confession, and the high-price akin to keeping silent. If they both chose to cooperate (C, C) and charge a high (non-competitive) price, each company makes a profit of ten million Euros per month. If one firm deviates and sets a lower (competitive) price (D, C) thereby increasing its market share, its profit rises to twelve million Euros, while that of the rival falls to seven million Euros. If both firms set low (competitive) prices (D, D), each of them obtain nine million Euros profit. The (prisoner’s) dilemma exists because, not being able to communicate, both parties will decide to act in a rationally selfish manner pursuing their own individual interests. By doing so, they will both end up in a worse position than if they had cooperated and pursued the collective interest.\textsuperscript{1508}

In a “one-shot” non-cooperative setting,\textsuperscript{1509} the outcome of the dilemma is, in effect, that each undertaking decides to behave independently. In other words: cheating is each firm’s dominant strategy.\textsuperscript{1510} However, static models cannot capture the dynamic essence of cartels. Collusive agreements between price fixing or market sharing firms are typically long-term dynamic relationships and, accordingly, a correct understanding of this type of dynamic phenomenon requires an analogous dynamic analysis.\textsuperscript{1511} After all, the dynamic character of collusive agreements is precisely a direct consequence of the individual deviation risk. Since individual free riding cannot be limited by explicit contracts to be legally enforced,\textsuperscript{1512} being profitable in expectation is not sufficient for a cartel to be viable. The cooperative agreement must thus also be sustainable in equilibrium.\textsuperscript{1513} This internal cohesion can only be ensured by the companies themselves. Each firm must voluntarily “prefer” to implement the agreement rather than unilaterally deviate from it.\textsuperscript{1514} Or, in other words, the illegal agreement must be “self-enforcing”.\textsuperscript{1515} To achieve this objective, cartel participants classically develop mechanisms to make cheating unappealing, including monitoring

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\textsuperscript{1509} It should be recalled that “one-shot game models” constitute the simplest form of non-cooperative game theory. A “one-shot game” is a static game setting in which each firm can only “move once” without knowledge about the moves of the rest of the players. In the market context, this means that to determine their business behavior, companies will only have one decision to make and two choices: to cooperate with their competitors or to compete independently (see e.g. J. B. BAKER, “Two Sherman” 153).

\textsuperscript{1510} The irony of this situation is that the Nash equilibrium of the prisoner’s dilemma is “Pareto inferior”, meaning that from a collective perspective it is not the best outcome. The Pareto optimum combination would be that all firms charge the cartel price and so maximize their collective profits. See S. STROUX, US and EC 14.

\textsuperscript{1511} G. SPAGNOLO, “Divide” 14. In effect, as this author points out ‘[u]sing a static model to analyse an intrinsically dynamic phenomenon as cartels, perhaps substituting endogenous self-enforcement constraints with exogenous assumptions, […] misses the core of the problem: how law enforcement affects the (endogenous) sustainability of the cartel’.

\textsuperscript{1512} F. THÉPOT, “Leniency and Individual Liability: Opening the Black Box of the Cartel”, The Competition Law Review (7-2) 2011, 221-240, at 232 (hereafter: ‘F. THÉPOT, “Leniency”’). F. THÉPOT points out that the fact that parties cannot rely on legally enforceable contracts, provides an extra source of moral hazard within the governance system of the cartel.


\textsuperscript{1514} G. SPAGNOLO, “Leniency and Whistleblowers” 4.

\textsuperscript{1515} As P. BUCCIROSSI AND G. SPAGNOLO (“Antitrust sanction” 3 of the online version of this publication) enlighten ‘Cartel members will stick to the agreed collusive price or market allocation division only if the expected loss from being punished by partner cartel members in the future is larger than the gain from cheating/secretly undercutting the agreed cartel price and stealing others’ customers today. This condition, called “incentive compatibility” or “self-enforcing” constraint, must necessarily be satisfied for a cartel to be sustainable’. See further on this aspect \textit{supra} Chapter 2, section 5.
compliance, rewards and credible punishments for deviating firms.\textsuperscript{1516} From a game theory perspective, it is precisely the (long-term) dynamic feature of the game what guarantees that cartels are sustainable (at least to a certain extent).\textsuperscript{1517}

In view of the artificial sustainability of collusion, new and more appropriate enforcement instruments were developed to (re)exploit the intrinsic instability of cartels. Leniency programs are precisely designed to undermine internal cartel stability and thereby trigger the collapse of existing cartels. The general idea behind these programmes is that they alter the expected payoffs in a dynamic game, so that the choice between cooperating and deviating looks again similar to that in a static Prisoner’s Dilemma.\textsuperscript{1518} In particular, leniency systems reduce sanctions or even grant immunity, which automatically increases the payoff of cheating in the market.\textsuperscript{1519} To elaborate somewhat, when a firm simultaneously deviates from the cartel and applies for leniency, the cartel participant in question may not only enjoy the profits resulting from undercutting the agreed collusive price and increasing its respective market share. In addition, it escapes from two different types of losses. Firstly, it avoids the losses related to potential retaliation measures adopted by the rest of the cartel members for the deviation. Secondly, it evades the possible sanctions for its illegal conduct imposed by the competition authority.\textsuperscript{1520} From an economic point of view, applying for leniency and revealing the existence of the cartel constitutes a rational and, thus, prominent strategy particularly for cartel “deviators”.\textsuperscript{1521} By increasing the payoff of cheating, leniency programmes make collusion again unstable and, thus, more difficult to maintain. This is called the desistance effect.\textsuperscript{1522}

\textsuperscript{1516} See further supra Chapter 2, section 5.
\textsuperscript{1517} See further supra Chapter 2, section 5.
\textsuperscript{1518} F. THÉPOT, “Leniency” 232; G. SPAGNOLO, “Leniency and Whistleblowers” 4. In this context, G. SPAGNOLO compares cartels with other forms of organised crimes which necessarily also take the form of “long-term dynamic criminal relationships”. He comments that “[i]n some countries and periods, Mafias have played the role of illegal state, of "legal system for illegal deals", developing a reputation of (real) toughness and using it to act as third party enforcement agency for non-self-enforcing illegal transactions’. For an interesting and detailed discussion of how the Sicilian Mafia enforced compliance with (illegal) bid-rigging agreements among "legal" companies in the procurement construction industry see D. GAMBETTA AND P. REUTER, “Conspiracy Among the Many: The Mafia in Legitimate Industries” in G. FIORENTINI AND S. PELTMAN (eds.) The Economics of Organised Crime, Cambridge, Cambridge University Press 1995, 320 p., at 116-139.
\textsuperscript{1519} G. SPAGNOLO, “Divide” 3; F. THÉPOT, “Leniency” 233; S. BRENNER, “An empirical study” 4 of the online version of this publication.
\textsuperscript{1521} See J. HARRINGTON, “Optimal” 217. J. HARRINGTON calls this the “Deviator Amnesty Effect” He explains that ‘in a repeated game model of collusion, the stability of collusion is impacted through an equilibrium condition: the expected payoff from continuing to collude exceeds the payoff to a firm from cheating on the cartel. The Deviator Amnesty Effect operates through the payoff to cheating’

\textsuperscript{1519} Or in the words of P. BUCCIROSSI AND G. SPAGNOLO (“Antitrust sanction” 1 of the online version of this contribution), ‘leniency programs, […] may prevent the formation of a cartel (or of any multi-agent crime) by modifying the “incentive constraint” of the potential offender; that is, they increase the (opportunity) cost of sticking to the “agreement” that keeps together the criminal team by tempting them with better conditions in case they betray their partners’. See also J. HARRINGTON, “Optimal” 217; P. BUCCIROSSI AND G. SPAGNOLO, “Corporate Governance and Collusive Behaviour” CEPR, Working Paper No. 6349, 2007, at p 21, available at http://www.learlab.com/pdf/lear_rp_06_01_1155472800.pdf (hereafter: P. BUCCIROSSI AND G. SPAGNOLO, “Corporate”); W. WILS, “Leniency” 23 of the online version of this article. For game-theoretical literature confirming that leniency may destabilise cartels agreements because companies can simultaneously cheat on the cartel and apply for leniency see e.g. G. SPAGNOLO, “Divide”; J. CHEN AND J. E. HARRINGTON, “The Impact of the Corporate Leniency
At the same time, when the benefits of cheating are relatively high – and, as a consequence, it becomes more rational to confess – firms in a prisoner’s dilemma are less likely to trust each other. In these circumstances, colluding firms are in effect aware of the fact that, even if the deviating firm is not willing to blow the whistle, there is a real risk that some other firm will. This hazard thrusts firms into a race with their rivals which ultimately squeezes the expected cartel profits. From this point of view, leniency programmes may generally render cartels less profitable and, thus, less likely to form in the first place. This is known as the deterrent effect of leniency programmes.

To summarise, a leniency programme can have both deterrent and desistance effects. It may deter cartels by dissuading companies from entering into collusive agreements that would have otherwise been formed. In addition, through the desistance effect it enables the detection of existing cartels that would otherwise have gone undetected.

2. Pre(conditions) to adopt and implement an effective leniency system

If a leniency program is to be effective at detecting and deterring cartels, cartel participants must fear imminent detection and strong sanctioning. Without such fear, cartel members will have no incentive to self-report their illegal activity and or to believe that other members of the agreement will confess their behaviour and apply for leniency. Even if the leniency policy is thus well drafted and generous, a programme cannot be successful when cartelists “feel safe” and have such little incentive to come forward. Competition authorities share a general consensus that, in order to implement a successful leniency program, three key prerequisites must be satisfied.

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1522 The words of C. R. LESLIE (“Antitrust Amnesty” 473-474) are quite clarifying in this context. This author explains that ’[a]s it becomes more rational or beneficial for one’s partner to confess, one should trust her less. And, because one has been offered the same deal, one’s partner should trust her less. Once he knows that she trusts him less, that should make him trust her even less. There is a vicious cycle of distrust until someone confesses’. In the event that an agreement has been reached, increased uncertainty and distrust among cartelists emphasises the need for costly monitoring. At the same time, when additional monitoring measures are needed, the general cost of maintaining cartels is increased, which may have a destabilizing effect. The effects of leniency are thus interconnected. See e.g. G. SPAGNOLO, “Divide” 6; N. K. KATYAL, “Conspiracy Theory” 2003 (112) Yale Law Journal, 1307-1398, at 1342-1350 (hereafter: ‘N. K. KATYAL, “Conspiracy”’); W. WILS, “Leniency” 23 of the online version. In this same line, W. WILS correctly observes that the ‘effect of raising the cost of setting up and maintaining cartels is not unique to leniency. The same logic underlies the legal rule that cartel or other restrictive agreements are legally unenforceable, and the practice of imposing higher penalties for cartel members that play active roles in setting up and running the cartel, and lower penalties for cartel members that are exclusively passive’.


1525 Nevertheless, this effect can only be produced if a positive discriminating treatment is offered to the whistle-blowers with regard to the rate of sanction reduction. An extreme example is when only the first self-reporting firm is eligible to receive lenient treatment. P. AGISILAOU, “Collusion” 20.

1526 P. AGISILAOU, “Collusion” 19.


1528 ICN, “Chapter 2” 3.
Firstly, there must be a high risk of detection. In order for the policy to work properly, firms participating in cartels must have the perception that, since efforts of detection are constantly going on, their infringement will be imminently and necessarily discovered if they do not come forward under the leniency programme. Only if this perception exists, cartelists will be under pressure to inform competition authorities about their activity.\(^\text{1529}\) Accordingly, a leniency policy will only be successful if the competition authority concerned has a credible and strong enforcement program to uncover cartels. For this purpose, the detection (and subsequent punishment) of cartel agreements must be prioritised\(^\text{1530}\) and the competition authority concerned must be equipped with extensive powers of investigation to pursue such infringements.\(^\text{1531}\)

Secondly, sanctions against cartel infringements must be effective. If the sanctions applicable in the absence of cooperation on the basis of the leniency policy are weak, and thus inadequate, the benefits for companies applying for leniency will be reduced or even inexistent. In this case, cartel members will logically not be inclined to come forward.\(^\text{1532}\) Basically, effective sanctions require that the cost of getting caught is (considerably) higher than the profits of the infringement for the cartel participants.\(^\text{1533}\)

Third, there must be transparency and certainty in the operation of the policy. If a leniency system is to be successful, potential applicants must be able to rely on clear policy requirements which are consistently applied and interpreted. This implies, on the one hand, that cartel participants must know exactly what to do in order to qualify under the programme and, on the other hand, they should be able to predict the consequences of their cooperation with a considerable degree of certainty.\(^\text{1534}\)

\(^{1529}\) Furthermore, a perception of an imminent risk of detection may also trigger a race between the members of the cartel to be “first in the leniency door”. ICN, “Chapter 2” 3. See also W. WILS, “Leniency” 29 of the online version of this article. W. WILS believes that, in the case of cartels, the fact that at least one of the cartel members believes that at least another member thinks that the detection risk exists, suffices for the programme to work.

\(^{1530}\) This is already the case for the Commission. See further Chapter 5.

\(^{1531}\) In this context, W. WILS points out that there is a risk for competition authorities of relying too much on leniency programmes to detect cartels. Particularly, he argues that ‘[i]f for a prolonged period [competition authorities] do not detect and prosecute any case anymore other than through leniency, they may lose their capacity to do so, or at least antitrust offenders may start doubting their continued capacity to do so. If this were to happen, the success of their leniency programmes would risk coming to an end’. W. WILS, “Leniency” 29 of the online version of this article.

\(^{1532}\) ICN, “Chapter 2” 3. In addition, it is important to keep in mind that reducing the level of sanctions to reward cooperation has a negative effect on the overall level of the penalty, and thus on deterrence (see W. WILS, “Leniency” 25-26 of the online version of this article; M. MOTTI AND M. POLO, “Leniency programs and cartel prosecution”, 2003 (21) International Journal of Industrial Organization, 347-379, available at http://cadmus.uie.eu/bitstream/handle/1814/708/ECO99-23.pdf?sequence=1 (hereafter: ‘M. MOTTI AND M. POLO, “Leniency”’); J. HARRINGTON, “Optimal”. As W. WILS notes, generally raising the level of penalties applicable in the absence of cooperation is an appropriate way to counteract the penalty-lowering effect of leniency. To some extent, the Commission has increased the level of its fines for cartels significantly over the past decade. According to W. WILS ‘[t]he European Commission adopted its first Leniency Notice in 1996 and its first Fining Guidelines, which reflected an increase in the level of fines, in early 1998. The European Commission’s current reflections on introducing a new settlements policy follow the publication of its new Fining Guidelines in 2006, which again reflect an increase in the level of fines. A similar pattern can be found in the EU Member States. In France, for instance, a leniency programme was introduced in 2001 by the same Act of Parliament which also increased the maximum fine’. See further Chapter 10. Furthermore, while it is true that the adoption of the leniency policy has a negative effect on the general level of fines, it is equally true that thanks to the leniency policy competition authorities are able to gather more and more specific and high quality evidence. This may allow competition authorities to prove additional aspects of the violation and, hence, impose higher penalty levels.

\(^{1533}\) See further Chapters 10 and 11.

3. Background of the Commission leniency programme

The Commission was familiar with the concept of leniency even before the official leniency programme was published. A number of Commission antitrust decisions dating from the 80’ and early 90’ show that undertakings providing their cooperation in Commission’s investigations, were effectively rewarded with a fine reduction or even fine immunity.1536

As regards decisions granting a reduction, for instance, in Wood pulp (1984) the Commission stated that ‘[i]n determining the fine on the associations of undertakings to which this Decision is addressed, the Commission has taken into consideration […] in mitigation of the fine imposed, the fact that some addressees have cooperated with the Commission during the proceedings’.1537 In the same line, the decision in Sperry New Holland (1985), specified that ‘SNH actively and voluntarily furnished information to establish the allegations made against it. Also, before proceedings were opened but after investigations had started, SNH ordered its staff and dealers to comply with the Community's competition rules. […] The Commission has taken these factors into account in deciding on the amount of the fine’.1538 In Cartonboard (1994) the Commission considered ‘any mitigating factors including the degree of cooperation with the Commission after the investigation and the extent to which any such cooperation may have materially contributed to facilitating or expediting the conclusion of the present proceedings’.1539 As to non-imposition of fines, in French-West African shipowners' committees (1992) the Commission found ‘grounds for exempting from fines the four shipping companies which although members of the committees contributed in drawing the attention of the Commission to the practices dealt with in this Decision’.1540

The adoption of the first official Leniency Notice in 19961541 was inspired by the proclaimed success of the US Department of Justice’s (DOJ) Corporate Leniency Policy of 1993.1542 The US DOJ was the first antitrust authority to adopt such policy in 1978.1543 Under the 1978 policy the US DOJ

1535 ICN, “Chapter 2” 3.
1542 This aspect was explicitly recognised in the Competition Policy Newsletter of the Commission (see V. JORIS, “La communication” 12). See also e.g. W. WILS, “Leniency” 15 of the online version of this article; W. WILS, “The Commission Notice” 127-128. A. STEPHAN, “An empirical” 538-539; C. R. A. SWAAK AND D. J. ARP, “A tempting” 9. For a comparison of the American and European policies see e.g. N. ZINGALES, “European and American Leniency programmes: two models towards convergence?”, 2009 (5-1) ECLR, 5-60. The 1993 DOJ leniency policy is available at
1543 W. WILS points out in this regard that while “[t]he contemporary practice of leniency in antitrust enforcement is generally considered to have been started by the US Department of Justice in 1978, when it adopted its first Corporate Leniency Policy […] [t]he basic idea of granting immunity or a reduced penalty in exchange for cooperation to help convict co-conspirators is however probably as old as criminal prosecution. W. WILS, “Leniency” 14 of the online version of this article, citing N. K. KATyal, “Conspiracy” 1330-1331, who refers to practices in English and American law going back to the early 12th century. See also e.g. F. ARBAULT AND F. PEIRO, “The Commission’s new notice on immunity and reduction of fines in cartel cases: building on success”, 2002 (2-June) Competition Policy Newsletter, 15-
granted immunity to the whistle-blowing cartel member who revealed the existence of a cartel before the opening of an investigation. However, given the lack of transparency of the programme and the uncertainty on the likely outcome of a leniency application, only very few leniency applications were made. The programme was consequently revised in 1993.\textsuperscript{1544} The key modifications included automatically granting immunity to the company that reports the illegal agreements and offers complete cooperation before an investigation, making immunity available after an investigation is started, and extending the benefit of immunity to directors and other employees coming forward together with the cooperating firm.\textsuperscript{1545} \textsuperscript{1546}

In 1996, the Commission followed the example of the US by (officially) introducing its first leniency notice.\textsuperscript{1547} From the outset, the programme was conceived as a powerful instrument designed to

\textsuperscript{22} at 15 (hereafter: ‘F. ARBault AND F. PEIRO, “The Commission’s new”’); C. R. A. SWAak AND D. J. ARp, “A tempting” 9-18, at 9; K. BRISSET AND L. THomas, “Leniency” 6; U. BLum et al, “On the rationale” 212. \textsuperscript{1544} In this context S. HAMMOND (“Cornerstones” 4-5) comments that the earlier version of the US leniency programme was ‘flawed and unsuccessful’. It lacked transparency, was unpredictable and failed to provide the incentives necessary to induce self-reporting and cooperation. Until the revision of the programme in 1993, ‘it generated only one leniency application per year, and failed to lead to the detection of a single international cartel. The Division learned some lessons the hard way and revised the programme in 1993’. In the same line U. BLum et al (“On the rationale” 212) observe that the first leniency system was unsuccessful for two reasons. ‘The first one is that amnesty was not automatic but depended on the discretion of the Department of Justice. And the second was that, before an investigation, the risk of detection is rather low. So, if a firm decides to join the cartel, it is because it judges that it does pay despite the risk. But prior to any investigation, there is no increased risk, so the firm judges that the amnesty program does not pay because it simply cancels out any positive gains, by exempting it from any fine’. See also e.g. A. STEPHAN, “An empirical” 538-539. \textsuperscript{1545} See DOJ, Antitrust Division Corporate Leniency Policy (August 10, 1993). See also U. BLum et al, “On the rationale” 212. These authors observe that ‘[s]ince this revision, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and fines totalling well over $1 billion’. See also stressing the increase in applications A. K. BINGAMAN AND G. R. SPRATLING, “Criminal Antitrust Enforcement”, address before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law, Dallas, February 1995, at 10, available at http://www.justice.gov/atr/public/speeches/0103.pdf. ‘The new policy was an immediate success. In the first year, an average of one corporation per month came forward, compared to one corporation per year under the old policy’. W. WILS, “The Commission Notice” 128; S. HAMMOND, “Cornerstones” 4-5. Moreover, according to this last author ‘[t]hose revisions not only made the programme more transparent, they expanded the opportunities, and raised the incentives, for companies to report criminal activity and cooperate with the Division’. For a more extended examination of these criteria see e.g. DOJ, ‘Frequently Asked Questions regarding the Antitrust Division’s Leniency Program and Model Leniency Letters” by S. D. HAMMOND AND B. A. BARNETT (November 19, 2008), available at http://www.justice.gov/atr/public/criminal/239583.htm; C. R. A. SWAak AND D. J. ARp, “A tempting” 9. \textsuperscript{1546} In 1994 the US DOJ also enacted the Leniency Policy for Individuals. This policy is available at http://www.justice.gov/atr/public/guidelines/0092.htm. See further A. K. BINGAMAN, “Antitrust Enforcement: Some Initial Thoughts and Actions”, Address before the ABA Antitrust Section, New York, August 1993, at 7-9, available at http://www.justice.gov/atr/public/speeches/0867.htm; A. K. BINGAMAN, “Report from the Antitrust Division – Spring 1994”, Address before the ABA Antitrust Spring Meeting, Washington, April 1994, at 8-9, available at http://www.usdoj.gov/atr/public/speeches/0110.pdf; S. HAMMOND, “Cornerstones” 7; W. WILS, “Leniency” 37-39 of the online version of this article. One of the key developments since then has been the adoption of the Antitrust Criminal Penalty Enhancement and Reform Act in 2004. Under this Act, a leniency applicant was granted the opportunity to reduce its treble damages to single damages and to avoid joint and several liability if it had rendered “satisfactory cooperation” to plaintiffs. Non-leniency applicants, on the other hand, (still) face(d) joint and several liability and treble damages (Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 2004, para 213). \textsuperscript{1547} Commission Leniency Notice 1996. The first version of the European leniency programme was adopted following the proposal of K. VAN MIERT (see Information of the European Commission concerning its policy of imposing fines for infringements of the competition rules - Draft Commission notice on the non-imposition or the mitigation of fines in cartel cases, [1995] OJ C 341/13). The proposal and subsequent introduction of the Leniency system constituted some of the key steps of former Commissioner VAN MIERT in the struggle against cartels. (Another important development under his mandate was the creation in December 1998 of a new unit within (the previous) Directorate General IV of the Commission dedicated exclusively to cartels, Unit E. See also emphasising this point e.g. M. JEPHCOTT, “The European Commission’s new leniency notice - whistling the right tune”, 2002 (23-8) ECLR, 378-385, at 379 (hereafter: ‘M. JEPHCOTT, “The European”’). The draft notice was subject to public consultation. In summary, business associations were mainly hostile to the project. Opinions among associations and law firms were mixed. Government experts of the
increase effectiveness in the detection and punishment of cartel agreements. Like other Commission notices regarding competition law and policy, the 1996 Leniency Notice largely codified the Commission’s previous practice in this field. Still, the publication of the notice was at any event welcome given the lack of (official) guidelines on the matter. The added value of the notice resided thus in the fact that companies could rely on the notice to predict how the Commission intended to act when they revealed their participation in a cartel or provided information facilitating the prohibition and punishment of such agreements. Furthermore, the additional transparency created through the publication of the system also served to increase its popularity and motivate companies to follow it.

The 1996 leniency programme equipped the Commission with a useful enforcement instrument to detect a string of highly damaging illegal cartels. Despite the positive experience of the Commission with the application of the system, the 1996 regime was also frequently criticised. One of the main draw backs of the system seemed to be the general lack of certainty for companies. Assessing whether qualifying applicants would receive a lenient treatment was considered a difficult task. Only after the finalisation of the administrative procedure, i.e. when the Member States were generally in favor of the project. See V. JORIS, “La communication” 12. (Unfortunately the consultation process is not available).

In effect, the 1996 Leniency Notice (as well as the consecutive revisions) create legitimate expectations, which an undertaking can rely on. If an undertaking complies with all the provisions of the 1996 Notice in respect of section B, C or D and has provided evidence which leads to the conviction of a cartel, the Commission is obliged to provide at least a significant discount on any fine it would otherwise have imposed on the applicant undertaking. Leniency Notice 1996, point E(3). Compare Leniency Notice 2002, point 26; and Leniency Notice 2006 point 38. See also V. JORIS, “La communication” 12; W. WILS, “The Commission Notice” 127-128.

According to G. SPAGNOLO (“Leniency and Whistleblowers” 6-7) ‘[c]odification of leniency programmes is actual instrumental to both generality and publicity, and helps reducing uncertainty and discretionality, two aspects that greatly discourage self-reports. Publicity is crucial for leniency programs’.

The 1996 leniency system was even qualified as an “indisputable success”, F. ARBAULT AND F. PEIRO, “The Commission’s new” 15. The application of the 1996 Notice is assessed below (“The application of the 1996 Commission’s Leniency Notice”).

See infra section 4.1.3 of this Chapter.

The critics did not only come from practitioners but also from fellow competition authorities. See, for instance, D. HAMMOND, (Director of Criminal Enforcement Antitrust Division, U.S. Department of Justice), “Detecting and Deterring Cartel Activity through an Effective Leniency Program”, presented at the International Workshop on Cartels in Brighton, 21-November 2000, available at http://www.justice.gov/atr/public/speeches/9928.htm (hereafter: ‘D. HAMMOND, “Detecting and Deterring”’). In 2001, (then) Competition Commissioner MARIO MONTI acknowledged that the role of the 1996 Notice in uncovering and punishing cartels could have been greater if greater incentives for companies to denounce collusion were offered. Commission, Press release IP/01/1011, “Commission launches debate on draft new leniency rules in cartel probes”. See also e.g. M. JEPHICOTT (“The European” 378) who commented that “[t]he main area in which the 1996 Notice seemed to be falling short was its apparent inability to pierce the veil of secrecy surrounding the cartels. The Commission did not manage to convince significant numbers of cartelists that sooner or later their co-conspirators would see how much they had to lose by failing to blow the whistle’. See further infra section 4.1.2 of this Chapter.

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decision had been adopted, undertakings could learn whether or not the Commission had decided to grant immunity or a reduction of the fine. Furthermore, it was argued that not many (high) reductions were granted. After approximately six years of application of the leniency system, the Commission considered that had acquired sufficient experience to re-evaluate its policy and make it more ‘effective and attractive for companies to come forward’.

The revised version of the Commission’s leniency notice was adopted in February 2002. The system was generally designed to improve the overall effectiveness of the system by providing additional transparency and certainty of the conditions on which any reduction of fines could be granted. To this end, three important modifications were made. First, immunity became automatic – when the undertakings in question satisfied the stipulated conditions – and was also extended to cover situations after an investigation is opened if the undertaking is the first that enables the Commission to establish an infringement. Second, fine reductions for subsequent applicants became more aligned with the real added value of the firm’s cooperation to the Commission’s investigation. Third, general clarifications were introduced in the system as regards the conditions to obtain fine reductions to make it more predictable and transparent.

Finally, in 2006, the third and most recent version of the Leniency Notice was issued by the Commission. In this version a number of important changes were made to provide additional guidance to applicants, increase the transparency of the procedure and, thus, generally induce companies to report cartels. The reforms are based on more than four years of experience in applying the 2002 Leniency Notice and are also fully in line with the European Competition Network’s Model Leniency Programme. The 2006 system contains three main innovations. Firstly, the Commission aimed at tackling one of the most criticised aspects of its 2002 regime, in particular the fact that there (still) was a significant lack of clarity about the nature and amount of

1556 Commission, Press Release MEMO/02/23 “Questions and Answer on the Leniency Policy”. The Commission’s intention to revise the policy was announced in its 1996 Leniency notice (point 3), where the Commission stated that it would ‘examine whether it is necessary to modify this notice as soon as it has acquired sufficient experience in applying it’.
1558 Commission Leniency Notice 2002, point 5.
1559 Ibid, point 8.
1560 Ibid, point B.
1561 These modifications are analysed in detail in the next (sub)section(s).
1563 In the words of N. Kroes ‘these changes will further strengthen the effectiveness of the Commission’s leniency program in the detection of cartels’. Commission, Press Release IP/06/1705. In this context it was argued that, even if the 2002 version of the leniency notice generally improved the system, there were several aspects that were not as effective as they could have been. This was mainly due to an underestimation of the importance of transparency and predictability issues. See e.g. J. S. Sandhu, “The European Commission’s leniency policy: a success?”, 2007 (28-3) ECLR, 148-157, at 149 (hereafter: ‘J. S. Sandhu, “The European’’); P. Billiet, “How lenient is the EC Leniency policy? A matter of certainty and predictability”, (1) 2009 ECLR, 14-21 (hereafter: ‘P. Billiet, “How lenient”’).
1564 See supra Chapter 5, section 2.3.1.2(d).
evidence that had to be provided to qualify for immunity. The current scheme, therefore, provides a clear and detailed description of the information to be provided by the immunity applicant. The second major change concerns the procedure. The 2006 leniency program now offers the opportunity, upon request, to assign a marker to a company applying for immunity. By using this instrument the immunity applicant can “book” his place in the leniency row. A final and important modification consists in the introduction of a special procedure to protect corporate statements from discovery in damages claims under civil law.

Following the example of the Commission, and thus indirectly of the US Department of Justice, several Member States also introduced leniency programmes into their enforcement systems. The United Kingdom and Germany were the first EU Member States to do so in 2000. In Belgium, the first leniency system dates from 2004, while in Spain the introduction of the leniency programme is relatively recent, dating from 2008. Frequently, national leniency systems have been subject to revisions and adjustments which reflect a process of experimentation and of emulation among (non-)European jurisdictions. Within the EU, the (complicated) task of designing an effective leniency programme is, thus, not only in the hands of the Commission; also NCAs have been taking part in and contributing to this process. In the next (sub)section a closer look is taken at the Commission’s leniency system.

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1568 See further supra Chapter 5, section 2.3.1.2(d).
1569 Leniency Notice 2006, points 6-7. The possible discovery of leniency applications in civil damages actions has long been one of the main undertaking’s concerns about the Leniency Notice (see e.g. U. BLUM et al., “On the rationale” 213; J. S. SANDHU, “The European” 148). After the publication of the Directive on antitrust damages actions (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L 349/1) such concerns have diminished significantly. See further section 4.3.2.5 of this Chapter.
1570 For an overview of other (EU and non-EU) leniency systems see http://www.internationalcompetitionnetwork.org/working-groups/current/cartel-awareness/leniency.aspx
1571 The (former) UK Office of Fair Trading included a leniency program in the guidance about appropriate penalties under the Competition Act, which was published for public consultation in August 1999. In Germany, the first leniency system was introduced with the Notice No. 68/2000 on the immunity from and reduction of fines in cartel cases of 17 April 2000. Both programmes have been subsequently amended.
1572 Gezamenlijke mededeling van de Raad voor de Mededinging en het Korps Verslaggevers betreffende immunititeit tegen geldboeten en vermindering van geldboeten in kartelzaken, Belgisch Staatsblad 30 april 2004 Ed. 2, p. 36.257.
1573 The Spanish leniency program entered into force on February 28, 2008 after publication of an implementing regulation under Law 15/2007 for the Defense of Competition (“LDC”), which was adopted on July 3, 2007 (BOE núm. 159, de 4.7.2007). While the LDC entered into force on September 1, 2007, the implementation of the provisions dealing with leniency was postponed until the adoption of the enabling regulation by the Spanish government (see Real Decreto 261/2008, de 22 de febrero, por el que se aprueba el Reglamento de Defensa de la Competencia). The implementing regulation was finally adopted on February 22, 2008.
1574 See W. WILS, “Leniency” 16 of the online version of this article; W. E. KOVACIC, “Background Note: Using Evaluation to Improve the Performance of Competition Policy Authorities”, in OECD, Evaluations of the Actions and Resources of Competition Authorities (16 December 2005), DAE/COMP(2005)30, at 22-57, available at http://www.oecd.org/dataoecd/7/15/35910995.pdf. W.E. KOVACIC emphasises the importance of the role of experimentation in competition policy. According to this author “[t]he enhancement by the Department of Justice of its leniency program in 1993 and 1994 is perhaps the best known and most widely emulated of these experiments”.

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4. A closer look at the Commission’s Notices

The leniency programme is generally considered one of the most effective tools in the fight against cartels.\(^{1575}\) However, the success of the system did not happen overnight. On the contrary, years of evolution and experience applying the system were needed to get where we are. Particularly, the 2006 Leniency Notice builds on the results of the 2002 Notice which, at the same time, is based on the achievements of the 1996 system. Since each revision of the Commission’s programme was intended to improve the effectiveness of the regime in uncovering and establishing infringements,\(^{1576}\) a thorough analysis of the 2006 Notice should include an examination of (the design and application of) the 1996 and 2002 Leniency programmes.

4.1. The 1996 Leniency Notice

4.1.1. Brief description of the 1996 Leniency Notice

The 1996 Notice was divided in five sections, A to E. While Section A consisted in a general introduction to the programme, sections B, C and D established the conditions to obtain a first, second and third degree of leniency respectively.

First degree of leniency consisted in a reduction in fines between 75% and 100%. To obtain this benefit, under section B, five cumulative conditions had to be satisfied.\(^{1577}\) Firstly, the undertaking had to reveal the existence of the cartel before the Commission had undertaken an inspection ordered by decision, provided also that the Commission did not already have sufficient information to establish the existence of the cartel (point a). Secondly, the undertaking had to be the first to come forward and provide decisive evidence of the cartel’s existence (point b). Thirdly, before disclosing the cartel, the company had to put an end to its involvement in it (point c). Fourthly, the undertaking had to provide the Commission with all the relevant information and maintain continuous and complete cooperation throughout the investigation (point d). Finally, the undertaking could not have compelled another company to take part in the cartel or acted as an instigator or played a determining role in the cartel (point e).

According to section C, companies could benefit from a second degree of leniency, consisting of a 50% to 75% reduction, when an investigation had already been undertaken but it had failed to provide sufficient grounds to initiate the procedure leading to a final decision. In this scenario, the company still had to satisfy the four conditions of section B (b)-(e) mentioned above.

Section D offered a “significant” reduction between 10% and 50% or a third degree of leniency to undertakings which – simply – cooperated with the Commission. Two examples of cooperation were described in this section. Firstly, a firm could provide the Commission with information or other evidence that materially contributed to establishing the existence of the infringement, before the

\(^{1575}\) See e.g. OECD, “Round table on Ex officio cartel investigations” (2013), at 15, available at http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf (hereafter: ‘OECD, “Round table on Ex officio’”). Interestingly, this policy document states that “[b]ecause amnesty/Leniency programmes are generally regarded as a very effective investigative tool, some competition agencies seem to have shifted most of their resources to the pursuit of amnesty/leniency cases”. See also infra section 4.3.3.3 of this Chapter.

\(^{1576}\) See also M. BLOOM, “Despite” 548-549.

\(^{1577}\) Leniency Notice 1996, Section B (a)-(e).
statement of objections was sent. Secondly, a company could, after having received the statement of objections, inform the Commission that it did not substantially contest the facts on which the Commission based its allegations. Still, other forms of cooperation were, however, not excluded.

Section E pertained to the procedure and *inter alia* provided that ‘only on its adoption of a decision will the Commission determine […] whether or not to grant any reduction or waiver of the fine’.  

4.1.2. Analysing the key elements of the 1996 Notice: was the system well devised?

To operate well in practice it is essential that leniency programmes are properly designed. However, designing and implementing a leniency system that completely exploits the vulnerabilities of cartels has proven a very challenging task. The 1996 system provides a useful model to evaluate how the design and operation of the European leniency system could be improved and taken further (as has effectively happened). In this part, the key elements of the first Commission’s system are analysed and its most relevant limitations are identified. This analysis will subsequently serve as a basis to determine whether (the design of) the reformed regimes (namely the 2002 and 2006 programmes) took full account of and addressed such limitations.

4.1.2.1. Scope of application

The 1996 system specified which types of practices fell under its scope of application. According to the Notice, the Commission’s policy covered ‘secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports’. Only companies that had taken part in these specific types of agreements – which are considered classic restrictions by object and are thus prohibited under (now) Article 101 TFEU – could, therefore, benefit from the programme. This implied, on the other hand, that infringements of (now) Article 102 TFEU were – from the outset – clearly excluded from the scope of application of the Notice.

The wording of the 1996 Notice did not completely clarify whether the system was only applicable to horizontal cartels, or whether vertical agreements were also covered by the system. Interestingly, V. JORIS, a staff member of (former) DG IV-A-2, stated that ‘while horizontal conduct was the main focus of the Notice, vertical agreements were not excluded when they took the form of one of the categories of agreements described in the Notice, namely agreements fixing prices, production or sales quotas, sharing markets or banning imports or exports’.

The fact that horizontal conduct constituted the focus of the application of the Notice is justified by the great difficulties that competition authorities face(d) in the detection and punishment of these

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1578 The 1996 Notice provided no procedures as such for leniency candidates. Potential applicants, or their designated representatives, were simply requested to contact the Directorate General Competition (see Leniency Notice 1996, Section E).
1579 Cf. supra Chapter 2, sections 1, 2 and 3.
1580 Leniency Notice 1996, para 1.
1581 Supra Chapter 4.
1582 Emphasis added.
categories of agreements,\textsuperscript{1584} as well as by the harmful nature of horizontal cartels.\textsuperscript{1585} It is precisely in these types of cases that the negative effects on deterrence, resulting from granting immunity or reductions of sanctions, can be compensated with a (substantial) increase in the probabilities of detection and punishment. Focusing on horizontal infringements is therefore consistent with the Commission’s enforcement priorities.\textsuperscript{1586} In addition, the need for effective detection mechanisms is clearly more limited in vertical cases.\textsuperscript{1587} Vertical agreements serve to coordinate the actions of an upstream firm and a downstream firm. Since in vertical relations the interests of the non-competing parties are in conflict to a greater extent, compared to horizontal cases, vertical anticompetitive agreements are usually easier to detect by their victims. Moreover, and in contrast to horizontal cartels, vertical agreements may be welfare improving in view of the complementary nature of the (vertical) relationship. In many cases, such agreements may, thus, be covered by Article 101(3) TFEU.\textsuperscript{1588}

Finally, it should be kept in mind that leniency systems are designed from an economic point of view to encourage a member of an agreement to confess and implicate its co-conspirators. Since Article 102 TFEU only applies to unilateral conduct, the economic reasoning underlying leniency systems cannot be applied to this type of activity.\textsuperscript{1589}

\textsuperscript{1584} See on this subject \textit{supra} Chapter 2, section 5.3. The adoption of the 1996 Leniency system can also be seen as a recognition of the fact that finding hard evidence of cartels – which function in an increasingly sophisticated environment – is a highly complex task (see XXVth Report on Competition Policy, Brussels 1996, para 50; XXVth Report on Competition Policy, Brussels 1997, para 50). This competition report stressed that ‘[c]artels are typically operated in secrecy and considerable efforts are devoted by participants to avoid detection by the authorities, including the use of information technology’. See also V. JORIS, “La communication” 12.

\textsuperscript{1585} See further analysing these questions Chapter Chapter 2, sections 2 and 4.

\textsuperscript{1586} W. WILS, “The Commission Notice” 131. See also \textit{supra} Chapter 5, section 2.1.

\textsuperscript{1587} W. WILS (“The Commission Notice” 131) considered the influence of the (presumed) limitation of the scope of application of the notice to horizontal cases on the former notification system of Regulation 17. He observes that such limitation ‘serve[d] to avoid upsetting the system of notification. If the leniency policy set out in the notice had been extended to cover those types of agreements for which it is conceivable that the enterprises concerned would notify them under Regulation No. 17, there would have been a risk of enterprises trying to benefit from the notice instead of notifying their agreements under Regulation No. 17’. This observation does, however, not to take into account that the (wording of the) Notice was not completely clear about the exclusion of vertical conduct. Still, in practice, the Commission did not apply the Leniency Notice in vertical cases (that had to be notified). Given the general illegal nature of cartel agreements, obtaining clearance under the former notification system, on the one hand, and benefiting from leniency, on the other hand, appeared to be excluding options.

\textsuperscript{1588} This is indeed illustrated by the fact that while cartels have always been considered hardcore restrictions, the Block Exemption Regulation for certain categories of vertical agreements has been applicable since 1999. (Commission Regulation No. 2790/99 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements [1999] OJ L336/21). See further on this subject e.g. V. VEROUDEN, “Vertical agreements: motivation and impact” in W.D. COLLINS (ed.) Issues in competition law and policy (3), ABA, Section of Antitrust Law, 2008, at 1817-1840, available at http://ec.europa.eu/dgs/competition/economist/vertical_agreements.pdf

\textsuperscript{1589} Furthermore, the fact that under former Regulation 17, the number of notifications concerning (now) practices falling under Article 102 TFEU was extremely low, also limited the need for a leniency programme. H. K. S. SCHMIDT discusses the question whether the leniency programme should be extended to cases covered under Article 102 TFEU. More specifically, this author points out that ‘if a leniency notice were adopted for Article 102 TFEU, it would need to create an incentive that would make the dominant firm in principle “kiss and tell” on itself. Unless a company knows that it will be investigated and found guilty of an Article 102 TFEU violation and us facing significant fines, it is dubious whether an incentive can be established by eliminating or limiting fines in return for “beyond normal cooperation”’. H. K. S. SCHMIDT, “Private Enforcement – Is Article 82 EC special?” in M.-O. MACKENRODT, B. CONDE GALLEGO AND S. ENCHELMAYER (eds.) \textit{Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?}, Berlin, SpringerVerlag 2008, 204 p., at 157-158). Although this author concludes that ‘a leniency programme […] does not seem to be effective or even plausible for Article 102 TFEU cases’ he only considers the difficulties in creating incentives to confess in Article 102 TFEU cases and overlooks the fact that the (economic) design of leniency simply would not work for (non-secret) individual conduct. A different question is whether cooperation provided within the
The reasons commented above indicate that the margin to include vertical agreements within the scope of application of the Notice was (at least) questionable. Although, in practice, the application of the 1996 Notice was limited to horizontal cases, a more precise wording of the scope of application of the 1996 system was desirable to increase certainty among potential leniency applicants.

4.1.2.2. Conditions to qualify for first or second degree leniency

a. First company coming forward

In order to benefit from first or second degree leniency under section B or C of the 1996 Notice, a company had to be the first to adduce decisive evidence of the cartel’s existence. In the event that multiple cartel participants would choose to cooperate, the reduction could thus only be granted to the fastest firm.

This requirement was intended to induce each cartel participant to collaborate in the Commission’s investigation as soon as possible. By maximising the incentive to be the first to cooperate, the system creates a race among the parties to come forward, which may have a destabilising effect on the cartel. In addition, the first comer requirement also ensures that the negative effects of granting leniency discounts on deterrence are limited. When only one company is entitled to a reduction under Section B or C (i.e. a minimum of 50% discount up to complete immunity) and, thanks to the undertaking’s cooperation, the rest of the cartel members can be sanctioned, deterrence generally improves. However, if not only the first applicant, but also subsequent applicants, could qualify for very high leniency rewards, cartel members would not have an immediate interest in being first to cooperate with the Commission. On the contrary, it would make sense for them to first exploit the illegal profits resulting from collusion and, then, apply for leniency. From this perspective, granting substantial discounts to multiple firms would not only have a negative effect on deterrence but may even encourage collusion.

framework of a Commission investigation could lead to a lower penalty, as is the case under the 2006 Fining Guidelines. This type of rewards should be distinguished from leniency rewards.

See further infra section 4.1.3 of this Chapter.

Compare the (wording of the) scope of application of the 2002 Leniency Notice.

As regards the distinction between these two different degrees of leniency see further infra section 4.1.2.2 of this Chapter.

As W. WILS (“The Commission Notice” 133) explains, in this situation, ‘each [company] realises that it could escape any fine or at least obtain a large reduction if it were the first to denounce the infringement, whereas it is exposed to receiving a (full) fine if one of the other cartel members were to do so earlier’. See also supra section 1 of this Chapter.

See also J. CARLE, “The new leniency” 266. In particular, this author comments that “[t]he criterion of the “first-comer-in” functions well in the sense that it contributes to creating an atmosphere of uncertainty and mistrust between the participants of a cartel, thereby increasing the chances of a secret cartel being denounced”. See in the same line W. WILS, “The Commission Notice” 133; V. JOHANSEN, “La communication” 14.


See supra section 1 of this Chapter. See also W. WILS, “The Commission Notice” 132-133.
A more problematic aspect was that, under the 1996 Notice, the reward offered to the first comer was not maximised.\textsuperscript{1598} Or in other words, the difference between the rewards available for the first comer, and those available for subsequent applicants was not large enough. In fact, depending on the circumstances of the case, a first comer could even end up obtaining only 50\% discount, \textit{i.e.} the minimum reduction available under section C, which is, at the same time, the maximum reduction available for subsequent applicants under section D.\textsuperscript{1599}

Although, in practice, the Commission was able to solve this issue by granting high discounts within the respective range of sections B and C\textsuperscript{1600} – which emphasised the difference between the rewards for first comers and subsequent applicants – the theoretical possibility that rewards could still be very similar did not maximise the intended incentive for first comers.\textsuperscript{1601}

\textbf{b. New and decisive nature of the evidence}

According to the 1996 Notice, in order to obtain the first or second degrees of leniency under sections B or C, the information provided by the first comer had to be “new” for the Commission and constitute “decisive evidence”. This condition intended to ensure that the cooperation offered by undertakings entailed a real benefit for the Commission.\textsuperscript{1602} This benefit either consisted in the detection of a (yet uncovered) cartel with respect to the first degree leniency, or in easing the path for the Commission in the collection of the evidence necessary to open a procedure, in case of the second degree.\textsuperscript{1603}

There is, indeed, a clear need to ensure the real (added) value of the undertaking’s cooperation for the Commission. However, the fact that the information had to be both “new” for the Commission and constitute “decisive evidence” constituted in practice a double standard that was difficult to fulfill.\textsuperscript{1604} In fact, this (double) requirement implied that companies could be easily disqualified in two different cases: (i) when they provided this ‘decisive evidence’ after the Commission was already in possession of this type of material and (ii) when they supplied evidence which was not decisive.\textsuperscript{1605 1606}

\textsuperscript{1598} Compare \textit{infra} section 4.1.2.2(f) of this Chapter.
\textsuperscript{1599} Alternatively, a first comer could obtain the minimum discount of 75\% under Section B, while a subsequent applicant could obtain a 50\% reduction.
\textsuperscript{1600} See further \textit{infra} section 4.1.3 of this Chapter.
\textsuperscript{1601} See OECD, “Hardcore cartels: recent progress”. This report emphasised that ‘[o]nly the first to apply should receive complete immunity, and if the programme is extended to subsequent applicants, the gap in the rewards should be substantial. This maximizes the incentive to be the first to defect […] If the returns to the second applicant approximate those that would accrue to the first then the result may be that no one would apply’. See also in this line e.g. J. CARLE, “The new leniency” 266.
\textsuperscript{1603} W. WILS, “The Commission Notice” 132-133.
\textsuperscript{1604} See further \textit{infra} section 4.1.3 of this Chapter.
\textsuperscript{1605} For instance in \textit{Sorbates}, two companies, Hoechst and Chisso, claimed to be the first undertaking to adduce decisive evidence. Hoechst had firstly provided the Commission with an oral description of the cartel’s activities, and only two weeks later Chisso provided an oral description of the cartel together with documentary evidence. The Commission considered, however, that the information provided by Hoechst could not be considered as decisive evidence of the cartel’s existence Case COMP/E-1/37.370 – \textit{Sorbates} [2005] OJ L 182/20, para 439.
\textsuperscript{1606} This aspect was acknowledged by Commission’s staff members, who commented that this double condition ‘seems to have been perceived as placing potential applicants in an ‘untenable’ quandary. Either the Commission is completely ignorant of the fact that a cartel may exist, or it does already have some information but not enough evidence to proceed to the adoption of a decision establishing the infringement and imposing fines’. F. ARBAULT AND F. PEIRO, “The Commission’s new” 18. See further \textit{infra} section 4.1.3 of this Chapter. See also commenting on the strict nature of this
Firstly, information had to be new, compared to the information that the Commission already had. However, since undertakings could not know what type of information (if any) was already in the possession of the Commission, it was hard to ascertain whether the information they wished to provide was really “new” to the Commission. On the other hand, the wording of the requirement regarding “decisive evidence of the cartel existence” left room for interpretation, which created uncertainty as to its precise meaning. Companies possessing evidence about a cartel, but without actual “smoking guns”, were in effect unable to establish in advance whether their information constituted “decisive evidence”. Furthermore, the requirement to submit “decisive evidence” meant in practice that an undertaking had to (do its best to) submit documentary evidence on the existence of the cartel. This is not always easy given that, in secret horizontal cartel cases, contemporary documents are frequently destroyed. Although witness statements were also accepted by the Commission, this type of evidence does not have the same value as documentary evidence. In these circumstances, a leniency applicant that aspired to be “first comer” had two options: (i) to submit hastily prepared company statements that did not provide the most accurate description of the cartel activity or (ii) to gather extensive evidence and carefully prepare company statements while running the risk of not being the first comer and, consequently, being disqualified.


1610 See e.g. Commission Decision of 21 January 1998 (Case IV/35.814 - Alloy surcharge) [1998] OJ L 100/55, paras 97 and 100: ‘Avesta undertook, at the inspection on 18 October 1996, to examine its files carefully in order to trace any possible contacts. Some documentary evidence of such contacts was sent to the Commission […] Thus, although certain undertakings (Usinor and Avesta) cooperated extensively, the Commission must also bear in mind that they did so extremely late. The cooperation shown by the other undertakings (Krupp, Thyssen, AST, ALZ and Acerinox) was more limited: the firms did not provide any documentary evidence or facts not already in the possession of the Commission and did not acknowledge the infringement’ (emphasis added). See also commenting on this aspect e.g. A. RILEY, “Cartel Whistleblowing” 81; J. M. JOSHUA, “Leniency in US and EU Cartel Cases”, 2000 Antitrust, 19-23, at 22 (hereafter: ‘J. M. JOSHUA, “Leniency”’). Further infra section 4.1.3 of this Chapter.

1611 See also stressing this aspect e.g. D. GERADIN AND D. HENRY, “The EC Fining” 16; J. CARLE, “The new leniency” 267.

1612 Some commentators have even suggested that the strict character of the “new and decisive evidence requirement” may lead to leniency applicant to fabricate evidence in order to qualify. See W. FISCHOTTER AND H. WRAGE-MOLKENTHIN, “Brauchen wir eine Kronzeugenregulierung im deutschen Kartellrecht” in E. NIEDERLEITHINGER, R. WERNER AND G. WIEDEMANN (eds.) Festschrift für Ottfried Lieberknecht zum 70. Geburtstag, Munich 1997, 673 p., at 326. This concern is, however, rather unrealistic as leniency applicants which fabricate fake evidence are immediately disqualified under the Notice.

1613 D. GERADIN AND D. HENRY, “The EC Fining” 16; S. HAMMOND, “When calculating the costs and benefits of applying for corporate amnesty, how do you put a price tag on an individual’s freedom?” March 2001, available at http://www.justice.gov/atr/public/speeches/7647.htm; J. CARLE, “The new leniency” 267. According to this last author, undertakings had a third option. Namely, ‘a cartel member could under the 1996 Notice adopt a “wait-and-see” approach after conducting its internal investigation, thus enabling it to leapfrog over another member that subsequently brought the matter to the attention of the Commission by quickly coming forward’. Still, as this author observes, this approach was not really viable in the sense that it required some insight into the other cartel members’ behaviour. If a company adopts a wait-and-see approach, there is always the risk to be disqualified when other company suddenly steps forward first.

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From a general leniency applicant’s perspective, the requirement that a company had to furnish the Commission with new and decisive evidence was thus fairly vague, strict and created substantial uncertainty.\textsuperscript{1614} This provision may as a result have discouraged companies considering to come forward under the 1996 system.

c. First degree leniency only prior to investigation

The 1996 Notice made a distinction between first and second degree leniency on the basis of the question whether or not an inspection had already been conducted by the Commission. First degree leniency under section B – that is, a 75\% fine discount up to immunity – could only be granted if a company informed the Commission about the existence of a secret cartel \textit{before} an inspection ordered by decision had been undertaken. After a Commission’s inspection, companies first degree leniency was no longer available. When firms cooperated with the Commission \textit{after} an inspection had been conducted at the premises of suspected cartel members, they were entitled to a less generous reduction of 50\% to 75\% under section C, but only if the inspection had not been fruitful enough to initiate the procedure leading to a decision.\textsuperscript{1615}

The fact that firms could obtain a more favourable treatment when they gave information prior to an investigation, indicates that the Commission attached great value to information revealing the existence of a cartel, at the moment when it was still unaware of the existence of such illegal agreement.\textsuperscript{1616} This seems quite logical as the most stable type of illegal cartels are, in practice, almost impossible to detect without the cooperation and help of undertakings. Furthermore, in order to limit the economic harm caused by cartels, early detection is essential. From this perspective, information revealing the existence of a cartel in a certain market has great inherent value for competition authorities.\textsuperscript{1617}

In contrast, once a cartel has been revealed to the Commission, collecting the necessary evidence to prove the infringement and sanction it accordingly, may appear less complex. This is particularly true taking into account that the Commission has other effective investigative tools at its disposal.\textsuperscript{1618} However, the importance of cartel participants’ cooperation at this stage should not be underestimated. One can indeed imagine situations in which the Commission – for different reasons – has conducted an inspection without being able to collect sufficient evidence to establish an infringement of Article 101 TFEU. In such scenario, and in spite of its awareness of the cartel, the


\textsuperscript{1615} See also V. JORIS, “La communication” 13-14.

\textsuperscript{1616} See commenting on this point W. WILS, “The Commission Notice” 131 \textit{et seq}. W. P. J. WILS additionally observes that ‘the distinction between first and second degree leniency […] makes sense in that such investigations consume considerable enforcement effort, which may be saved if a cartel member comes forward before they take place. An earlier denunciation is also preferable from the point of view of prevention, in that it may result in the cartel ceasing to function at an earlier time’.

\textsuperscript{1617} See also F. ARBAULT AND F. PEIRO, “The Commission’s new” 17. In spite of this reasoning, during the first years of application of the Notice, companies only denounced their illegal behavior before an investigation in a limited number of cases. These authors note that ‘[o]ver 60\% of the cases in which the 1996 notice has been applied were already under investigation in either the EU or in another jurisdiction when the first application was filed’. However, this data do not take into account the (frequent) application of the 1996 Notice after 2002. See further \textit{infra} section 4.1.3 of this Chapter.

\textsuperscript{1618} See \textit{supra} Chapter 7.
readiness of undertakings to submit such information can effectively be of decisive value to the Commission.\textsuperscript{1619} Offering a discount of 50-75% to firms which cooperated \textit{after} an inspection may have been counterproductive in the sense that such reduction was rather low to encourage firms to reveal information which could be useful for the Commission to break the cartel and to establish the infringement.\textsuperscript{1620} \textsuperscript{1621} Proving the existence of the most complex type of anticompetitive agreements is not only an intense task in terms of time and resources, but is also extremely difficult.\textsuperscript{1622} Offering firms a strong(er) incentive to cooperate, after an inspection has been conducted, makes sense as this could contribute to ensure the final outcome of the procedure while saving enforcement efforts.\textsuperscript{1623} This reasoning is also in line with economic theory. If the cartel participants are aware of an inspection and of the possibility that one of them could subsequently apply for leniency afterwards, the whole stability of their agreement is likely to be seriously damaged.\textsuperscript{1624} \textsuperscript{1625}

d. The condition regarding continuous and complete cooperation

In order to qualify for first or second degree leniency, the 1996 Notice required firms to provide the Commission with all the relevant information and all documents and evidence available to it regarding the cartel, and to maintain continuous and complete cooperation throughout the investigation.\textsuperscript{1626}

This condition was designed to prevent that an undertaking’s behaviour undermined the benefits deriving from its own cooperation.\textsuperscript{1627} If companies could unilaterally decide to discontinue their

\begin{thebibliography}{99}
\item This view has been confirmed by economic studies which have shown that cartels are less likely to collapse under a system that does not offer companies sufficient incentives to cooperate with the Commission after the industry is put under scrutiny. See e.g. M. MORTA AND M. POLO, “Leniency” 18 of the online version of this contribution; J. CARLE, “The new leniency” 266-267. In fact, it is not really surprising that section C of the 1996 Notice has only been applied in one case (see further infra section 4.1.3 of this Chapter). Compare the conditions to obtain immunity under point 8(b) of the 2002 Leniency Notice.
\item See supra Chapter 2, section 5.3. For a more economic analysis of this question see M. MORTA AND M. POLO, “Leniency” 14-15 of the online version of this contribution.
\item See also J. CARLE, “The new leniency” 266-267. See for a more economic analysis of this question M. MORTA AND M. POLO, “Leniency” 21-23 of the online version of this contribution. In this paper, M. MORTA AND M. POLO proved that systems which allow to give fine reductions only to firms which cooperate with the antitrust authority before an inquiry is opened, are inferior to leniency systems which grant a lenient treatment also after an inquiry is conducted. This conclusion was based, among others, on the US experience, which ‘clearly shows that extension of the leniency program to post-investigation amnesty (along with the automatic granting of the amnesty) is a crucial ingredient for success’.
\item M. BLOOM, “Despite” 544. See also J. CARLE, “The new leniency” 266-267. In addition, this author notes that ‘the incentive to engage in collusion tends to remain undiminished under a leniency regime that fails to sufficiently reward co-operation offered after the Commission has opened an investigation. If not enough incentive for revealing information is provided subsequent to this point in time, the parties’ interest in staying in the cartel may remain intact even after an investigation has been opened’ (referring to M. MORTA AND M. POLO, “Leniency” 18 of the online version of this contribution)
\item However, to ensure that the cooperation provided by undertakings after the Commission is aware of the violation has a real value for the Commission, the conditions for granting leniency may be stricter. OECD, “Using Leniency” 3. See further the analysis below. In addition, it should also be taken into account that as W. WILS points out limiting leniency discounts is necessary to ensure that the net effects on deterrence are positive. W. WILS, “Leniency” 26-27 of the online version of this article.
\item Leniency Notice 1996, section B(d).
\item W. WILS, “The Commission Notice” 133.
\end{thebibliography}
cooperation with the Commission without being penalised, the effectiveness of the investigation could be seriously undermined.

Even though requiring absolute cooperation from undertakings is a must to safeguard the end of the investigation, the wording of this condition was quite broad and, at times, the Commission gave it a too strictly interpretation in practice.1628 1629 As a consequence, potential candidates encountered difficulties knowing precisely which obligations derived from the duty to cooperate. The 1996 regime failed to provide such certainty which probably discouraged companies to apply for leniency.

e. General exclusion of ringleaders

Under the 1996 Leniency Notice, a firm could only qualify for a fine reduction under section B or C if it had ‘not compelled another enterprise to take part in the cartel and [had] not acted as an instigator or played a determining role in the illegal activity’.1630 This requirement restricted the benefits of the Notice for ringleaders significantly, by allowing them to apply for a fine reduction in the range of 10 to 50% under section D.

As is well known, cartel agreements are extremely complex from an organizational point of view. In order to guarantee the stability and the smooth functioning of the agreement, one (or various) cartel members must take care of certain key organisational tasks such as arranging initial meetings, collecting data and information, and planning safe and frequent communication between the cartel members. If these activities are not properly organised, the smooth functioning of the collusive agreement could be at risk.1631 The exclusion of ringleaders from the application of sections B and C of the 1996 Notice was, thus, meant to make sure that companies playing this role “knew” that assuming this role would bar them from obtaining immunity from fines when the cartel proves unsuccessful.1632 The ringleader exclusion thus increased the expected antitrust fine for this type of cartel participants thereby making this essential role less attractive for companies.1633 When none of the cartel members is willing to be the ringleader, the formation of (stable) cartels is, ceteris paribus, less likely.1634

1628 See e.g. M. MOTTA AND M. POLO, “Leniency” 19 of the online version of this contribution.

1629 See, for instance, the decision in British Sugar where the Commission considered that Tate & Lyle did not maintain “continuous and complete co-operation” with the Commission because it had retracted its admission of certain facts or legal qualifications which it had made earlier during the proceeding. The General Court did, however, not follow the reasoning of the Commission in this case. See CFI 12 July 2001, Joined cases T-202/98, T-204/98 and T-207/98, Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission [2001] ECR II-2035, para 160-161. This decision is commented below in section 4.1.3.4 of this Chapter.

1630 Leniency Notice 1996, section B(e).

1631 See also J. HERRE, W. MIMRA AND A. RASCH, “Excluding Ringleaders from Leniency Programs”, April 2012, at 3, available http://ssrn.com/abstract=1342549 (hereafter: ‘J. HERRE et al., “Excluding”’). These commentators note that ‘the characteristics of [cartels] per se do not require a special market position, size, or knowledge of the firm which acts as a Ringleader. Therefore, even if a reliable ringleader is crucial to run a successful and stable cartel, it is not a priori clear that it is necessarily a particular firm, e.g., the largest, that must take on the role of ringleader’. For a more detailed discussion of the tasks carried out by cartel leader see supra Chapter 2, section 5.3.

1632 See also e.g. W. WILS, “The Commission Notice” 133.

1633 In addition, ringleaders additionally face an increase of the basic fine. See Fining Guidelines 2006, para 28.

1634 See on the implications of the ringleader exclusion a.o. J. HERRE et al., “Excluding” 5; W. WILS, “Leniency” 31 of the online version; K. MEHTA, “Comments on Switgard Feuerstein’s “Collusion in Industrial Economics – A Survey”, 2005 (5-3/4) Journal of Industry, Competition and Trade, 217-222, at 220; N. K. KATYAL, “Conspiracy” 1365. As regards the implications of this exclusion, it is interesting to note that including ringleaders as immunity applicants may make the rest of the cartel participants more careful to follow the ringleader’s initiative (see C. AUBERT, P. REY AND W. E. KOVACIC, “The Impact of Leniency and Whistleblowing Programs on Cartels”, 2006 (24) International Journal of
While the ringleader exclusion is basically meant to enhance deterrence, competition authorities should be careful to formulate such exclusion clearly. If the concept of ringleader is vague and potential applicants cannot know precisely which type of behaviour is covered by this concept, this exclusion may cause legal uncertainty. In the 1996 Notice, the term “instigator” and, particularly the concept of “playing a determining role” were vague and potentially overbroad. This language, which could be (and was) in practice interpreted to exclude multiple firms considered ringleaders, vested the Commission with a substantial margin of discretion to determine whether or not to exclude certain participants from obtaining full immunity.

In practice, the wide interpretation of the ringleader requirement appears to have prevented companies quite often from obtaining first degree leniency under section B. This far-ranging interpretation, combined with the lack of clarity surrounding this condition, probably discouraged applications from companies which had played some type of relevant role in the cartel and, consequently, feared to be excluded from section B.

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1635 J. HERRE et al, “Excluding” 5.
1636 This aspect was also recognised by the Commission which noted that, “[e]xperience to date has shown that the notion of ‘instigator’ is somewhat vague (it is rarely clear-cut if and who the instigator of a cartel is: Who is a leader in a cartel of two or three? How many leaders can you have?).” See Commission, Press Release MEMO/02/23. See also C. R. A. SWAAK AND D. J. ARP, “A tempting” 13. As these authors observe, under the 1996 system, if two undertakings agreed to fix prices or rig bids for a particular customer, both firms could be disqualified. The company that firstly contacted its competitor to propose the agreement could be seen as “an instigator”, while the other played a determining role by consenting to the agreement.
1637 For instance, in the Lysine cartel Ajinomoto and Archer Daniels Midland were both considered leaders. Even though Ajinomoto, was the first to approach, and provide decisive evidence to the Commission before it had undertaken an investigation, as this company was considered the instigator of the cartel, it received 50% reduction. Case COMP/36.545/F3 — Amino Acids [2001] OJ L 152/24, paras 418-419. Comparably in Belgian Breweries Interbrew and Alken-Maes had taken the joint initiative of organising the discussions and meetings on private-label beer. For this reason Interbrew received could not qualify for a reduction under section C, and obtained 50% fine discount. Case IV/37.614/F3 POI/Interbrew and Alken-Maes [2003] OJ L 200/1, paras 356-357. For more comments on this point see e.g. Commission, Press Release MEMO/02/23; F. ARBAULT AND F. PEIRÓ, “The Commission’s new” 18; M. JEPHCOTT, “The European” 379; W. WILS, “Leniency” 31 of the online version. W. WILS correctly points out that, ‘the first version of the European Commission’s Leniency Notice in 1996 excluded all ringleaders (even if there were several of them)’.
1638 See further infra section 4.1.3 of this Chapter. In addition, it should be taken into account that, since ringleaders frequently possess important and accurate evidence about the functioning of the cartel, an excessively wide interpretation of the concept of ringleader may have a negative influence on the collection of evidence (see e.g. J. J. HERRE et al, “Excluding” 4). Practice, has indeed confirmed ringleaders may provide high quality evidence. For instance, in the Pre-insulated Pipes case, ABB acted as the ringleader and was able to submit valuable information which described the origin of the cartel. See Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgeit Sugars Ltd [1999] OJ L 076/1, paras 172-174. Adopting a more restrictive approach as to the exclusion of ringleaders may, accordingly, be more also appropriate from an economic point of view since the information they may provide can be of great help to establish the relevant facts.
1639 It is, however, important to note that toward the last years of application of the 1996 Notice, the Commission adopted a more flexible approach as regards the interpretation of the concept of ringleader. See for instance Case COMP/C.37.671 — Flood flavour enhancers) OJ [2004] L 75/1, para 286. This case is commented below.
f. Maximum reduction of 75 to 100%: no guarantee of immunity

Under the 1996 Leniency Notice, there was no guarantee that first degree leniency applicants would obtain complete immunity from fines. According to the 1996 regime, a first-reporting undertaking that satisfied all the requirements of the Notice was entitled to a minimum reduction of 75% of the fine that would have been otherwise imposed. Although in practice the Commission often granted full immunity, it is a fact that under section B, the Commission retained certain discretion to determine the applicable reduction within a margin of 25% (from 75% to 100%) instead of granting automatic and total reduction of fines when all the relevant conditions were satisfied.

This lack of guaranteed immunity caused uncertainty and skepticism within the business community. The lack of full protection from fines failed to satisfy companies’ expectations and, arguably, diminished their motivation to break the wall of silence. In order to enhance the success of the 1996 Leniency Notice, applicants providing the Commission with complete cooperation and new evidence that established the existence of a cartel, must be treated generously and should also be able to predict accurately the outcome of their application.

g. Elements regarding the third degree leniency (Section D)

(i) Rewarding subsequent applicants

Under the 1996 Leniency Notice, subsequent leniency applicants were entitled to a reduction somewhere in the range of 10% to 50% of the fine. To benefit from such a reduction, a company did not have to fulfil the conditions to obtain first or second degree leniency under sections B or C. The only condition set forth in section D was that a company “cooperated” with the Commission. The absence of other explicit requirements indicates that, at this stage of the procedure, the Commission expected to have detected the infringement and to have enough evidence to proceed towards a decision.

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1640 Leniency Notice 1996, para. B.
1641 See further infra section 4.1.3 of this Chapter.
1642 It is, however, interesting to comment that the proposal of the Leniency Notice (draft Commission notice on the non-imposition or the mitigation of fines in cartel cases, OJ C 341, 19.12.1995, p. 13–15) included automatic immunity for leniency applicants which satisfied the requirements. According to V. JORIS, a member of the Commission’s staff, the final exclusion of the automatic immunity was meant to preserve the Commission's discretion in each case. See V. JORIS, “La communication” 13.
1643 This point was also accepted by (staff members of) the Commission at the time of the publication of the revised version of the 2002 Leniency Notice. See F. ARBAULT AND F. PEIRO, “The Commission’s new” 18. See also J. CARLE, “The new leniency” 267-268; M. JEPHCOTT, “The European” 380. In the words of M. JEPHCOTT the absence of full immunity in the Notice ‘[dangled only a very blurred image of a somewhat anaemic carrot in front of a potential whistleblower’.
1644 See also supra section 2 of this Chapter; C. R. A. SWAAK AND D. J. ARP, “A tempting” 11; M. MOTTA AND M. POLO, “Leniency” 19-20 of the online version of this contribution.
1646 The “cooperation” condition, however, implied that other requirements stipulated under section B or C to obtain first or second degree leniency were applicable. This is the case for the requirements of point (c) concerning the condition to put an end to the involvement cartel before reporting it, and (d) regarding the condition to provide the Commission with all the relevant information and evidence available to it regarding the cartel and to maintain continuous and complete cooperation.
Rewarding subsequent leniency applicants that cooperated in the Commission’s investigation under the 1996 programme was an appropriate choice. Although the benefits of rewarding the first applicant that denounces the cartel are far more apparent,\textsuperscript{1647} there is a general consensus as regards the benefits of a system rewarding subsequent applicants.\textsuperscript{1648}

Firstly, subsequent applicants are extremely helpful in the collection of evidence because they are often in a position to prove additional facts in terms of duration, product or geographic scope or the composition of the cartel. This information serves to complete the knowledge about the cartel that had been provided by the first applicant\textsuperscript{1649} and is, therefore, crucial for the establishment of the infringement to its full extent.\textsuperscript{1650} In addition, additional testimonies and documentation from subsequent applicants may also be valuable to corroborate the evidence that had been submitted by the first applicant.\textsuperscript{1651} In the absence of corroborating evidence, pursuing a case successfully may be more difficult. Finally, cooperation from subsequent applicants may also reduce administrative investigative costs as there is no need to conduct a full investigation to gather the information necessary to prove an infringement. This type of cooperation is thus a very cost effective-means to gather conclusive evidence.\textsuperscript{1652}

The main objection to leniency programmes which reward subsequent applicants concerns the decrease in deterrence resulting from the lower sanctions.\textsuperscript{1653} In order to limit such negative effects

\textsuperscript{1647} See OECD, “Co-operation and Enforcement relationship between public and private antitrust enforcement” (Note by the Secretariat), DAF/COMP/WP3(2015)14, June 2015, at 23, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&doclanguage=en (hereafter: OECD, “Co-operation and Enforcement relationship”). As this policy document explains ‘[t]he rationale for offering immunity to a cartelist who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing the co-operating corporation. These benefits include increased detection rate, destabilising effects on cartels, cost savings in investigation and prosecution as a result of the applicant providing evidence directly from within the cartel, litigation savings and so on. All these benefits combined result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment’.

\textsuperscript{1648} OECD, “Leniency for Subsequent” 5.

\textsuperscript{1649} The important (complementary) value of cooperation from subsequent applicants is logically also related to the fact that the threshold for first applicants is generally (relatively) lower. In effect, the Commission attached great value to information which revealed the existence of a cartel agreement. See supra section 4.1.2.2(a); OECD, “Leniency for Subsequent” 5.

\textsuperscript{1650} It is interesting to note that that since ringleaders are excluded as immunity candidates, in practice they are rarely first leniency applicants. This means that, typically, first leniency applicants, which possess less information than ringleaders are not always in a position to inform the authority about the full extent of the cartel (see OECD, “Leniency for Subsequent” 5-6). When the first leniency applicant is a company with a minor role in the cartel, cooperation from subsequent applicants may be decisive to establish the infringement.

\textsuperscript{1651} See also OECD, “Leniency for Subsequent” 5.

\textsuperscript{1652} See OECD, “Leniency for Subsequent” 11. This policy report further enlightens this aspect: ‘subsequent applicants may [for example] come forward after initial dawn raids and either submit evidence that was not found by the authority, explain any ambiguous content in the evidence found, or provide access to individuals with inside knowledge of the cartel. This might be particularly relevant in jurisdictions where the authority does not have the power to compel individual testimony. The authority might eventually obtain this evidence or explanation otherwise, but only at the expense of going through a formal subpoena or information request process. In this sense, the co-operation of subsequent applicants lowers the authority’s investigation and prosecution costs, allowing it both to proceed faster and possibly devote some of the saved resources to other investigations. Co-operation from subsequent applicants serves also as a pressure on the immunity applicant to submit all the evidence in its possession and accordingly carry out thorough internal reviews’. It must however also be stressed that the administrative savings resulting from leniency applications of subsequent applicants, while of course beneficial, must not lead the authority to simply wait for leniency applicants. See also OECD, “Leniency for Subsequent” 5-6.

\textsuperscript{1653} There is also a less important (and more theoretical) concern. It is submitted that leniency programmes could promote the formation of new cartels or that, at least, cartel members will adapt their market strategy to the existence of the programme. W. Wils, “Leniency” 29-30 of the online version of this article. It is well known that cartels are complex
and to justify the granting of leniency rewards in these cases, leniency programmes must contain clear and strict requirements for subsequent applicants to benefit from the system. Firms should not only be prepared to offer complete and effective cooperation, subsequent applicants should also be in a position to supply evidence that allows an authority to prove new facts, or at least corroborate existing facts in return for fine reductions.\textsuperscript{1654} This implies, in turn, that the value of the reward should be aligned with the (added) value of the cooperation for the enforcer to establish the infringement under investigation. The absence of any specific conditions (besides the general condition of “cooperation”) for subsequent applicants, was without any doubt one of the growing pains of the system for both the Commission and undertakings.\textsuperscript{1655}

(ii) Wide band for later reporting companies

Subsequent applicants that cooperated with the Commission were promised a reduction of the fine somewhere in the range of 10 per cent to 50 per cent under section D.\textsuperscript{1656}

The considerable broadness of this reduction range, combined with the fact that companies were only required to “cooperate”, implied that many varying types of cooperative behaviour could be rewarded with differing amounts of leniency discounts.\textsuperscript{1657} As a result, it was on the one hand, difficult to see how the level of reduction corresponded to the value of the company’s contribution to establishing the infringement.\textsuperscript{1658} Since the 1996 Notice did not specify whether (and if so how)

\textsuperscript{1654} See also W. WILS, “The Commission Notice” 134. W. WILS explains that “[f]or the net effect of third degree leniency to be an increase in the expected fine (and thus in deterrence), not a decrease, the condition that an enterprise “cooperates” should be interpreted as requiring a level of cooperation which goes beyond the ordinary and which ensures a substantial saving of enforcement resources for the Commission. In choosing the reduction percentage within the 10 to 50 per cent range when applying the notice, the Commission should bear in mind the need for an increase in the probability of detection and punishment (thanks to the saving in enforcement costs) which outweighs the fine reduction granted. Otherwise the net effect of leniency will be less deterrence and in the end more cartels. For instance, a reduction of 50 per cent of the fine should only be given to an enterprise to reward a degree of co-operation which, if it were practised by all the enterprises involved in the case, would more than halve the efforts needed by the Commission to bring the case to a successful end’. Although this reasoning is not fully clear, it is a fact that in order to preserve deterrence companies should only obtain a reduction if they contribute to the establishment of the infringement. In addition, the level of such reduction should correlate the value of their cooperation in the investigation of the case.

\textsuperscript{1655} In order to ensure that the benefits from the cooperation provided by subsequent applicants were attained, the Commission developed (in practice) a number of conditions that it took into account to determine the amount of the leniency discount. However, since these requirements were not specified in the 1996 Notice, undertakings faced substantial uncertainty in this context. This was an undesirable situation which limited the effectiveness of the Commission’s system. See further infra section 4.1.2.2(d) of this Chapter.

\textsuperscript{1656} Leniency Notice 1996, section D.

\textsuperscript{1657} See J. CARLE, “The new leniency” 267. See further infra section 4.1.3 of this Chapter. For example, the fact that an undertaking did not contest the facts presented by the Commission in its statement of objections, does not have any value for the Commission in terms of evidence, but simply facilitates the Commission’s decision-making process. Despite the little value of this type of cooperation, the Commission granted reductions in the range of 10 to 20 per cent.

\textsuperscript{1658} As regards the issue of discrepancy in fines, the General Court has nevertheless clarified that granting different reductions under the same section of the 1996 Notice does not constitute a breach of the principle of equal treatment. Since a reduction of the fine is justified only if the conduct of the undertaking concerned enabled the Commission to
the timing of cooperation was taken into account to determine the amount of the reduction, it was on the other hand not clear whether a fast leniency applicant providing cooperation which met the threshold, could obtain a (considerably) higher discount, compared to other (slower) leniency applicants. In these circumstances, later reporting companies had little motivation to run to the leniency line and, thus, to quickly report their participation in a cartel and provide their cooperation.

4.1.2.3. The grant of leniency at the end of the administrative procedure

Section E of the 1996 system, setting out the procedure, provided *inter alia* that ‘only on its adoption of a decision will the Commission determine […] whether or not to grant any reduction or waiver of the fine’. Since the conditions to qualify for a leniency discount – reasonably – applied throughout the whole administrative procedure, it was the Commission’s view that it would not be appropriate to grant such a reduction or waiver before the procedure had been concluded. This meant, nevertheless, that under the 1996 Notice, leniency applicants had little indication as to whether they obtained the discount they applied for or any discount at all. In fact, this question was only clarified once the – often lengthy – Commission’s proceedings were concluded.

establish the infringement more easily, the Commission is perfectly entitled to grant leniency applicants different reduction of fines, in accordance with the difference in the value of their cooperation (CFI 13 December 2001, Joined cases T-45/98 and T-47/98, *Krupp Thyssen Stainless GmbH and Acciai speciali Terni SpA v Commission* [2001] ECR II-3757, paras 245-246). A difference in treatment of the undertakings must be attributable to degrees of cooperation which are not comparable, notably in so far as they consisted in supplying different information or in supplying that information at different stages of the administrative procedure, or in circumstances that were not similar (Case T-48/02, *Brouwerij Haacht v Commission* [2005] ECR II-5259, para 109).

A. RILEY commented in this context that the wideness of section D was linked to its structure: ‘[section D] was divided into two very different sub-paragraphs. The first sub-paragraph provides for active co-operation with the Commission, assisting it with the provision of evidence to prove its case. The second subparagraph deals with the case where an undertaking merely agrees not to contest the initial findings of the Commission in the statement of objections’. A. RILEY, “Cartel Whistleblowing” 81. While it is true that the Commission tried to grant the same type of discounts for comparable or similar cooperation, it did not always succeed in this purpose. In practice, the general uncertainty concerning the wide reward band for subsequent applicants, was exacerbated by the fact that, the Commission at times did not completely align the level of reduction in fines with the value of the company’s contribution. See further infra section 4.1.3 of this Chapter.

Comparably, rewarding subsequent applicants with a discount in the range of 10-50 % did also raise the question as to whether a discount of 50-75 % offered to first applicants under section C, was sufficiently attractive compared to the reductions available to subsequent applicants under section D (*i.e.* up to 50%). If the difference between the reductions for subsequent applicants and for first applicants was too small, cartelists may no longer wish to meet the high(er) threshold of section C, and decide to come cooperate only under section D. It was, therefore, important that the difference between the reductions for subsequent and for firsts applicants was significant, so that the incentives to be the first applicant were not undermined. Likewise, the reward for first applicants which revealed a cartel under section B (*i.e.* a minimum of 75%) could also be considered too low, compared to the reward for subsequent applicants under section D. See supra section 4.1.2.2(a). See OECD, “Leniency for Subsequent” 12.

See e.g. M. JEPHCOTT, “The European” 378. According to this author this was a key complaint about the system. See also A. RILEY, “Cartel Whistleblowing” 92.

Leniency Notice 1996, para E(2). To cite an example, in Case COMP/E-1/36.212 — *Carbonless paper* [2004] OJ L 115/1, Sappi had to wait almost 6 years before it finally obtained immunity. See also commenting on this point A. RILEY, “Cartel Whistleblowing” 87. According to A. RILEY “[t]he lack of knowledge, for several years, as to what the outcome of a leniency application might be is likely to have proved a major deterrent for many undertakings’. For a general overview of the length of the Commission proceedings in cartel cases see further hereafter: ‘M. MOTTA, “On Cartel Deterrence” 211-212.
It is true that the 1996 Notice stated that ‘provided that all the conditions are met, non-imposition or reductions will be granted’.

However, it is equally true that the Commission had some discretion to interpret and apply the conditions of the Notice and decode whether companies were finally entitled to a leniency discount or not. This circumstance, added to the fact that Commission officers were, logically, not authorised to discuss the possible leniency rewards, created considerable uncertainty for applicants until the final Commission decision was issued. In order to encourage firms to come forward, they should be able to estimate in advance, with a reasonable degree of certainty, the potential reward for its cooperation.

4.1.2.4. The risk of private damage actions

The 1996 Leniency Notice clearly stated that the fact that leniency was granted in respect of fines did not protect an undertaking from the civil law consequences of its participation in an illegal agreement. As a consequence, even if a company fulfilled all the necessary requirements, and finally obtained the benefit of leniency, the details of its participation in the cartel were published in the final decision establishing the infringement. In certain cases, providing cooperation on the basis of the Leniency Notice actually amounted to setting up a platform for civil damages for past involvement in a cartel.

During the period of application of the 1996 Notice, the level of private enforcement through damages claims for breach of EU competition law was extremely low. Although the state of total underdevelopment of actions for damages clearly reduced the probabilities for leniency applicants of facing civil action, the complete lack of protection and confidentiality was seen as (an additional)

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1664 Section E of the 1996 Leniency Notice continued: ‘[t]he Commission is aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission. Failure to meet any of the conditions set out in Sections B or C at any stage of the administrative procedure will, however, result in the loss of the favourable treatment set out therein’.

1665 In A. RILEY’s view, leniency applicants should be able to negotiate discounts under the Leniency Notice (A. RILEY, “Cartel Whistleblowing” 80). This opinion is, however, not in line with the purpose of the European Leniency system. It should be kept in mind that the Leniency programme system is meant to reward companies’ cooperation, which should be fully provided. This is a key consideration that should not be forgotten by potential leniency applicants: once they decide to apply for leniency, they must fully cooperate. Negotiating concessions in turn for (additional) cooperation would, therefore, go against the spirit of the system. In this regard the European Courts have also confirmed that ‘a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate a genuine spirit of cooperation on its part’. 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 Rørindustri and others v Commission [2005] ECR I-5425, paras 388-403, particularly paragraph 395; Case C-301/04 P, Commission of v SGL Carbon AG [2006] ECR I-5915, para 68.

1666 See M. JEPHCOTT (“The European” 380) who observed that ‘Section D was nebulous to say the least, but most importantly an undertaking would have no firm commitment as to the level of the reduction of the fine it would receive until the final decision’. See also in this context J. CARLE, “The new leniency” 268; A. RILEY, “Cartel Whistleblowing” 80. A. RILEY even commented that ‘[t]he conditions in the 1996 Notice further applied throughout the administrative procedure, an undertaking could, […] not backtrack on its decision to co-operate, since this might well mean losing potential benefits under the 1996 Notice’. Making the conditions of the Notice applicable during the whole procedure was, however, necessary to ensure the loyal nature of the cooperation from undertakings. If companies are not willing to cooperate during the whole procedure, they should not be entitled to receive a leniency reward. The fact that backtracking on the decision to cooperate implies losing a potential reward was, therefore, both understandable and appropriate. Cf: 2002 Leniency Notice.

1667 Cf: 2002 Leniency Notice.

disincentive for potentially cooperating firms. Before deciding whether to go down the leniency path, companies had to evaluate the question whether the possible benefits of the Leniency Programme could surpass the disincentive deriving from the risk of civil liability.

4.1.3. The application of the 1996 Leniency Notice

The introduction of the first Leniency Programme in 1996 was a tremendous development in the area of cartel enforcement. Although the publication of the Notice played an important role creating incentives for companies to come forward, having a programme in place was not enough for the system to (completely) succeed. To be motivated to take part in the leniency race, companies needed indications that the programme would also work effectively in practice. The real test was, therefore, how was the system interpreted and applied by the Commission: would applicants who were first to report an infringement, in effect, obtain immunity? Was the Commission inclined to grant other type of discounts in exchange of simple “cooperation”? Furthermore, an analysis of the published decisions of the Commission provides the necessary guidance with respect to what applicants could expect from the 1996 Leniency Notice.

4.1.3.1. An overview of cases and leniency discounts

On the basis of the 1996 Leniency system, the Commission granted some type of lenient treatment in 37 cartel decisions to (approximately) 178 undertakings in total. These Commission’s decisions are listed below in Table 1. The table shows how much leniency discount was granted in each case and the number of undertakings receiving such reductions. As the table illustrates, individual reductions varied considerably: while numerous companies received total immunity from fines or a considerably high discount under sections B or C in view of the crucial importance of their cooperation, other applicants did not cooperate significantly (or cooperated only passively by not contesting the facts) and were granted a more limited reduction under section D.

1669 See e.g. J. CARLE, “The new leniency” 268; M. JEPHCOTT, “The European” 380.
1670 The question regarding the interaction between the Leniency Notice and private enforcement in cartel cases is analysed in more detail below.
1671 I.e. a discount in fines under sections B, C or D of the 1996 Notice.
1672 As to the applicability of the 1996 leniency regime, it should be noted that the Commission’s Notice applied only in respect of cooperation taking place after its publication on 18 July 1996. However, in respect of cooperation that took place before that date the Commission applied the Notice by analogy in a number of cases (supra section 3 of this Chapter). Those cases are Commission Decision of 21 January 1998, Case IV/35.814 - Alloy surcharge [1998] OJ L 100/55; Commission Decision of 14 October 1998, Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd, [1999] OJ L 076/1 and Commission Decision of 16 May 2000 (IV/34.018 - FETTCSA) [2000] OJ L 268/1). From 14 February 2002, the 2002 Notice replaced the 1996 Notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice (para 28, 2002 Notice). This explains that the 1996 Notice was applied even after the publication of the 2002 and 2006 Notices.
1673 The dates in the table correspond to those for the adoption of the decision, which will normally be a few years after the leniency application(s).
1674 See also commenting on this aspect F. ARBAULT AND F. PEIRO, “The Commission’s new” 15. It should be noted that the comments of these authors are based (only) on 16 cartel decisions, i.e. the number of decisions applying the 1996 notice that had been adopted by June 2002. Interestingly, these authors also highlight that the total amount of the fines imposed in all these 16 cases is EUR 2 240 million. The overall reductions of fines granted in these cases represent almost EUR 1 400 million. Based on these ciphers, they conclude that the value of the non-imposed fines corresponds to an average reduction per case of approximately 38%, “showing that the leniency policy provides tangible benefits to those companies that choose to co-operate with the Commission”. This reasoning is, however, rather simplistic as calculating the average leniency discount on the basis of the not imposed fines does not appear appropriate or correct. To elaborate on this point: although 38% does indeed correspond to the percentage of the value of fines which should
<table>
<thead>
<tr>
<th>Date</th>
<th>Decision</th>
<th>Discount granted under</th>
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<tbody>
<tr>
<td>January 1998</td>
<td>Alloy Surcharge</td>
<td>40%: 2 (firms), 10% : 4</td>
</tr>
<tr>
<td>October 1998</td>
<td>British Sugar</td>
<td>50%: 1, 10%: 3</td>
</tr>
<tr>
<td>October 1998</td>
<td>Pre-insulated pipes</td>
<td>30%: 5, 20%: 3</td>
</tr>
<tr>
<td>December 1998</td>
<td>Greek Ferries</td>
<td>45%: 1, 20%: 6</td>
</tr>
<tr>
<td>December 1999</td>
<td>Seamless Steel Tubes</td>
<td>40%: 1, 20%: 1</td>
</tr>
<tr>
<td>May 2000</td>
<td>FETTCSA (Maritime Transport)</td>
<td>10%: 15</td>
</tr>
<tr>
<td>June 2000</td>
<td>Amino acids (Lysine)</td>
<td>50%: 2, 30%: 2, 10%: 1</td>
</tr>
<tr>
<td>July 2001</td>
<td>Graphite Electrodes</td>
<td>70%: 1</td>
</tr>
<tr>
<td>July 2001</td>
<td>SAS-Maersk Air</td>
<td>25%: 1, 10%: 1</td>
</tr>
<tr>
<td>October 2001</td>
<td>Sodium Gluconate</td>
<td>80%: 1</td>
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<td>November 2001</td>
<td>Vitamins</td>
<td>100%: 1</td>
</tr>
<tr>
<td>December 2001</td>
<td>Belgian Brewers</td>
<td>50%:1, 30%: 1, 10%: 4</td>
</tr>
<tr>
<td>December 2001</td>
<td>Luxembourg Brewers</td>
<td>100%: 1</td>
</tr>
<tr>
<td>December 2001</td>
<td>Citric acid</td>
<td>90%: 1</td>
</tr>
<tr>
<td>December 2001</td>
<td>Zinc Phosphate</td>
<td>50%: 1,40%: 1, 10%: 4</td>
</tr>
<tr>
<td>December 2001</td>
<td>Carbonless Paper</td>
<td>100%: 1</td>
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<tr>
<td>June 2002</td>
<td>Austrian Banks</td>
<td>10%: 8</td>
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<tr>
<td>July 2002</td>
<td>Methionine</td>
<td>100%: 1</td>
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<tr>
<td>July 2002</td>
<td>Industrial and medical gases</td>
<td>25%: 2, 10%: 2</td>
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<tr>
<td>October 2002</td>
<td>Auction Houses</td>
<td>100%: 1</td>
</tr>
<tr>
<td>November 2002</td>
<td>Methylglucamine</td>
<td>100%: 1</td>
</tr>
<tr>
<td>November 2002</td>
<td>Plasterboard</td>
<td>40%: 1, 30%: 1</td>
</tr>
</tbody>
</table>

have been imposed (EUR 1 400 million) compared to the 62% which has effectively been imposed, it is unclear how the value of the not imposed fines corresponds to an average percentage of leniency discount per case. This assumption seems to overlook the fact that each individual fine is calculated based on the total turnover of each undertaking. Accordingly, a discount of 100% can consist in the non-imposition of a fine that could have amounted to €10 or to €1000 million. Given that not each “not-imposed fine” represents necessarily the same discount percentage, it appears incorrect to (only) use this criterion to calculate the average leniency discount.
<table>
<thead>
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<th>50%:</th>
<th>40%:</th>
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<td>March 2011</td>
<td>Hard Haberdashery: Fasteners[^1673]</td>
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4.1.3.2. The application of section B

The Commission granted complete immunity from fines under section B in a total of 17 cartel cases.^[1676]^[1677]

[^1673]: In this case both the 1996 Notice as well as the 2002 Notice were applied. Prym Group and Coats Group applied for leniency in November 2001 in relation to zip fasteners. Since William Prym/Eclair Prym and Coats approached the Commission before 14 February 2002 these applications are dealt with under the 1996 Leniency Notice. Three years later, in November 2004, William Prym submitted a leniency application concerning ‘other fasteners’ and completed the group’s initial leniency application concerning the sector of zip fasteners. While the (new) application concerning ‘other fasteners’ is addressed under the 2002 Notice, Prym Group’s completion of its leniency application relating to the zip fasteners sector is assessed under the 1996 Leniency Notice. See Commission Decision of 19 September 2007 (Case COMP/E-1/39.168 – PO/Hard Haberdashery: Fasteners) [2009] OJ C 47/8, paras 597-598.

[^1676]: For the effects of this discussion a cartel case concerns a single proceeding against various undertakings and may involve more than one infringement.

[^1677]: See also commenting on the application of section B of the 1996 Notice e.g. D. GERADIN AND D. HENRY, “The EC Fining” 44; A. STEPHAN, “An empirical”; A. RILEY, “Cartel Whistleblowing.”
The first case in which a company benefited from a 100% reduction was the *Vitamins* cartel, which dates from November 2001. In this case, Rhone Poulenc (Aventis) was the first to provide the Commission “decisive evidence” on the cartel affecting the Vitamin A and E markets and satisfied all the other conditions to obtain ‘a very substantial discount’.\footnote{Case COMP/E-1/37.512 — *Vitamins* [2003] OJ L 6/1, paras 738-742.} Interestingly, Aventis also participated in the *Methionine* cartel and was also rewarded with immunity in this case.

In the *Luxembourg Brewers* cartel (2001), the Commission was able to launch the investigation because Interbrew (a parent company of Brasserie de Luxembourg) revealed the existence of the cartel during the investigation in the *Belgian Brewers* case, concerning the Belgian beer market.\footnote{However, it is noteworthy that in the *Vitamins* case, Aventis entered the illegal agreements in September 1989 and applied for leniency on 12 May 1999 (Case COMP/E-1/37.512 — *Vitamins* [2003] OJ L 6/1, paras 124 and 613). In *Methionine*, the infringement started in February 1986 and lasted until February 1999. On 26 May 1999, Aventis submitted to the Commission a statement admitting its involvement in a cartel to fix prices and allocate quotas for methionine and invoking the Notice on the non-imposition or reduction of fines in cartel cases. Case C.37.519 — *Methionine* [2003] OJ L 255/1, paras 52 and Article 1 of this decision. Taken into account this information, it cannot be concluded that the fact that Aventis was granted immunity “encouraged” this firm to participate in a different infringement.} The Commission found that Brasserie de Luxembourg fulfilled the conditions of section B and received total immunity from fines.\footnote{See Commission, Press Release IP/01/1739 of 5 December 2001, “The Commission fines brewers in market sharing and price fixing cartels on the Belgian market”. In *Belgian Brewers*, Interbrew did not obtain an increased reduction in fines for the submission of this additional information. This undertaking obtained a discount of 30% (Case IV/37.614/F3 POInterbrew and Alken-Maes [2003] OJ L 200/1, paras 323-325). In this context, it has been argued that the Commission may have missed an opportunity to introduce a “2-1 programme”. According to this concept when a firm that is cooperating with a cartel investigation in one market, reveals its participation in a cartel in a second market, it is granted complete immunity for its activities in the second market and, in addition, it receives an “extra reduction” for its co-operation in the first market (D. GERADIN AND D. HENRY, “The EC Fining” 44). Arguably, granting an additional discount for this special type of cooperation may serve to enhance the detection potential of leniency programmes. At the same time, the need to grant such discount is also questionable. It should be kept in mind that each discount granted under the leniency system should be compensated by increasing the detection probabilities and, hereby, overall deterrence. The question, therefore, is: what are the probabilities of discovering cartels in second markets once a company is already cooperating as regards a cartel in a first market? Given that firms are generally required to provide their full cooperation to obtain a leniency discount, it appears unlikely that the participation of the firm in a cartel in a second market can be easily concealed. Even if there is no additional discount for disclosing the existence of a second cartel, it is in the interest of companies to provide the Commission with such information under the framework of the leniency regime. In addition, companies must keep in mind that keeping information from the Commission may not only lead to losing a discount for the first cartel. Depending on the circumstances of the case, this can be considered as an obstruction of the investigation and lead to procedural fines under Article 23 of Regulation 1/2003.} Sappi was also granted immunity for its cooperation in the *Carbonless Paper* case (2001). The evidence was provided by Sappi before any investigation into the cartel had commenced and consisted essentially of minutes of cartel meetings, employee statements on the functioning of the cartel (including descriptions of cartel meetings, persons present and agreements reached), documentation on price increases and information on the market. The Commission qualified this evidence as decisive proof on existence of the cartel.\footnote{Commission Decision of 5 December 2001 (Case COMP/37.800/F3 — *Luxembourg Brewers*), [2002] OJ L 253/21, paras 102-108.}

\footnote{Case COMP/E-1/36.212 — *Carbonless paper* [2004] OJ L 115/1, paras 436-443.}
In 2002, complete immunity was granted in Auction Houses, Methylglucamine, Speciality Graphites and Nucleotides. This last case is noteworthy because the Commission adopted a more flexible approach as regards the interpretation of the concept of ringleader. The Commission particularly observed in Nucleotides that, although ‘there were elements in the file which indicated that Takeda may have played, on certain occasions, a coordinating role in the cartel, Takeda did not compel other companies to take part in the cartel and did not act as an instigator’. Since Takeda satisfied all the conditions of section B, it obtained complete fine immunity.

In Sorbates (2003), two companies, Hoechst and Chisso, claimed to be the first undertaking to adduce decisive evidence. Hoechst had first provided the Commission with an oral description of the cartel’s activities, and only two weeks later Chisso provided an oral description of the cartel together with documentary evidence. The Commission considered, however, that the information provided by Hoechst could not be considered as decisive evidence of the cartel’s existence. Although Hoechst referred to the product market, the producers and respective market-shares, the US proceedings and the cartel’s activities, the information submitted was imprecise, not sufficiently detailed and to a certain extent even misleading. Therefore, it did not allow the Commission to establish the existence of the alleged cartel. In contrast, the evidence provided by Chisso was extensively used to prove the infringement. This evidence consisted, in particular, of handwritten notes taken during a number of cartel meetings. The Commission declared that ‘[t]he oral description of the cartel’s activities allowed [it] to put the documents in their real context. The information provided by Chisso enabled the Commission to establish the existence, content and the participants of most of the cartel meetings’. The Commission concluded that Chisso fulfilled all the conditions set out in section B and granted immunity.

In Electrical and mechanical carbon and graphite products (2003), immunity was granted to Morgan, the first company to adduce decisive evidence of the cartel’s existence. The decisive nature of the evidence was clear given the ‘voluminous, highly incriminating documents provided by Morgan, in particular the contemporaneous reports of Technical Committee and local meetings of the cartel which covered the main activities of the cartel, the entire infringement period and most meetings within that period’.

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1686 Case C.37.667 — Speciality Graphite [2006] OJ L 180/20, paras 520-522. In this case the Commission commented inter alia that ‘[t]he information provided by UCAR enabled [it] to establish existence, content and participants of several cartel meetings in both the isostatic and extruded specialty markets, and the existence of collusive contacts during the periods subject to these proceedings’ (para 521).
1688 In all these cases the Commission limited its analysis to confirm that all the conditions of section B were fulfilled.
1689 Case COMP/C.37.671 — Flood flavour enhancers OJ [2004] L 75/1, para 286.
1691 Ibid, para 439.
1692 Ibid, paras 443-444.
1693 The Commission, however, acknowledged the value of Hoechst’s information by stating that ‘the information provided to the Commission by Chisso was not the only evidence used to prove the infringement in this case’ (ibid, para 428). The Commission further stated that ‘[t]he submission by an undertaking of “decisive evidence” within the meaning of Sections B (and C) of the Notice, as Chisso did in this case, does not mean that other undertakings may not adduce evidence that materially contributes to establishing the existence of the infringement. In this context, it is not relevant if other undertakings have provided the Commission with information – which does not constitute decisive evidence - before or after the submission of the “decisive evidence” of the cartel’s existence’. Finally, Hoechst was granted a 50% reduction under section D (see para 451).
1695 Ibid, para 432.
In *Industrial bags* (2005), BPI was first to provide evidence on the cartel, consisting in statements by employees and documents dating from the time in which the infringement was committed. This information led the Commission to organise the inspections on the premises of 13 undertakings. However, several undertakings claimed that BPI continued to take part in the infringement after reporting the cartel to the Commission, thereby contravening one of the conditions of section B. Since no material evidence was adduced, the Commission did not accept such allegations. BPI finally benefited from a 100% reduction.\(^{1697}\)

Other cases where immunity was granted include *Organic peroxide* (2003),\(^{1698}\) *Copper Plumbing Tubes* (2004),\(^{1699}\) *Needles* (2004),\(^{1700}\) *Monochloroacetic Acid* (2005),\(^{1701}\) *Fittings* (2006)\(^{1702}\) and *Dutch beer market* (2007).\(^{1703}\)

In addition to the immunity concessions, the Commission also granted very substantial reductions under section B to two companies in 2001.

In particular, Fujisawa received a discount of 80% in the *Sodium Gluconate* cartel and Cerestar obtained a reduction of 90% in *Citric Acid*.\(^{1704}\) These undertakings did not obtain complete immunity because the Commission considered that their cooperation did not take place entirely on a spontaneous basis. Although they were both first to cooperate and to provide valuable information on the cartel before an investigation had been conducted, they approached the Commission only after having received a specific request for information.

The application of section B illustrates that the Commission administered the policy in a forthright manner which favoured awarding immunity or very high fine discounts to applicants who were first


\(^{1698}\) Commission Decision of 10 December 2003 relating (Case COMP/E-2/37.857— *Organic Peroxides*) [2005] OJ L 110/44, paras 502-503. In this case Akzo, the immunity recipient, was the first member to provide evidence in a company statement and added a number of annexes, which were very useful to show the existence, functioning, duration and implementation of the agreement as well as the sub arrangements.

\(^{1699}\) Case COMP/E-1/38.069 - *Copper Plumbing Tubes* [2006] OJ L 192/21, paras 39-40. Mueller was the first firm that informed the Commission (in January 2001) about the existence of the Copper Plumbing Tube in the 1990s. The evidence, which was provided prior to the initiation of the investigation, enabled the Commission not only to establish the existence, content and the participants of a number of cartel meetings, but also to undertake inspections. As the rest of the conditions of section B were fulfilled Mueller obtained a 100% reduction.

\(^{1700}\) Commission Decision of 26 October 2004 (Case COMP/F-1/38.338 — PO/Needles) [2009] OJ C 147/23, paras 336-338. In this case Entaco was the only leniency applicant and, thus, the only undertaking to inform the Commission of the existence of the market sharing agreements and to bring decisive evidence. In its decision the Commission clearly stated that although Entaco participated actively in the market sharing agreements, this undertaking allowed the Commission to find out about the infringements (para 336).

\(^{1701}\) Case No C.37.773 — *MCAA* [2006] OJ L 353/12, paras 328-331. The Commission found that Clariant met all the conditions of point B of the Notice and that it qualified for the non-imposition of any fine. Clariant was the first member of the cartel to provide evidence in statements and documents on the agreement which proved to be very useful in demonstrating the existence, functioning, duration and implementation of the cartel agreement.

\(^{1702}\) Case COMP/F-1/38.121 – *Fittings* [2007] OJ L 283/63, paras 833-835. In this case Mueller, obtained immunity for having provided evidence which enabled the Commission to establish the existence, content and the participants of a number of cartel meetings and other contacts as well as to undertake inspections. The Commission noted that Mueller continuously provided the Commission with all relevant information, documents and evidence available, and maintained full cooperation throughout the investigation.

\(^{1703}\) Commission Decision of 18 April 2007 (Case COMP/B-2/37.766 – *Nederlandse biermarkt*), paras 491-492. (The non-confidential version of this decision is only available in Dutch). In this decision InBev obtained immunity from fines as it fulfilled all the conditions stipulated under section B of the leniency system. Also in this case the Commission stressed that InBev had provided all the evidential material in its possession and that it cooperated continuously throughout the whole investigation.


\(^{1705}\) Case No COMP/E-1/36 604 — *Citric acid* [2002] OJ L 239/18, paras 295-311.
to provide sufficient evidence with respect to the existence of the cartel. In turn, this approach motivated firms to quickly come forward and reveal infringements.¹⁷⁰⁶

Furthermore, the decisions adopted by the Commission under the 1996 Notice also clarify which type of evidence had to be provided by firms in order to obtain immunity. Evidence that was new to the Commission and could be used to establish the existence, content, functioning, duration and the participants of the collusive activity was, as a general rule, regarded as decisive evidence.¹⁷⁰⁷ This evidence could, for instance, consist of the minutes of cartel meetings, statements on price increases and the general functioning of the cartel and information on the market.¹⁷⁰⁸ It also appears that, although oral statements were accepted, the Commission attached greater value to documentary evidence than to oral descriptions of the cartel activities.¹⁷⁰⁹ As regards the decisive nature of the evidence, the Commission also stated its view that evidence has a clear decisive nature when it is highly inculpating and contemporaneous to the time in which the infringement was committed.¹⁷¹⁰ In contrast, it is important to emphasise that the Commission was not willing to grant immunity to undertakings which provided information which was imprecise, not sufficiently detailed and/or misleading.¹⁷¹¹ Moreover, the Commission was also reluctant to grant full immunity when undertakings did not cooperate fully spontaneously.¹⁷¹² Finally, the published decisions illustrate that towards the last years of application of the 1996 system, the Commission adopted a more flexible approach as regards the interpretation of the requirements regarding the ringleader exclusion.¹⁷¹³

With respect to the general application of the Notice, it can be observed that in the first nine published decisions, covering a period from 1996 to mid-2001, no discounts under section B were granted.¹⁷¹⁴ To be more precise, it appears that in five of these decisions the Commission had already launched an investigation and, therefore, the application of section B was no longer possible.¹⁷¹⁵

¹⁷⁰⁶ See further infra section 4.1.4 of this Chapter.
¹⁷¹³ Case COMP/C.37.671 — Flood flavour enhancers OJ [2004] L 75/1, para 286.
¹⁷¹⁴ During this period the highest reduction, consisting in 70% discount, was granted under section C. That case concerned Showa Denko in Graphite Electrode. See further supra Table 1.
¹⁷¹⁵ These cases concern Alloy surcharge (Case IV/35.814 - Alloy surcharge [1998] OJ L 100/55, paras 94-95), Pre-Insulated Pipe Cartel (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, paras 20-22), Greek Ferries (IV/34466 - Greek Ferries) [1999] OJ L 109/24, para 1), Seamless steel tubes (Case IV/E-1/35.860-B seamless steel tubes) [2003] OJ L 140/1) and FETTCSA (IV/34.018 - FETTCSA) [2000] OJ L 268/1). In contrast, (only) in two decisions, more precisely, in British Sugar and Amino Acids, the infringements were brought to the Commission’s attention at a time when the Commission had not taken any investigative steps. However, the Commission considered that the immunity applicant concerned did not fulfil all the requirements of section B and, accordingly, did not grant immunity in these cases. In particular in British Sugar the Commission found that, after the initial revelations, Tate & Lyle did not maintain continuous and complete cooperation with the Commission throughout the investigation (See Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd., [1999] OJ L 76/1, paras 216-218). In Amino Acids, “[t]he Commission consider[ed] that Ajinomoto, at least by negligence, did not provide it with all the relevant information and all the documents and evidence available to it at the time when it started its cooperation with the
This suggests that, during the first years of application of the 1996 system, cartel participants were not particularly inclined to approach the Commission on their own initiative and denounced the existence of the cartel, before the Commission had started to investigate. During this period, companies seemed more prone to cooperate in the investigation once the Commission was already aware of the existence of the cartel and the investigation had started. In this sense, the 1996 Leniency Programme did arguably not contribute to the detection of illegal collusive agreements in an optimal manner, at least during the first years of application of the system. In contrast, the increasing number of immunity concessions granted under the 1996 Leniency Notice from the second half of 2001, clearly indicates that the motivation of companies to voluntarily come forward and cooperate with Commission in the investigation of the case had considerably increased. The enhanced popularity of the system is probably linked, on the one hand, to the more flexible approach adopted by the Commission as regards the interpretation of certain requirements of section B and, on the other hand, to the additional certainty created by the experience acquired by the Commission in the application and interpretation of the system. While, in effect, at the time of the adoption of the 1996 system, there was considerable ambiguity as regards the interpretation of a number of conditions, the publication of the Commission’s cartel decisions where the Notice had been applied certainly had a clarifying effect. Once the leniency conditions had been applied and interpreted by the Commission, firms gained additional confidence and were more ready to rely on the system. As a consequence, undertakings also felt more inclined to apply for leniency even when the existence of an infringement was unsuspected by the Commission.

4.1.3.3. The application of section C

Section C – which allowed for 50-75% reductions of fines – has only been applied once, in Graphite electrodes (2001). In Graphite electrodes (2001), SDK was the first company to submit substantial and decisive evidence on the cartel, including private reports and several price lists. This evidence assisted the Commission significantly in establishing the facts on which the final decision was based and, therefore, SDK received 70% reduction.

1716 See commenting on this point F. ARBAULT AND F. PEIRO, “The Commission’s new” 17. These authors observe that ‘[o]ver 60% of the cases in which the 1996 notice has been applied were already under investigation in either the EU or in another jurisdiction when the first application was filed’. A. STEPHAN, “An empirical”. See further analysing the method that was used to detect cartels during the period of application of the 1996 Notice in infra section 4.1.4 of this Chapter.

1717 See further infra section 4.1.4 of this Chapter. See also C. R. A. SWAAK AND D. J. ARP, “A tempting” 11-12. These authors commented that the infrequent granting of immunity under the 1996 indicated that the ‘Leniency Notice, as written and implemented, did not provide prospective amnesty applicants with full protection from fines in return for disclosing violations, and this reduced incentives to apply for leniency under the EC policy’.

1718 The fact that the Commission applied the Leniency in a more flexible manner was probably connected to the preparation of the revision of the Notice. See also M. JEPHCOT, “The European” 380, commenting that ‘[t]he 1996 Notice was subject to much criticism and the fact that it was not followed rigidly by the Commission towards the end of its tenure adds weight to criticisms levied against it’. C. R. A. SWAAK AND D. J. ARP, “A tempting” 11.

1719 See supra section 4.1.2 of this Chapter.

1720 See also A. RILEY, “Cartel Whistleblowing” 84. This author indeed concludes that the application of the Notice in the second half of 2001 indicates that some firms at least see incentives to apply for leniency sufficiently early.

The scarce application of section C is directly connected to the nature of the requirements contained in this section. In effect, in order to benefit from a 50%-75% reduction under section C, a company had to satisfy the same conditions of section B (points (b) to (e)), while hoping that the investigation that had been undertaken by the Commission had failed to provide sufficient evidence to initiate the procedure leading to a decision.\textsuperscript{1722}

From the moment a company was first to submit decisive evidence on the cartel existence and qualified for leniency under section B, the rest of the cartel parties were immediately disqualified under section C. In fact, even if a company was first to submit decisive evidence before the Commission had conducted an inspection, but failed to satisfy another requirement of section B, the rest of leniency applicants were still disqualified under section C, because they were not first to submit decisive evidence.\textsuperscript{1723} In addition, in the few cases where companies applied for leniency once the Commission had launched an investigation, they were often disqualified under section C because the investigation on the premises of the parties of the cartel provided sufficient grounds for initiating the procedure leading to a decision.\textsuperscript{1724}

\textsuperscript{1722} See further supra section 4.1.2 of this Chapter.

\textsuperscript{1723} In the following cases the fact that undertaking was first to submit decisive evidence automatically disqualified the rest of leniency applicant under section C. These cases are Amino Acids (Case COMP/D.36.545/F3 — Amino Acids [2001] OJ L 152/24, para 429); Alloy surcharge (Case IV/35.814 - Alloy surcharge [1998] OJ L 100/55, para 95. This decision states that ‘Avesta ended the infringement on 1 November 1996, but it was not the first to supply decisive evidence of the existence of the agreement. Such evidence was supplied in particular by Outokumpu at the inspection on 17 October 1996’); British Sugar (Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd, [1999] OJ L 76/1, para 216. It is interesting to mention that in this case, Tate & Lyle met all the conditions of section B except for the cooperation obligation. As a result, not only Tate & Lyle could not benefit from section B, but the rest of applicant could not benefit from section C). Citric acid (Case No COMP/E-1/36 604 — Citric acid [2002] OJ L 239/18, paras 54-55, para 311. This decision clearly states that ‘[n]either ADM, Haarmann & Reimer, Hoffmann-La Roche, nor Jungbunzlauer were the first to provide the Commission with decisive information on the citric acid cartel, as required under point (b) of Section B of the Leniency Notice. Consequently none of those undertakings meet the conditions set out in Section C of the leniency Notice’), Carbonless paper (Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 445. In Carbonless paper: ‘[t]he Commission consider[ed] that at the time when Mougeot started to cooperate with it, Sappi had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’); Methionine (Case C.37.519 — Methionine [2003] OJ L 255/1, para 342: ‘[n]either Nippon Soda or Degussa were the first to provide the Commission with decisive information on the methionine cartel, as required under point (b) of section B of the Leniency Notice’). Methylicgalamine (Case COMP/E/2/37.978/Methylicgalamine [2004] OJ L 38/18, para 273, ‘Aventis Pharma or Rhône-Poulenc Biochimie were not the first to provide the Commission with decisive information on the methylmaleicameline cartel, as required under point (a) of Section C of the Leniency Notice’. Specialty Graphite (Case C.37.667 — Specialty Graphite [2006] OJ L 180/20, para 523-526); Case COMP/C.37.671 — Flood flavour enhancers OJ [2004] L 75/1, para 288: ‘Daesang, Cheil and Ajinomoto request the benefit of a reduction in fine in accordance with Section C of the Leniency Notice. At the time when Daesang, Cheil and Ajinomoto started to cooperate with the Commission, Takeda had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’), Carbonless paper (Case COMP/E/2/37.978/Methylicgalamine [2004] OJ L 38/18, para 273, ‘Aventis Pharma or Rhône-Poulenc Biochimie were not the first to provide the Commission with decisive information on the methylmaleicameline cartel, as required under point (a) of Section C of the Leniency Notice’. Specialty Graphite (Case C.37.667 — Specialty Graphite [2006] OJ L 180/20, para 523-526); Case COMP/C.37.671 — Flood flavour enhancers OJ [2004] L 75/1, para 288: ‘Daesang, Cheil and Ajinomoto request the benefit of a reduction in fine in accordance with Section C of the Leniency Notice. At the time when Daesang, Cheil and Ajinomoto started to cooperate with the Commission, Takeda had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’), Carbonless paper (Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 445. In Carbonless paper: ‘[t]he Commission consider[ed] that at the time when Mougeot started to cooperate with it, Sappi had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’), Carbonless paper (Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 445. In Carbonless paper: ‘[t]he Commission consider[ed] that at the time when Mougeot started to cooperate with it, Sappi had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’), Carbonless paper (Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 445. In Carbonless paper: ‘[t]he Commission consider[ed] that at the time when Mougeot started to cooperate with it, Sappi had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’), Carbonless paper (Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 445. In Carbonless paper: ‘[t]he Commission consider[ed] that at the time when Mougeot started to cooperate with it, Sappi had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’), Carbonless paper (Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 445. In Carbonless paper: ‘[t]he Commission consider[ed] that at the time when Mougeot started to cooperate with it, Sappi had already submitted sufficient information to establish the existence of the cartel. Consequently, the Commission concludes that Mougeot’s co-operation does not meet the conditions laid down in point (b) of Section B of the Leniency Notice and that it does not, therefore, qualify for a substantial reduction in the fine pursuant to Section C of the Leniency Notice’).
4.1.3.4. The application of section D

Section D, stipulating reductions from a minimum of 10% to a maximum of 50%, has from the outset (in 1998) till the last application of the Notice (in 2011) been applied most frequently.\footnote{1725} Some of the most interesting decisions are (briefly) commented below.

*Alloy Surcharge* (1998) was the first decision in which the Commission applied the 1996 policy.\footnote{1726} In this case, although none of the undertakings qualified for a discount under section B or C,\footnote{1727} two undertakings, Usinor and Avesta, acknowledged the existence of the concerted action and cooperated extensively during the investigation.\footnote{1728} In particular, Avesta examined its files carefully in order to trace any possible contacts and put an end to the infringement by radically changing its method of calculating the alloy surcharge.\footnote{1729} Usinor, on the other hand, was the first to inform the Commission of a meeting in Madrid. Still, these undertakings only provided cooperation after the issuance of the statement of objections and, therefore, each firm obtained a reduction of 40%.\footnote{1730} Other undertakings, including Krupp Thyssen and Acerinox, only cooperated in a more limited manner as they only provided documentary evidence that was already in the possession of the Commission, and they did not acknowledge the infringement. For these firms a

investigation which failed to provide sufficient grounds for initiating proceedings under Article 3 of Regulation No 17 (Section C); *Zinc Phosphate* (Case COMP/E-1/37.027 - Zinc phosphate) [2003] OJ L 153/1, para 353: ‘[t]he Commission collected decisive evidence of the cartel’s existence before any undertaking filed an application under the Leniency Notice. None of the addressees of this Decision was therefore in a position to fulfill condition (b) of Section B of the Leniency Notice. Section C of the Leniency Notice is therefore not applicable’; *Industrial Tubes* (Case COMP/E-1/38.240 – *Industrial tubes*) [2004] OJ L 125/50, para 400: ‘Outokumpu does not qualify for a substantial reduction from 50% to 75% […], as the Commission investigations ordered by decision provided sufficient grounds for initiating the procedure leading to a decision in this case. The inspections produced direct evidence on the existence of the cartel primarily in the period from May 1994 to May 1998. While the evidence and indices before and after that period, including documents concerning the first known cartel meeting in May 1988, were only sporadic, the Commission considers that it could have opened proceedings in this case and established a continuous infringement from 1994 to 1998 without Outokumpu’s cooperation’; *Industrial and medical gases* (Case COMP/E-3/36.700 — *Industrial and medical gases*) [2003] OJ L 84/1, para 453: ‘[t]hese conditions [of section C] are not met in the present case, as the investigation ordered by decision on the premises of the parties of the cartel has not failed to provide sufficient grounds for initiating the procedure leading to a decision’; *Copper Plumbing tubes* (Case COMP/E-1/38.069 - *Copper Plumbing tubes*) [2006] OJ L 192/21, para 40: ‘Mueller provided occasional evidence for the time before 1997 and disclosed the existence of the cartel for 1997 until 2001. Together with the documents collected during the inspections, the Commission had sufficient evidence to initiate the procedure leading to a decision against all parties involved. Therefore none of the other parties qualified for a reduction under Section C of the 1996 Leniency Notice’; *Fittings* (Case COMP/F-1/38.121 – *Fittings*) [2007] OJ L 283/63, para 841: ‘[t]he Commission investigations ordered by decision provided sufficient grounds for initiating the procedure leading to the Decision in this case. The inspections produced direct evidence on the existence of the cartel in the period starting in 1988 and ending in 2001’; Case COMP/E-1/39.168 – PO/Hard Haberdashery: *Fasteners*, [2011] OJ C 210/26, paras 606, 619 and, 631: ‘[t]he Commission investigations ordered by decision provided sufficient grounds for initiating the procedure leading to a decision in this case. The inspections produced evidence of the meeting between Coats, YKK and Prym on 2 June 1999, where the parties agreed on the methodology to establish minimum prices on standard zip fastener products. The Commission also had evidence that the follow-up meeting on 29 September 1999 between the companies was scheduled. The Commission considers that it could have opened proceedings in this case’.

\footnote{1725} The Commission granted discounts on the basis of this section in 35 cartel decisions. See further *supra* (Table 1) and *infra* section 4.1.4 of this Chapter. See also commenting on the application of this section e.g. A. RILEY, “Cartel Whistleblowing” 84.

\footnote{1726} Case IV/35.814 - *Alloy surcharge* [1998] OJ L 100/55.

\footnote{1727} *Ibid*, paras 94-95. In effect, none of the undertakings reported the agreement before the Commission had started its investigation. Furthermore, only one firm (Avesta) ended the infringement timely but it was not the first to supply decisive evidence.

\footnote{1728} *Ibid*, para 97.

\footnote{1729} It is interesting to point out that in this case the Commission emphasised that this initiative constituted a major commercial risk. *Ibid*, para 97. See further on this issue *supra* section 4.1.2 of this Chapter.

reduction of 10% was granted. However, with respect to Krupp Thyssen and Acerinox, the (now) General Court, found on appeal that the Commission had misapplied section D of the Notice and infringed the principle of equal treatment. In particular, the Court found that since the Commission had posed the same question simultaneously to all the cartel participants, the extent of the cooperation provided by all the parties was comparable, in so far as those firms provided the Commission, at the same stage of the procedure, with similar information. Accordingly, the fact that one of those undertakings was the first to acknowledge the facts in response to the questions put by the Commission could not be an objective reason for treating them differently. As a result the General Court ruled that ‘[t]he appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors, such as the order in which they are questioned by the Commission’. In *British Sugar* (1998), Tate & Lyle cooperated significantly with the Commission by sending the two self-incriminating letters and met all the conditions set out in section B, except for the requirement regarding continuous and complete cooperation. With regard to the latter, the Commission found that this obligation was not respected because Tate & Lyle had retracted statements which it had made earlier during the proceeding. As a result, the Tate & Lyle could not benefit from any favourable treatment under section B or of section C of the Notice. Finally, Tate & Lyle obtained the maximum reduction of 50% under section D. On appeal, however, the Court considered that Tate & Lyle had simply provided a different qualification of the facts, rather than challenging the facts previously admitted or retracting statements made earlier. In addition, the Court further found that the Commission cannot establish a failure to cooperate if an undertaking contests an element of the infringement which the Commission has not been able to prove in the decision. This is the case even if the inability to prove the infringement is the result of a retraction of facts previously admitted by an undertaking.

In *Pre-insulated pipes* (1998), five firms (ABB, Løgstør, Tarco, Brugg and KWH) obtained a 30% reduction, while three firms (Pan-Isovit, Starpipe and Ke-Kelit) received a 20% reduction. ABB was qualified as ‘the ringleader and instigator of the cartel’ and, thus, was unable to meet the requirements of sections B or C. However, the Commission declared that even if ABB was responsible for the continuation of the cartel for nine months after the investigation, it cooperated at the earlier of the stages of the case by providing information concerning the origins of the cartel.

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1734 Ibid, para 215.
1735 Ibid, paras 216-217.
1736 Ibid, para 218.
1738 Case No IV/55.691/E-4: - *Pre-Insulated Pipe Cartel* [1999] OJ L 24/1, paras 177-183. According to the Commission, all these companies provided important information which contributed substantially to establishing important aspects of the case.
1739 Ibid, para 180. In this regard, the Commission justified the lower reduction because ‘Pan-Isovit and Starpipe were [...] on the borderline between active cooperation with the Commission and merely admitting what could not be denied in their responses to enquiries made under Article 11 of Regulation No 17. These two undertakings did not contest the essential factual allegations made against them, and although Pan-Isovit denied that its participation in meetings before 1994 had constituted an infringement of Article 85 the Commission will not penalise it for this position’. With respect to Ke-Kelit, the Commission only clarified that this firm ‘receive[d] a reduction of 20 % as it did not contest the essentials of the statement of objections’ (para 183).
1740 In this same case, no reduction for cooperation was granted to two other leniency applicants Henss/Isoplus and Sigma. The Commission found that although Henss/Isoplus ultimately provided documentation which added to the evidence already in its possession, it is implicit that to benefit from a reduction, an undertaking must act in good faith and not attempt to deceive the Commission on an important aspect of the case, as did Henss/Isoplus. Sigma, made no express admissions. Case No IV/35.691/E-4: - *Pre-Insulated Pipe Cartel* [1999] OJ L 24/1, paras 180 and 183.
1741 Ibid, paras 172-173.
which was useful to establish the relevant facts. Finally, ABB received a 30% reduction, instead of the full 50% reduction available under section D, because its cooperation was only provided after the Commission had sent detailed requests for information.\(^{1742}\)

In *Amino Acids (lysine)* (2000), the Commission acknowledged that Ajinomoto provided evidence which was sufficient in itself to establish the existence of the cartel in a certain time period. The illegal agreement was reported before an investigation had been undertaken and, at that time, the Commission did not have sufficient information to establish the cartel. However, since Ajinomoto admitted that it had destroyed some of its documentation, the Commission considered that this firm, at least by negligence, had not provided all the relevant information available to it at the time when it started its cooperation.\(^{1744}\) In addition, the Commission found that Ajinomoto was the leader in the infringement, which directly excluded the application of section B.\(^{1745}\) Finally, Ajinomoto was granted the highest reduction pursuant to section D, *i.e.* 50%.\(^{1746}\) In this case the Commission also granted other discounts consisting in 50% for Sewon, 30% for Kyowa and Cheil and 10% for Archer Daniels Midland.\(^{1747}\) Sewon provided decisive documents which constituted, together with those submitted by Ajinomoto, the main source of evidence used by the Commission in preparing this decision. However, according to the Commission, there were various reasons why a discount under sections B or C could not be granted. Firstly, at the time when Sewon started to cooperate, the Commission had already some evidence which had been supplied by Ajinomoto. Secondly, Sewon disclosed the collusion after the Commission had undertaken investigations. Finally, a substantial part of the information submitted was not provided completely voluntary but in response to the requests for information. The Commission, therefore, concluded that Sewon’s cooperation did not meet the condition regarding complete cooperation.\(^{1748}\) On appeal, however, the (now) General Court ruled that the Commission had failed to apply Leniency Notice correctly by granting Sewon a reduction under section D of the notice instead of under section C. More precisely, it held that cooperation in a Commission investigation, which does not go beyond that which undertakings are required to provide in the context of requests for information does not justify a reduction in the fine. Nevertheless, a fine reduction is justified where an undertaking provides the Commission with information well in excess of that which the Commission may require. The fact that a request for information has been addressed to the undertaking, cannot itself

\(^{1742}\) *Ibid.*, para 174. On appeal, the Court also confirmed that to decide the level of any reduction, the Commission is entitled to take into account the fact that the cooperation was not entirely spontaneous. In particular, it held that ‘it was perfectly admissible for the Commission not to grant the maximum reduction envisaged by section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information’ (Case T-31/99, *ABB Asea Brown Boveri Ltd v Commission* [2002] ECR II-1881, para 238; see also CFI 20 March 2002, Case T-17/99, *E KELIT Kunststoffwerk GmbH v Commission* [2002] ECR II-1647, paras 181-182).


\(^{1744}\) *Ibid.*, paras 413-414. It is especially interesting to mention that ‘Ajinomoto's Tokyo legal department instructed that remaining documents concerning the cartel, which were stored in Europe and Japan, be destroyed. Ajinomoto admits that it had destroyed some of its documentation and, more particularly, documentation which it stored in Europe’.\(^{1745}\)

\(^{1745}\) *Ibid.*, paras 417-419. It appears that in this case there was more than one leader in the infringement, namely Ajinomoto and Archer Daniels Midland. The Commission commented in its decision that, in this case scenario it could be argued that, ‘leaders are co-equals, and that in such a context none of the leaders is able to play a determining role in the infringement […]’ However, from the wording of the leniency notice it is clear that the Commission balanced the Community interest in granting favourable treatment to offenders which cooperate with it against the Community interest to deter future offenders by fining undertakings for their committed infringements. This balance would be disturbed if leniency was available for cartel members which played a determining role in the infringement’. As regards the – wide – interpretation of the condition regarding the role of leader see *supra* section 4.1.2 of this Chapter.

\(^{1746}\) Taking into account that evidence had been destroyed, which may jeopardise the purpose of the whole investigation, this reduction can be seen as generous. Whether such generous reductions should be granted to companies which have destroyed evidence is therefore a (more than) questionable issue.

\(^{1747}\) *Ibid*.

\(^{1748}\) Kyowa did not meet the requirement laid down in section B(b), and Cheil did not meet the conditions of section B(b) and (d) (Case COMP/36.545/F3 — *Amino Acids* [2001] OJ L 152/24, para 426). Still, the Commission rewarded their material contribution to the establishment of a number of meetings and other contacts (para 432). Archer Daniels Midland only obtained a small reduction as it did not actively cooperate but it did not contest the facts.

exclude the possibility of obtaining a reduction pursuant to section C, particularly as a request for information is a less coercive measure than an investigation ordered by decision.\(^{1749}\)

In *Graphite Electrodes* (2001)\(^{1750}\) several companies were granted reductions under section D, which ranged from 10% to 40%.\(^{1751}\) The highest discount of 40% was granted to UCAR. Although this undertaking was not first to provide decisive evidence, it submitted a price table, employees statements specifying details of the organisation of the cartel, and a detailed corporate statement which contributed substantially to establishing important aspects of the case. In addition, it was the first company to acknowledge “illicit contacts with competitors”, in reply to a formal request for information.\(^{1752}\) SGL obtained a 30% reduction as it cooperated at an early stage by providing documentation concerning details of secret meetings and on the national implementation of the cartel in Europe. Such information went beyond that required in the context of a formal request for information.\(^{1753}\) It is, however, worth noting that SGL continued partaking in the infringement for several months after the investigation.\(^{1754}\) VAW Carbon’s and C/G obtained a 20% reduction for supplying some useful information to the Commission.\(^{1755}\) With respect to C/G this is a (relatively) generous reduction taking into account that the corporate statement submitted by this firm was ambiguous with regard to its role in the cartel. Moreover, its reply to the Commission’s request for information was not considered as a voluntary contribution.\(^{1756}\) Finally, Tokai, SEC and Nippon Carbon received a reduction of 10% for not contesting the factual allegations.\(^{1757}\)

In *SAS-Maersk Air* (2001)\(^{1758}\) two companies SAS and Maersk Air cooperated with the Commission after an inspection and obtained reductions under section D.\(^{1759}\) Maersk Air handed over to the Commission the “private files” that the firm’s representative had kept in his home. Since these files were useful to establish the evolution of the negotiations and the precise scope of the agreement, the Commission granted a reduction of 25%. SAS, on the other hand, provided information that only served to confirm what the Commission already knew. The Commission also found that this information was not provided spontaneously but pursuant to a request for information. As a result, only 10% discount was granted.\(^{1760}\)

In *Vitamins* (2001)\(^{1761}\) Roche and BASF were first to adduce decisive evidence of the cartel arrangements affecting the vitamin B2, B5, C, D3, beta-carotene and carotinoids markets.\(^{1762}\) Roche


\(^{1751}\) In this case, the Commission also granted a discount of 70% under section B, one discount of 40%, one of 30%, two of 20% and three of 10%.


\(^{1753}\) Ibid, para 169.

\(^{1754}\) Ibid, para 169. Under the 1996 Leniency Notice, obtaining a reduction under section D was indeed possible even if the firm in question continued its participation in the cartel. In effect, the condition that the leniency applicant must end the infringement was only applicable in the context of sections B and C. See 1996 Leniency Notice B(c). Compare infra sections 4.2.1.2 and 4.3.2.3 of this Chapter.

\(^{1755}\) As regards VAW Carbon’s, the decision stresses that this discount takes into consideration the fact that the cooperation started before the Commission adopted its Statement of Objections and continued afterwards (COMP/E-1/36.490 — *Graphite electrodes* [2001] OJ L 100/1, paras 230-231). With respect to C/G, the Commission clearly stated C/G claims was not entitled to a reduction of at least 50%.

\(^{1756}\) Ibid, para 240.

\(^{1757}\) Ibid, para 220. The Commission also pointed that both SEC’s and Nippon Carbon’s vague replies to several requests for information could not be regarded as voluntary cooperation in the context of the Leniency Notice.


\(^{1759}\) Ibid, para 121.

\(^{1760}\) Ibid, paras 123-125.

\(^{1761}\) Case COMP/E-1/37.512 — *Vitamins* [2003] OJ L 6/1. See also commenting on this case A. RILEY, “Cartel Whistleblowing” 84.

\(^{1762}\) Case COMP/E-1/37.512 — *Vitamins* [2003] OJ L 6/1, para 743. In addition, both companies also submitted substantial evidence in relation to the cartels in vitamins A and E. Even though such information was provided at an early stage in the procedure, Aventis was the first undertaking to adduce decisive evidence on the existence the vitamin A and vitamin E cartels and obtained completely immunity in this case (see *supra* section 4.1.3.2 of this Chapter).
and BASF provided documents of the organisation structure of the cartel arrangements, as well as detailed corporate statements which confirmed essential aspects of the infringements. However, they were in any case not eligible for a reduction under Section B or C as they also were instigators or played a determining role in these illegal activities. Taken their decisive cooperation into consideration, the Commission still granted a quite generous discount of 50% to each company.

In Zinc Phosphate (2001), the Commission had collected sufficient information during its inspections to establish the existence of the cartel and, therefore, none of the parties could qualify for a discount under Section B. All the leniency reductions, varying from 50% to 10%, were consequently granted under section D. Waardals received 50% because the documentation and the list of the cartel meetings which it provided allowed the Commission to have a clearer idea of the history and mechanisms of the cartel, and to interpret other documents more accurately. In addition, the explanations given by Waardals enabled the Commission to send to the other cartel participants very detailed requests for information. The firm Trident provided statements which enabled the Commission to cross-check information, and to get a better picture of the cartel. This party showed, however, some reluctance to come forward spontaneously before any further investigatory measures and, therefore, obtained a reduction of only 40%. The four remaining firms received a limited 10% reduction for not contesting the facts as set out in the Statement of Objections.

In Industrial and medical gases (2002), four companies fulfilled the requirements to benefit from discounts under section D. In particular, AGA provided evidence dating from the period of the infringement and admitted that one of its executives attended meetings with competitors. Air Products also provided comprehensive explanations on the documents found during the Commission’s inspection and admitted inappropriate contacts with competitors. Both companies obtained a 20% reduction. The undertakings Hoek Loos and Messer obtained 10% reduction in fines for not contesting the facts.

In Industrial Tubes (2003), all leniency applicants benefited from discounts under section D. Outokumpu cooperated the earliest and assisted the Commission significantly in establishing the cartel infringement. Accordingly, it received the most generous reduction of 50%. Outokumpu’s early assistance allowed the Commission to understand the infringement better and interpret the documents obtained in the inspections. Further, Outokumpu submitted very detailed information, in the form of documentary evidence, corporate statements and executive interviews, which was used extensively by the Commission in the pursuance of its investigation as well as to draft requests

1764 Ibid, para 745.
1765 Ibid, para 745. Besides the above commented leniency rewards the Commission also granted 35% reduction to three companies of 30%, 15% and 10%. See further Commission Decision in Vitamins, paras 746-768. In particular, Daiichi Pharmaceutical, Solvay Pharmaceuticals and Takeda Chemical were rewarded with 35% fine discount for providing corporate statements giving details of the organisation and structure of the cartels which contributed substantially to establishing and/or confirming important aspects of the infringements committed by each of them. Eisai submitted evidence which was partly in possession of the Commission and received 30% discount. Merck KgaA obtained a lower discount of 15% as it only cooperated with the Commission following a request for information and did not substantially contest the facts. Finally, besides obtaining complete immunity for the vitamins A and E cartel, Aventis also received a 10% reduction for not contesting the fact in relation to the infringement in vitamin D3.
1767 Ibid, paras 351-352.
1768 Ibid, paras 354-356.
1769 Ibid, paras 357-359.
1770 Ibid, paras 360-365.
1771 In this case section B was not applicable since none of the parties reported the infringement before the Commission undertook an investigation. Likewise, section C did not apply as the investigation of the premises of the cartel parties provided sufficient grounds for launching the procedure leading to a decision. Case COMP/E-3/36.700 — Industrial and medical gases) [2003] OJ L 84/1, paras 452-453. Cf. supra section 4.1.3.4 of this Chapter.
1772 Ibid, para 455.
1773 Ibid, para 456.
1774 Ibid, paras 457-458.
for information. Two other firms, Wieland Werke and the KME-group, were rewarded with reductions amounting to 20% and 30%, respectively. The Commission explained that KME-group’s reduction exceeded by 10 % that granted to Wieland Werke because KME disclosed the existence of the arrangements since the 1980’s as opposed to 1993 which was identified as the beginning of the cartel activities by Wieland. KME also disclosed a number of “working group” meetings which were not mentioned by the other participants, and helped the Commission to appreciate the extent of cartel activity.

This discussion shows that the leniency discounts granted under section D varied considerably within the limits of 10% to 50% set out by the system, depending on the type of cooperation provided by the leniency applicant. The highest discounts under this section were generally granted to firms which applied for a reduction under section B or C but did not satisfy all the relevant requirements, on the one hand, and to firms which provided active and valuable cooperation before the issuance of the statement of objections under the first paragraph of section D, on the other hand. Although the Notice only specified that companies had to “cooperate” in order to qualify for a discount under section D, the above commented decisions clearly illustrate that the Commission took a number of factors into account in order to determine the precise percentage of the reduction.

The Commission’s practice clearly indicates that the percentage reduction varied according to the degree of usefulness of the company’s cooperation to the investigation of the case. This approach has also been confirmed by the European Courts. A reduction of the fine is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily. At the same time, in order to determine the extent to which the cooperation was valuable or useful, the Commission took into account whether the information provided by the undertaking...

1776 Ibid, para 398. The Commission specifically mentioned that the information provided by Outokumpu largely contributed to trigger the admission by Wieland Werke and KME of their participation in the cartel.
1777 The Commission clarified in its decision that Outokumpu did not qualify for a reduction of at least 75% under Section B since it did not inform the Commission about the cartel before it undertook an investigation. Furthermore, since the Commission investigations provided sufficient grounds for initiating the procedure leading to a decision in this case, Outokumpu could not qualify for a substantial reduction from 50% to 75% under Section C. Case COMP/E-1/38.240 – Industrial tubes [2004] OJ L 125/50, paras 399-400.
1780 See supra section 4.1.2.2(g)(ii) of this Chapter. In this regard the Court has also clarified that ‘the mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure’ (CFI 14 May 1998, Case T-347/94, Mayr-Melnhof Kartonschaft mbH v Commission [1998] ECR II-1751, para 368; Case T-31/99, ABB Asea Brown Boveri Ltd v Commission [2002] ECR II-1881, para 239). Each case has to be assessed on its own merits. Still, in appraising the cooperation shown by undertakings, the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which, according to settled case-law, is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified (Case T-45/98, Krupp Thyssen Stainless v Commission [2001] ECR II-3757, para 237).
1781 See also A. RILEY, “Cartel Whistleblowing” 81.
1782 In this regard, the (now) General Court has made clear that the evaluation of the extent of the cooperation shown by undertakings cannot depend on purely random factors. A difference in the treatment of the undertakings concerned must therefore be capable of being ascribed to differences in the degree of cooperation provided, particularly where different information was provided or that information was supplied at different stages in the administrative procedure or in dissimilar circumstances (Case T-45/98, Krupp Thyssen Stainless v Commission [2001] ECR II-3757, paras 245-246).
concerned was or not already in its possession.\textsuperscript{1784} Consequently, information which served to establish relevant new facts, was clearly more valuable than information which only served to confirm facts that were already known to the Commission. Moreover, the quality of the information was also taken into account by the Commission. In this sense, information which was contemporaneous to the time in which the infringement was committed and was also detailed was, as a rule, considered very useful.\textsuperscript{1785} This consideration certainly makes sense, since this type of information can be extremely helpful for the Commission to prove the infringement.

Another essential factor to determine the percentage of the reduction was the timing of the cooperation.\textsuperscript{1786} Early cooperation had logically a greater value for the Commission than information provided at a late stage of the investigation. In fact, the timing factor also has a clear impact on the value or usefulness of the information: when cooperation is provided at an early stage, there are more chances that the information and documentation provided is not yet known to the Commission. In addition, when undertakings cooperate at an early stage, the Commission may save additional resources which in turn may justify a higher leniency discount.

Last but not least, the attitude of the undertaking concerned may also influence the level of reduction. Companies which wished to benefit from the Leniency system had to show willingness and readiness to fully cooperate. Accordingly, the fact that firms offered their cooperation only following a request for information, often led the Commission to lower the reduction.\textsuperscript{1787} Likewise, the applicant’s cooperation in the investigation had to go further than what it was required to provide to comply with its duties to answer a request for information in Regulation 17/62.\textsuperscript{1788} As regards passive cooperation – i.e. cooperation consisting in not contesting the statement of objections – since the value of this type of cooperation is very limited, the Commission generally granted the lowest reduction in the range of section D, (frequently) amounting to mostly 10%.\textsuperscript{1789}

\textsuperscript{1784} This criterion is also in line with the conditions to obtain the benefit of leniency under section B. In particular, a company can only benefit from leniency under section B provided that the Commission ‘does not already have sufficient information to establish the existence of the alleged cartel’ (Leniency Notice 1996, section B(a).

\textsuperscript{1785} The General Court has, however, found that even if there has been a certain degree of helpful cooperation, the Commission is justified in refusing to grant a reduction if the undertaking has provided it with incomplete or inexact information (CFI 20 March 2002, Case T-9/99, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission [2002] ECR II-1487, paras 616-619).


\textsuperscript{1787} In this context the Court has indeed expressed its view that the Commission is entitled to take into account the fact that the cooperation was not entirely spontaneous when determining the level of a leniency reduction. In the ABB case, the Court found that ‘it was perfectly permissible for the Commission not to grant the maximum reduction envisaged by section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information on 13 March 1996, although the investigations at ABB IC Moller’s premises had commenced on 29 June 1995’. Case T-31/99, ABB Asea Brown Boveri Ltd v Commission [2002] ECR II-1881, para 238; see also E KELIT Kunststoffwerk GmbH v Commission [2002] ECR II-1647, paras 181-182.


\textsuperscript{1789} See also affirming that companies obtained a standard 10% reduction for not contesting the facts F. ARBAULT AND F. PEIRO, “The Commission’s new” 16. However, some cartel decisions show that in some cases the Commission granted 20% reduction for non-contestation of the facts. This was the case for instance for Dalmine in Seamless Steel Tubes (Case IV/E-1/35.860-B Seamless steel tubes) [2003] OJ L 140/1, paras 170-171); Anek and other firms in Greek Ferries (IV/34466 - Greek Ferries) [1999] OJ L 109/24, para 169) and Ke-Kelit in British Sugar (Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-
4.1.4. Measuring the effectiveness of the 1996 Notice

Measuring to what extent the Leniency policy is effective is not an easy task. Given that the number of hidden cartels is unknown, it is not possible to directly observe the impact of the Leniency programme on the population of cartels.\textsuperscript{1790} There are, however, other methods which can provide an indication of the effectiveness of the programme.\textsuperscript{1791}

One of the methods to assess the effectiveness of the system in detecting cartels is to observe the population of discovered cartels across time.\textsuperscript{1792} The chart below shows the number of cartel\textsuperscript{1793} decisions adopted before and after the adoption of the 1996 Leniency Notice, in the period from 1990 to 2002.

\textsuperscript{1790} See also stressing this point W. WILS, “Leniency” 33-34 of the online version of this article. In this context it is also interesting to comment that in its competition policy newsletter dating from the summer of 1996 (a staff member of) the Commission commented that since its publication, one company had already approached the Commission denouncing an unknown arrangement. Based on this first contact, the author of this article affirmed that the success of the Notice had been confirmed. V. JORIS, “La communication” 14. Although the fact that a company quickly approached the Commission in order to cooperate under the leniency system can be certainly seen as a positive development, this first contact is, on the other hand, not fully appropriate to conclude that the system if successful.

\textsuperscript{1791} It has been commented that ‘[t]he most obvious measurement of the effects of leniency is the number of leniency applications received by the competition authorities’ (W. WILS, “Leniency” 33-34 of the online version of this article). See for instance commenting on the number of applications F. ARBAULT AND F. PEIRO, “The Commission’s new” 15, stressing that ‘[o]verall, more than 80 companies have filed leniency applications under the 1996 notice’). See also OECD, “Round table on ex officio”: ‘[t]o illustrate the success of the leniency system this policy document states that ‘[a]s a consequence of the adoption of its [1996] leniency programme, the European Commission received many leniency applications (approximately 188 between 1996 and 2002’. It is true that without any applications at all a leniency programme cannot be successful at all. However, a high number of applications cannot confirm the effectiveness of the programme. One can affirm that a Leniency system works properly when it contributes to the detection and punishment of cartels. In this context, the quality of leniency applications plays a decisive role. If the cooperating undertakings “apply for leniency” without submitting information which is new to the Commission and that can be used to establish relevant facts, such applications are useless and cannot constitute an indication of the effective working the regime.

\textsuperscript{1792} See also E. COMBE \textit{et al.}, “Cartels: the probabilities”.

\textsuperscript{1793} It should be recalled that the concept of cartel should be understood as a hardcore restriction in the sense of Article 101 TFEU. See further \textit{supra} Chapter 4.
As the chart illustrates, following the introduction of the Leniency programme in 1996, the overall number of cartel decisions adopted by the Commission appears to increase on average.\(^{1794}\) In effect, during the period from 1990 to 1996, previous to the introduction of the programme, the Commission adopted a total of 18 cartel decisions. This corresponds to almost three cartel decisions per year on average. In contrast, from 1997 to 2002, the Commission was able to adopt a total of 28 cartel decisions.\(^{1795}\) These ciphers show a steady trend of almost five decisions per year on average after 1996. Although this increase in cartel decisions may be the result of a combination of factors,\(^{1796}\) the introduction of the leniency policy most probably contributed to this increase.\(^{1797}\)

A more accurate way to assess the effectiveness of the 1996 Leniency policy in the area of cartel detection is by looking at the method that led the Commission to detect the existence of cartel agreements in the decisions adopted during the period in which the 1996 Notice was applicable.

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\(^{1794}\) See also commenting on this aspect E. COMBE et al, “Cartels: the probabilities” 18.

\(^{1795}\) It should be noted that the chart reflects the number of decisions according to the date of their adoption. Since administrative procedures can take several years to complete and, therefore, decisions are only adopted a few years after the launch of the investigation, the impact of the 1996 Notice on the number of cartel decisions is not properly illustrated by the first couple of years in which the system was applicable. This explains, for instance, that in 1997 no decisions were adopted at all. See also observing this point A. RILEY, “Cartel Whistleblowing” 81.

\(^{1796}\) See W. WILS, “Leniency” 33-34 of the online version of this article. W. WILS comments that ‘an increase or decrease in the number of detected cartels can be equally due to improved or worsened detection as to an increase or decrease in the cartel population’.

\(^{1797}\) See commenting on the positive influence of the Leniency system in the number of Commission cartel decisions A. ITALIANER, SPEECH 2013/09 “European Commission Fighting cartels in Europe and the US: different systems, common goals”, Speech delivered at the Annual Conference of the International Bar Association (IBA), October 2013, Boston, at 4-5. See also E. COMBE et al, “Cartels: the probabilities” 18. These authors conclude that ‘the introduction of leniency programs in the European Union in 1996, should have contributed to reinforce the probability of detection’.
Since the date of the adoption of the 1996 Notice until the end of 2002, a total of 28 cartel decisions were adopted. In these decisions three main methods of detection have been identified. These are: (i) complaints; (ii) investigations of the Commission and (iii) leniency applications.


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1798 This period has been chosen as representative for the application of the 1996 Notice because although the 1996 Notice was replaced in February 2002, given the considerable length of the proceedings, none of the cartel decisions adopted during 2002 involve the application of the 2002 Notice.

1799 It should be taken into account that, as Table 1 shows, the 1996 Leniency Notice was also applied in a considerable number of decisions adopted after 19 of February of 2002, that is, the date on which the 1996 system was replaced by the 2002 Notice. However, given that since this date the 2002 Leniency Notice was also applicable, it is difficult to measure impact of the 1996 system separately by looking at the total number of cartel decisions adopted after the 2002 Leniency Notice was published.

1800 In addition, the opening of other cartels cases was linked to (i) self-incrimination falling, in principle, outside the scope of the Leniency Notice and to (ii) other parallel procedures in other jurisdictions. See further the analysis below.


1804 Case IV/34.018 - FETTCSA) [2000] OJ L 268/1, paras 3-10.

1805 See Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) [2001] OJ L 265/15, p. 15-41, paras 3-6. More precisely, the cartel in the SAS + Maersk Air case was detected following both a notification under former Regulation 17 and a complaint. While in their notification the parties applied for negative clearance and for exemption (under Article 3(2) and under Article 5 of that Regulation (EEC) No 3975/87 respectively) the complainant (“Sun-Air”, a small Danish airline that operates as a British Airways franchisee) stated that: ‘there is a history of SAS working far more closely, coordinating far more business activities with its partner airlines than it has announced publicly. It is this surreptitious cooperation that I [the chief executive officer of Sun-Air] asked the Commission to investigate’.

1806 In this case, which concerned the application of art 65 ECSC Treaty, the Commission had firstly received and several informal complaints from consumers and reports from the specialised press. After the informal complaints, it decided to conduct a survey on the implementation by the stainless steel producers of a mark common price known as the “alloy surcharge”. The replies to this survey led the Commission to undertake further investigations. Décision de la Commission du 21 janvier 1998 (Affaire IV/35.814 - Extra d’alliage) [1998] OJ L 100/55, paras 1-2). Given that without the complaints the Commission would have probably not conducted a survey, the complaints are considered the triggering factor for the opening of the procedure for the purpose of this research.

1807 According to the information published in the cartel decisions. It can, however, be inferred that such spontaneous inspections may result from anonymous complaints. See further supra Chapter 7, section 2.

1808 Commission Decision of 30 October 1996 (IV/34.503 - Ferry operators - Currency surcharges) [1997] OJ L 26/23, para 1. According to this document, [t]his Decision arises from investigations made in April 1993 under Article 18 (3) of Regulation (EEC) No 4056/86 at the offices of four ferry operators. During the investigations the Commission discovered documentary evidence showing that a number of ferry operators had agreed the common imposition of a currency surcharge on freight following the devaluation of the pound sterling in September 1992”.

1809 Case IV/E-1/35.860-B seamless steel tubes [2003] OJ L 140/1, para 1. This decision simply states that “[o]n 1 and 2 December 1994, acting under a Commission decision of 25 November 1994, Commission officials and representatives of the competition authorities of the Member States concerned carried out investigations under Article 14(3) of Regulation No 17 at a number of undertakings, including British Steel plc, Mannesmannröhren-Werke AG and Vallourec SA, to which this decision is addressed. It was the Commission's intention to examine the existence of a possible infringement of Article 85 of the EC Treaty (now Article 81 EC”.

1810 See Commission Decision of 11 December 2001 (Case COMP/E - 1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany) [2003] OJ L 15/1, paras 15-24. In this case the opening of proceedings was preceded by a number of requests for information which were followed by inspections in two different locations.

1811 Case COMP/E-1/37.027 - Zinc phosphate [2003] OJ L 153/1, paras 54-57. As regards the opening of the procedure, this decision only mentions that “[o]n 13 to 14 May 1998, simultaneous and unannounced investigations under Article

The 1996 leniency system served as a basis to detect cartel agreements and open procedures in 11 decisions. These are: Amino acids (2000), Vitamins (2001), Carbonless paper (2001), Luxembourg brewing industry (2001), Methylglucamine (2002), Speciality graphite

14(2) of Regulation No 17 were carried out by the Commission at the premises of Heubach, SNCZ and Trident. [...] Documents indicating that the zinc phosphate producers participated in arrangements infringing Article 81 of the EC Treaty and/or Article 53 of the EEA Agreement were found during the investigations. Waardals approached the Commission on 17 July 1998 and announced its intention to fully cooperate with the Commission under the [Leniency] Notice.

1812 Case IV/37.614/F3 PO/Interbrew and A llen-Maes [2003] OJ L 200/1, paras 22-24. According to this decision ‘[o]n 26 and 27 October 1999 inspections were carried out under Article 14(3) of Regulation No 17 at the offices of A llen-Maes in Waarloos and the CBB in Brussels. On 11 November 1999 requests for information were sent under Article 11 of Regulation No 17 to Interbrew, A llen-Maes and the CBB. [...] These documents contained information which led to the inspections carried out in October 1999’.

1813 Case COMP/E-3/36.700 — Industrial and medical gases [2003] OJ L 84/1, paras 87-89. In this case the Commission conducted inspections without warning and, subsequently, addressed requests for information to the undertakings concerned.

1814 Case No COMP/E-1/37.152 — Plasterboard [2005] OJ L 166/8, para 4. In this case the inspections were conducted in response to documentation received following a request for information, pursuant to Article 14(3) of Regulation 17.

1815 The (original) decision in Ronds à béton (concrete reinforcing bar) does not specify which method of detection led to the opening of a proceeding (Commission Decision of 17 December 2002 (Case C.37.956 — Reinforcing bars) [2006] OJ L 353/1). This decision was annulled by the General Court for procedural reasons and was readopted in 2009. The 2009 decision clearly specifies that the Commission initiated proceedings on the basis of ‘the information gathered during inspections carried out at the offices of reinforcing bar manufacturers and the answers to requests for information sent to those undertakings’. Commission Decision of 8 December 2009 (Case COMP/37.956 — Reinforcing bars, re-adoption) [2011] OJ C 98/16, paras 4-5.

1816 It should, however, be noted that in a number of cases, an investigation in the US had preceded the investigation by the Commission. Arguably, the Commission could have established the existence of these cartels by its own means (that is, without leniency applications). Nevertheless, since no investigations had yet been undertaken and the Commission did not (yet) possess sufficient information, it is considered that leniency applications led to the opening of the proceedings in Europe for the purpose of this research. See commenting on the impact of the US proceeding on the detection of the cartel by the Commission M. BLOOM, “Despite” 552; A. RILEY, “Cartel Whistleblowing” 84. According to these authors the fact that some cartels were first exposed in the US opened the question whether the 1996 Notice created any initial incentive for cartelists in those cartels to come forward and provide evidence to the Commission.

1817 Commission Case COMP/36.545/F3 — Amino Acids [2001] OJ L 152/24, para 167. This decision states that ‘[i]n July 1996, immediately after the publication of the Commission notice on the non-imposition or reduction of fines in cartel cases, Ajinomoto offered to the Commission, on the basis of that notice, its full cooperation in establishing the existence of a cartel in the lysine market and its effect in the EEA’.

1818 Case COMP/E-1/37.512 — Vitamins [2003] OJ L 6/1, para 124. According to this decision ‘[o]n 12 May 1999 Rhône-Poulenc announced to the Commission that [...] it wished to inform the Commission of its involvement and that of other producers in the European aspect of a [...] vitamins cartel, and intended to cooperate with its investigations’.

1819 Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, paras 54-55. In this case Sappi provided to the Commission information and documents which gave the Commission reason to suspect that there was or had been a secret price fixing cartel in the carbonless paper sector.


1821 Case COMP/E-2/37.978/Methylglucamine [2004] OJ L 38/18, para 33: ‘[o]n 27 September 2000, representatives from Merck visited the Commission. During the meeting the company expressed its wish to cooperate with the Commission pursuant to the [Leniency] Notice, and gave an oral description of the cartel activity in which it had been involved’.
Lastly, the opening of the Commission’s procedures in British Sugar, Graphite electrodes and Austrian Banks was possible thanks to parallel or previous procedures in other jurisdictions or to incriminating statements, falling outside the scope of the 1996 Notice.

The following figure illustrates the proportion of cases detected by each of these methods, since July 1996 (the date of the adoption of the 1996 Notice) until the end of 2002.

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1822 Case C.37.667 — Specialty Graphite [2006] OJ L 180/20, paras 71-72. Although this cartel agreement was indeed revealed to the Commission thanks to a leniency application, it is interesting to note that such application was made in the context of a Commission investigation in a connected market, namely the graphite electrode market.


1824 It is noteworthy that, even though the European investigation of this case had been triggered by a leniency application, and Section B of the 1996 Notice was applied, there had been a previous investigation in the US. See COMP/E-2/37.784 – Fine Art Auction Houses [2004] OJ L 200/92, paras 48-51.

1825 Case COMP/C.37.671 — Flood flavour enhancers OJ [2004] L 75/1, para 43.

1826 COMP/E-1/36.756 – Sodium Gluconate, paras 53-55. In this case, the American Department of Justice informed the Commission, in October 1997, that three producers of Sodium Gluconate had recognised their involvement in an international price fixing and market sharing cartel. During the winter of 1997-1998 the Commission sent a number of requests for information to the main European producers of Sodium Gluconate. After having received a request for information, one firm contacted the Commission to inform it about the fact that it had already cooperated in the American investigation of the cartel in which it had been involved, and that it wished to do the same in the European context.

1827 In this case, the Commission had also been notified by the US Department of Justice of an investigation into the citric acid market, and it had also been informed of the plea-bargain agreements reached by Hoffmann-La Roche and Jungbunzlauer. Following these events, the Commission sent requests for information and, as a reaction, a number of companies applied for leniency. See Commission Decision of 5 December 2001 (Case No COMP/E-1/36 604 — Citric acid [2002] OJ L 239/18, paras 54-55). Since the Commission had not yet undertaken an investigation and did not have sufficient information to establish the existence of the cartel, one company was able to qualify under Section B.

1828 Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd. [1999] OJ L 76/1, para 2. According to this decision, ‘the starting point of the Commission’s procedure in this case, and of a parallel procedure by the UK Office of Fair Trading, is with two self-incriminating letters which Tate & Lyle wrote to the OFT on 16 July 1990 and on 29 August 1990’. Since the events happened before the publication of the 1996 system, the undertakings’ cooperation was rewarded by analogy on the basis of the 1996 Notice.

1829 Case COMP/E-1/36.490 — Graphite electrodes [2001] OJ L 100/1, paras 31-36. In Graphite electrodes, the Commission had already conducted an investigation in 1983 into the graphite electrodes market. Although the investigation revealed that prices offered by the major producers of graphite electrodes were nearly identical, the evidence discovered was not sufficient to prove the existence of a price-fixing agreement. A second round of unannounced investigations was carried out in mid-1997. During these inspections evidence showing the existence of a price-fixing agreement was found. This second round of investigations may, however, also been triggered by the investigations of May 1997 in the US, which led to the bringing of criminal proceedings for conspiracy to fix prices.

1830 Commission decision of 11 June 2002 (Case COMP/36.571/D-1 — Austrian banks — “Lombard Club”) [2004] OJ L 56/1, paras 13-15. The initiation of this case is quite peculiar. ‘In April 1997 (…), a member of the management board of an Austrian bank committed suicide. He left a note which he sent, along with a number of enclosures, to the Public Prosecutor’s office and to opposition parties. Among the enclosures was a list of 13 measures to improve banks’ earnings on which ‘Lombard 8.5.’ had been written by hand. On May 1997 the Commission became aware of the existence of this document, clearly the agenda for, or record of, a meeting held on 8 May 1996, and prepared the ground for an investigation into suspected competition-restricting agreements. On 30 June 1997 the Freedom Party lodged a complaint, invoking Article 3 of Regulation No 17, against eight Austrian credit institutions for suspected competition-restricting agreements. Unannounced inspections were finally carried out in June 1998’.

In this period, the 1996 Notice has led to the adoption of a decision, in 28% of cases. In contrast, investigations conducted on the initiative of the Commission, and complaints led to a decision fining a cartel in 20% and 15% of the cases respectively. As the figure above illustrates, compared to other methods of cartel detection, the Leniency Notice may arguably be considered more effective.

The evolution of the effectiveness of the programme, compared to other detection methods, can also be examined across time.

Looking at the detection of cartels in Europe across the years, the (evolution of the) success of the Leniency Notice becomes even more apparent. It is true that in the first three years of application of the system, none of the decisions adopted by the Commission were the result of a leniency application. However, this does not necessarily indicate that companies were (absolutely) reluctant to contact the Commission to reveal the existence of a cartel infringement.\textsuperscript{1831} In fact, immediately

\textsuperscript{1831} In fact, the first decision in which the 1996 Notice was applied was adopted in 1998. \textit{Cf. supra} section 4.1.3.2 of this Chapter.
after the publication of the 1996 Commission Notice, one company, offered its full cooperation to the Commission to establish the existence of a cartel in the lysine market on the basis of the Leniency Notice. The decision regarding this infringement was, nevertheless, only adopted nearly four years later in June 2000. It can, therefore, be assumed that given the considerable length of the administrative procedure, the real success of the Notice only becomes apparent after the year 2000. In effect, the decisions adopted in the years 2001 and 2002 show that, at least the half of the proceedings had been triggered by a leniency application. This demonstrates that despite the fact that the design of the system could be improved, the 1996 leniency programme had a strong capacity to motivate companies to come forward and cooperate in the Commission’s investigation.

Last but not least, the application of each section of the Notice can be assessed individually in order to evaluate the specific contribution of (the application of) the Notice in the context of anti-cartel enforcement: did the programme mainly contribute to the detection of secret cartels or to the establishment of infringements of Article 101 TFEU?

Under the 1996 leniency programme, some type of lenient treatment under sections B, C or D has been granted in a total of 38 cases. More precisely, section B has been applied in 19 of these cases, section C was applied in one case and finally, section D was applied in 36 decisions.

![Pie chart showing the distribution of leniency applications](chart.png)

1. **Section B** was applied in 19 cases out of 38
2. **Section C** was applied in 1 case out of 38

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1833 See supra section 4.1.2 of this Chapter.
1834 See also A. RILEY, “Cartel Whistleblowing” 84. A. RILEY stresses that ‘[t]he [more] recent run of applications of the 1996 Notice, the high reductions and three fine cancellations under section B, together with some very high fines and very high reductions suggest that the Notice was finally coming into its own. Furthermore, as suggested above the initial slow start […] is explicable by the nature and length of Commission investigative and contentious procedures’. See for a different opinion M. JEPHICOTT, “The European” 378. This commentator observes that ‘the 1996 Notice seemed to be failing short was its apparent inability to pierce the veil of secrecy surrounding the cartels. The Commission did not manage to convince significant numbers of cartelists that sooner or later their co-conspirators would see how much they had to lose by failing to blow the whistle’.
1835 This examination is conducted by looking at all the Commission’s cartel decisions in which the 1996 Notice was applied, regardless of the date of the adoption of the decision.
1836 In 17 of these cases one or more reductions were also granted under section D.
1837 In this case multiple reductions were also granted under section D.
1838 In 17 out of these 36 decisions section B was also applied. For a concrete overview of the leniency discounts granted under this section see Table 1.
As these graphics illustrate, Sections B and D were applied in a very significant number of cases.

With respect to the application of section B, it should firstly be recalled that the Commission only granted discounts under this section when a company was the first to adduce decisive evidence about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it did not already have sufficient information to establish the existence of the alleged cartel. Bearing in mind these requirements, it can be affirmed that the granting of a discount under section B in 50% of the cases where the 1996 Notice was applied, demonstrates that the Leniency Notice played an important role in terms of detection. With respect to the application of section D, discounts were only granted when the cooperation of undertakings was helpful for the Commission to establish the infringement. The fact that the Commission applied section D in nearly all cases where the 1996 Leniency Notice was applied indicates, therefore, that the cooperation offered by subsequent applicants under this section was sufficiently useful for the Commission to prove the full extent of the infringement and corroborate facts.

4.1.5. Concluding remarks on the 1996 Leniency Notice

The analysis of the (application of the) 1996 Leniency Notice has made clear that the Notice has motivated cartel participants sufficiently to come forward and denounce secret cartels and helped the Commission to establish infringements. In the words of OLIVIER GUERSENT, then Head of the Scrutiny and Coordination Unit in DG Competition, ‘[t]he Notice has proven to be a formidable tool

[1839] In addition, it has been commented that ‘the [1996] Notice has made a noticeable difference to the behaviour of cartel members faced with a Commission investigation. Whereas before the Notice, the undertakings under investigation would present a unified defence against the Commission, the Notice has encouraged greater calculation. Each undertaking can now obtain benefits by revealing all at an early stage in the investigation. Furthermore, there may also be undertakings, such as Sappi in Carbonless Paper, who are willing to come forward and provide evidence in return for either a 100% reduction or a very high reduction under Section C’. A. RILEY, “Cartel Whistleblowing” 85, referring to REYNOLDS, Caught Red-Handed: Anti-Cartel Enforcement, The Advanced International Cartel Workshop, paper delivered, February 2001, ABA Antitrust Law Section, New York, 11. See, however, for a different opinion C. R. A. SWAAK AND D. J. ARP, “A tempting” 15, arguing incorrectly that ‘immunity was rarely granted’.

[1840] This important detection role was however, only apparent after 2001, when the Commission decisions granting immunity started being adopted. See supra section 4.1.3.2 of this Chapter. In effect, in the first nine decisions applying the 1996 Notice, covering a period from 1996 to mid-2001, no discounts under section B were granted.

[1841] For an overview of all the individual discounts granted under this section, see supra Table 1. For a more detailed discussion of the advantages of a Leniency system rewarding subsequent applicant see supra section 4.1.2 of this Chapter.
to detect and prosecute cartels. Not only it enabled the Commission to uncover individual cartels, but the fear that one member could go to the authorities and obtain immunity proved to de-stabilise cartel activity in general. As a result, since 1996, the Leniency Program has been the most effective generator of important cases'.

However, and despite its considerable level of success, it has also been shown that the 1996 Leniency Notice suffered a number of flaws which, arguably, limited the effectiveness of the system. In order to enhance the deterrent effect of the European Leniency system it was necessary to address its main shortcomings and to increase the standards of predictability and transparency. This was also the main objective of the revised 2002 Leniency Notice, which is analysed in the next part.

4.2. The 2002 Leniency Notice

The analysis of the (application of the) 1996 leniency system made clear that even though the 1996 Notice provided sufficient incentives for companies to denounce secret cartels and cooperate, certain aspects could be improved. In order to address the main shortcomings of the 1996 policy, the Commission issued in 2002 a revised version of the Notice on immunity from fines and reduction of fines in cartel cases. The Commission had indeed anticipated that it would consider modifying the original Notice once it had acquired sufficient experience in applying it. This subsection aims to establish whether – and if so to which extent – the 2002 Notice increases the incentive of colluders to disclose and prove the existence of cartels, compared to the previous system.

4.2.1. Summary of the 2002 Notice

The Commission’s 2002 policy distinguished two degrees of leniency: complete immunity from fines (section A), and reduction of a fine (section B).

4.2.1.1. Conditions to obtain immunity from fines

Under the 2002 regime, the Commission fully guaranteed immunity from fines to the first company which reported and provided adequate evidence of the infringement at issue. There were two alternative ways to satisfy this condition. First, according to point 8(a) of the 2002 Notice the applicant could qualify for immunity if it was the first company ‘to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with an alleged cartel affecting the Community’. Immunity pursuant to point 8(a) could, however, only be granted if the Commission did not already have sufficient evidence to carry out a dawn raid investigation. Second, after the Commission had

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1844 See 1996 Leniency Notice, point 3. In the first version of the Notice the Commission clearly stated that ‘[t]he Commission will examine whether it is necessary to modify this notice as soon as it has acquired sufficient experience in applying it’. In the 2002 version the Commission indeed confirmed that ‘[a]fter five years of implementation, the Commission has the experience necessary to modify its policy in this matter. Whilst the validity of the principles governing the notice has been confirmed, experience has shown that its effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted’. Leniency Notice 2002, point 5.
launched an investigation, a leniency applicant could still secure immunity from fines under point 8(b) the 2002 Notice if it was the first company to submit evidence that enabled the Commission to establish a cartel infringement. Under this provision, immunity could nevertheless only be granted if the Commission did not have, at the time of the submission, sufficient evidence to find an infringement and that no other party had been granted conditional immunity under point 8(a).

The decisive requirement under both approaches was that the applicant had to be the first to approach the Commission to provide evidence that enabled it to initiate an investigation and/or prove an infringement.

a. Additional immunity conditions

In addition to meeting one of the immunity thresholds set out in point 8(a) or 8(b), point 11 of the 2002 Leniency Notice established three additional conditions for immunity applicants.

First, the company had to cooperate fully, on a continuous basis and expeditiously throughout the procedure and provide the Commission with all evidence that came into its possession or was available to it relating the infringement. In particular, the company had to remain at the Commission’s disposal to answer swiftly any request that could contribute to the establishment of the facts concerned (point 11(a)). Secondly, the company had to end its involvement in the infringement no later than the time at which it disclosed the cartel (point 11(b)). Thirdly, the applicant must not have taken steps to ‘coerce other undertakings to participate in the infringement’ (point 11(c)).

b. Procedure for immunity applications

The procedure for granting immunity was considerably modified by the 2002 regime. Under the revised Notice, the Commission informed leniency applicants at a very early stage, in writing, whether they fulfilled the requirements for immunity.\(^{1845}\) If this was the case, the company in question was granted conditional immunity.\(^{1846}\) Once the Commission verified that the relevant conditions set out in the Notice were observed during the whole administrative procedure, definitive immunity was granted.\(^{1847}\) If, on the contrary, a company failed to meet the immunity conditions no immunity was granted and the company could withdraw the evidence disclosed for the purposes of its immunity application or, alternatively, request the application of section B.\(^{1848}\)

Notably, the 2002 Notice introduced the possibility for immunity applicants of initially presenting evidence to the Commission in abstract, hypothetical terms and thereby ascertain whether they were in a position to qualify for immunity.\(^{1849}\) In this case, the undertaking (only) had to present a descriptive list of the evidence it proposed to disclose at a later agreed date.\(^{1850}\) The Commission then examined whether the evidence described in the list met the immunity conditions and informed

\(^{1845}\) Leniency Notice 2002, point 12.
\(^{1846}\) Ibid, points 15-16.
\(^{1847}\) Ibid, point 19.
\(^{1848}\) Ibid, point 17.
\(^{1849}\) See Ibid, point 13(b).
\(^{1850}\) The Commission provided a written acknowledgement of the undertaking’s application for immunity and the date on which it received the application. Ibid, point 14.
the undertaking accordingly. Following the disclosure of the evidence on the date agreed, the Commission granted the undertaking conditional immunity from fines in writing.\textsuperscript{1851}

The Commission did not consider other applications for immunity before it had taken a definitive position on an existing application in relation to the same suspected infringement.\textsuperscript{1852}

4.2.1.2. Conditions and procedure to obtain a reduction in fines

Under the 2002 system, undertakings that did not meet the immunity conditions of section A could still benefit from a fine reduction under section B,\textsuperscript{1853} provided that they satisfied two requirements. In particular, a company had to provide the Commission with evidence of the cartel, which represented ‘significant added value with respect to the evidence already in the Commission’s possession’ and it had to ‘terminate its involvement in the suspected infringement no later than the time at which it submits the evidence’.\textsuperscript{1854}

The 2002 Notice specified that the concept of “added value” referred to the extent to which the evidence provided strengthened, by its very nature and/or its level of detail, the Commission’s ability to prove the facts in question. To assess the “added value” of the evidence, the Commission generally considered written evidence originating from the period to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question was generally considered to have a greater value than that with only indirect relevance.\textsuperscript{1855}

The revised 2002 Notice contained, for the first time, a sliding scale of reductions for companies which provided evidence with significant added value. The order in which leniency applicants provided evidence constituting “significant added value” became the decisive criterion to establish the range of the applicable reduction. Accordingly, the first qualifying company was entitled to a reduction from 30\% to 50\%. The second qualifying company received a reduction in the 20\%-30\% range. Finally, later qualifying cooperating parties could expect a reduction in fine of up to 20\%.\textsuperscript{1856}

In order to determine the precise level of reduction within each band, the Commission considered (i) the time at which the evidence representing “significant added value” was submitted, (ii) the quality of the information (in terms of added value), and (iii) the extent and continuity of the company’s cooperation.\textsuperscript{1857}

Furthermore, according to point 23(b) of the 2002 Notice, if a company disclosed evidence previously unknown to the Commission that influenced directly the gravity of the violations or the length of time over which they existed, the Commission did not take these elements into account when setting the fine on the undertaking concerned. In other words, if a leniency applicant revealed

\textsuperscript{1851} Ibid, point 16.
\textsuperscript{1852} Ibid, point 18.
\textsuperscript{1853} Ibid, point 20.
\textsuperscript{1854} Ibid, point 21.
\textsuperscript{1855} Ibid, point 22.
\textsuperscript{1856} Ibid, point 23(b).
\textsuperscript{1857} Ibid, point 23(b).
that a cartel started earlier or ended later than the Commission could establish, the company would not be penalised with an increase in its fine to account for the larger scope of the infringement.\textsuperscript{1858}

As regards the procedure to obtain a reduction under section B, undertakings were simply requested to ‘approach the Directorate-General for Competition with their evidence’.\textsuperscript{1859} Applicants received a written acknowledgement of receipt of the application, which recorded the date on which the evidence was submitted. However, the evidence was not considered until the Commission had taken a position on any existing application for immunity.\textsuperscript{1860}

If the Commission came to the preliminary conclusion that the evidence submitted by the undertaking constituted ‘added value’, the undertaking received – before the statement of objections was issued – a written indication of the band into which it was likely to fall.\textsuperscript{1861} The final position of each leniency applicant was evaluated at the end of the administrative procedure in the prohibition decision.\textsuperscript{1862}

\subsection{4.2.2. Analysis of the main 2002 revisions}

The 2002 Notice significantly modified a number of aspects of the first leniency programme. Table 2 below provides a clear overview of the main differences between the 1996 and 2002 Leniency Notices. In this section the main new elements of the 2002 leniency policy are analysed.

<table>
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<th>Comparison of the 1996 and 2002 Leniency systems</th>
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<td><strong>Scope of application</strong></td>
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<td>‘Secret cartels between enterprises’</td>
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<td><strong>Guarantee of full and automatic immunity?</strong></td>
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<td><strong>Immunity available after the Commission had undertaken an inspection</strong></td>
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<td><strong>Threshold to qualify for immunity</strong></td>
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\textsuperscript{1858} See also C. R. A. SWAAK AND D. J. ARP, “A tempting” 11. This aspect is further analysed below in section 4.2.2.

\textsuperscript{1859} Leniency Notice 2002, point 24.

\textsuperscript{1860} See Leniency Notice 2002, point 25.

\textsuperscript{1861} Ibid, point 26.

\textsuperscript{1862} Ibid, point 27.
<table>
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<tr>
<th><strong>Conditions for immunity</strong></th>
<th>The undertaking has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity.</th>
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<tr>
<td><strong>Procedure to qualify for immunity</strong></td>
<td>No specific procedure</td>
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<td><strong>Procedure to qualify for immunity: when does the applicant learn about the level of leniency granted</strong></td>
<td>Final Decision</td>
<td>Conditional immunity is granted (i) once the Commission has verified that the evidence meets the relevant conditions or, alternatively (ii) once the Commission has verified that the evidence provided in hypothetical terms it corresponds to the description made in the list</td>
</tr>
</tbody>
</table>
| **Reductions available to subsequent firms?** | Yes  
Wide band of 10-50% | Different reduction bands, depending on timing and quality of information |
| **(Threshold to qualify for) reductions in fines** | An undertaking had to ‘cooperate’ | An undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission’s possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence |
| **When does the applicant learn about the level of leniency reduction granted?** | When the final decision was adopted | Indication of reduction before the SO was issued |
| **Availability of partial immunity** | No | Yes |
| **Interaction with private enforcement?/ protection of confidentiality** | No protection of confidentiality | Protection of confidentiality in practice |
4.2.2.1. Scope of application

The 2002 Notice specified that it only concerned ‘secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports’. By clarifying that only agreements between competitors were covered by the system, the 2002 regime cleared all doubts as to which type of agreements may benefit from the applicability of the system. Only horizontal practices fell (and still fall) under the scope of application of the Notice and vertical agreements were, consequently, excluded.

This clarification is certainly welcomed for two main reasons. Firstly, granting leniency discounts in exchange for cooperation is clearly justified in horizontal cartels cases. However, the issue whether the leniency programme should be available for vertical conduct is more than questionable. Secondly, the revised wording improved companies’ ability to ascertain whether or not they could benefit from the system, hereby enhancing the level of certainty and transparency of the system.

4.2.2.2. Full and automatic immunity from fines

Under the 2002 Leniency Notice, once the Commission had confirmed that a leniency applicant met the conditions to obtain full immunity, the company in question was granted full conditional immunity from fines (in writing). This is an important improvement, compared to the 1996 Notice, which only guaranteed a reduction somewhere in the range between 75% and 100% of the fine, rather than immunity.

The fact that the first company meeting the relevant criteria could obtain automatic and full immunity, significantly increased the certainty of outcome for potential leniency candidates. Even though the grant of immunity was logically conditional, the commitment of the Commission

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1863 Ibid, point 1. The 2002 Notice also stress that ‘[s]uch practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry’.

1864 Cf. 1996 Leniency Notice, point 1. The first version of the Leniency Notice only referred to ‘secret cartels between enterprises’.

1865 It should be noted that, since the 2002 Notice is no longer applicable, the analysis of the 2002 leniency policy is conducted in past tense. However, as the discussion of the 2006 Leniency Notice shows, most of the elements of the 2006 system remained unmodified in the 2006 Notice.

1866 For analysis of the reasons why leniency is only justified in horizontal cases see further supra section 4.1.2.1 of this Chapter.

1867 See also commenting on this point e.g. C. R. A. SWAAK AND D. J. ARP, “A tempting” 11; J. S. SANDHU, “The European” 149. J. S. SANDHU even commented that the fact that the by offering the guarantee to obtain full immunity the ‘2002 leniency programme removed the prior policy's underlying requirement that all cartel members be punished’. This comment is, however, rather inaccurate. In effect, the lack of a guarantee of full immunity did certainly not imply that all the cartel members had to be punished. As the practice of the Commission under the 1996 shows, the Commission granted full immunity in an important number of cases.

1868 One year after the publication of the 2002 Notice, P. LOWE, (Director General of DG Competition) stressed that the system had been a “tremendous success” for two main reasons. It guaranteed full immunity to the first undertaking providing the required evidence and it offered more legal security. P. LOWE, SPEECH 2003/044 “What's the Future for Cartel Enforcement?”, delivered at Conference: Understanding Global Cartel Enforcement, DG Competition, February 2003, Brussels. See also e.g. J. CARLE, “The new leniency” 271; M. BLOOM, “Despite” 544; M. JEPHCOTT (“The European” 378) who even observed that by offering guaranteed immunity to the first whistleblower, the Commission acknowledged the need to encourage firms to uncover the secrecy of the cartels, as opposed to the hollow “wait and see” approach offering only a reduction of fines in uncertain and nebulous circumstances.
to grant immunity certainly provides reassurance.\textsuperscript{1869} In addition, the guarantee of full protection from fines constitutes an important reward for cartel participants and motivates cartel conspirators to report illegal activity to the Commission and cooperate in the investigation of the case.\textsuperscript{1870} By introducing this modification, the Notice became also more aligned with economic theory, which indicates that full immunity must be guaranteed from an early stage in the procedure in clear circumstances.\textsuperscript{1871}

4.2.2.3. The availability of immunity after a Commission’s inspection

The 2002 programme introduced the possibility to obtain immunity after the Commission had conducted an inspection concerning a suspected cartel.\textsuperscript{1872} Particularly, under this new alternative, the leniency applicant had to provide evidence which ‘in the Commission’s view may enable it to find a cartel infringement’.\textsuperscript{1873} Or put differently, the evidence submitted had to enable the Commission to adopt an infringement decision condemning the cartel. This is, after all, the ultimate goal of the leniency policy.

The introduction of this possibility shows that the Commission listened to the concerns regarding the absence of such a provision under the previous Notice,\textsuperscript{1874} and accepted the idea that an effective system must engender a “race to the court mentality” also after a cartel has been detected.\textsuperscript{1875} Indeed, companies that have been deeply involved in a cartel can provide essential cooperation after an unproductive inspection by helping the Commission to find an infringement.\textsuperscript{1876} In view of this, the possibility to obtain immunity after an inspection has been conducted encourages undertakings to engage in cooperation until the moment when the Commission has sufficient evidence to establish the existence of a violation.\textsuperscript{1877} Still, and logically, under the 2002 system the requirements to obtain

\begin{thebibliography}{99}
\bibitem{1870} See also e.g. J. S. SANDHU, “The European” 149. According to this author “[t]his change rebalanced the public policy interests of uncovering cartels, on the one hand, and punishing cartel members, on the other, recognising that the detection of a larger number of cartels is the predominant goal of a leniency programme’. J. CARLE, “The new leniency” 269-270. However, this last author noted that, although the guarantee of full immunity was certainly a new advantage, such immunity was only to the benefit of the first “whistle-blower”. In addition, such maximized reward for the first informer stands in sharp contrast to the sliding scale of reductions available for subsequent applicants. Yet, these critics do not take into account the need to limit the leniency rewards in order to promote overall deterrence. Furthermore, there is a need to emphasise the difference between the rewards available for the first-comer and for subsequent applicants. Such difference has the effect of motivating firms to be first in the race to the Commission’s door. This aspect is further discussed below.
\bibitem{1871} In addition, it is important to note that in the instance that a company fails to satisfy the immunity conditions, it may still withdraw the evidence disclosed to the Commission. This new provision is further dealt with below.
\bibitem{1872} See also e.g. M. MOTTI AND M. POLO, “Leniency” 19-20 of the online version of this contribution; J. S. SANDHU, “The European” 149.
\bibitem{1873} Leniency Notice 2002, point 8(b). In this context it is interesting to note that this possibility was only introduced in the final version of the 2002 programme. In contrast, the 2002 Draft Notice did not provide for the possibility of immunity to undertakings where the Commission had already started its investigation. See Draft Notice of the Commission relating to the revision of the 1996 notice on the non-imposition or reduction of fines in cartel cases [2001] OJ C 205/18, point A(8).
\bibitem{1874} Leniency Notice 2002, point 8(b).
\bibitem{1875} See further supra section 4.1.2 of this Chapter.
\bibitem{1876} M. JEPHCOTT, “The European” 384. See also emphasising the importance and value of this possibility e.g. A. RILEY, “Cartel Whistleblowing” 91-92; J. CARLE, “The new leniency” 270; M. MOTTI AND M. POLO, “Leniency” 18 of the online version of this contribution.
\bibitem{1877} See OECD, “Leniency for Subsequent” 5. See further supra section 4.1.2 of this Chapter.
\bibitem{1878} J. CARLE, “The new leniency” 270.
\end{thebibliography}
obtaining immunity under this provision were stricter than in a situation where the Commission did not have any knowledge about the alleged cartel.\textsuperscript{1879} Once the Commission has certain information about the cartel and is in a position to use its investigation powers,\textsuperscript{1880} given the high probability of finding an infringement, the cartel participants will have a strong inclination to quickly approach the Commission.\textsuperscript{1881} In these circumstances, evidence and information which can only be used by the Commission to trigger an inspection are of little value. Companies should, thus, be required to submit information that serves the Commission in its task of establishing the infringement.\textsuperscript{1882}

It is important to note that this new type of immunity was no longer available once the Commission had granted conditional immunity to a firm whose cooperation enabled it to launch an inspection under point 8(a) of the 2002 Notice.\textsuperscript{1883} The fact that preference was given to immunity under point 8(a) of the 2002 Notice, indicates that the Commission attaches great importance to information which reveals the existence of a secret cartel.\textsuperscript{1884} On the other hand, the existence of two alternative paths to obtain immunity implied that only one company, i.e. the first company to reach the relevant threshold, could finally obtain immunity.\textsuperscript{1885}

The alternative nature of the immunity paths has a positive impact on the general effectiveness of the leniency system.\textsuperscript{1886} When cartel participants – know that they – can only qualify for immunity under point 8(b) if immunity under point 8(a) has not been granted, they are pressured to apply for leniency before an inspection has been launched. As a result, the race to the Commission to reveal the existence of the infringement is encouraged.\textsuperscript{1887} In addition, it should be kept in mind that lowering the level of penalties has an inevitable negative effect on deterrence. Limiting the granting of immunity to only one company is an appropriate choice to avoid granting unnecessary penalty reductions and, accordingly, to generally preserve deterrence.\textsuperscript{1888}

\textsuperscript{1879} Cf. supra section 4.1.2 of this Chapter. See also F. ARBAULT AND F. PEIRO, “The Commission’s new” 17; L. ORTIZ BLANCO, K. KONSTANTIN AND J. JÖRGENS, “Investigation of cases (I): Leniency policy” in L. ORTIZ BLANCO (ed.) \textit{EC Competition Procedure}, Oxford, OUP 2006, 1655 p., at 224 (hereafter: ‘L. ORTIZ BLANCO et al, “Investigation of cases”’). This aspect has also been stressed by the Commission in practice. See further infra section 4.2.4.2 of this Chapter.

\textsuperscript{1880} Cf. supra Chapter 7.

\textsuperscript{1881} In this context A. RILEY correctly observed that the extension of the right to seek immunity to undertakings already subject to an investigation by the Commission combined with the abolition of the decisive evidence test and the narrowing of the coercion test should encourage a significant number of additional immunity applicants to come forward. A. RILEY, “Cartel Whistleblowing” 92.


\textsuperscript{1883} Leniency Notice 2002, point 10.

\textsuperscript{1884} Cf. supra Leniency Notice1996. See also F. ARBAULT AND F. PEIRO, “The Commission’s new” 17.

\textsuperscript{1885} See also stressing this aspect L. ORTIZ BLANCO \textit{et al}, “Investigation of cases” 223. J. CARLE (“The new leniency” 270-271) has commented in this regard that ‘[t]he uncertainty as to whether the Commission has already applied the “dawn raid sufficiency test” may negatively affect the predictability of the alternative test in practice. A would-be cooperating entity may in other words find it difficult to predict whether it will be able to benefit from full immunity under the alternative test, as long as it does not know whether the Commission has already granted immunity under the “dawn raid sufficiency test” to another company’. This observation is, however, unjustified. As point 12 of the 2002 Notice specifies, once it becomes apparent that the relevant requirements are not met, the undertaking concerned will immediately be informed that immunity from fines is not available for the suspected infringement. This provision is therefore, designed to preserve the certainty of the procedure to apply for immunity.

\textsuperscript{1886} See for a different opinion J. CARLE, “The new leniency” 272. According to this author ‘the predictability as regards the Commission’s methodology for assessing applications for immunity is substantially reduced by the introduction of the “dawn raid sufficiency” test’.

\textsuperscript{1887} W. WILS, “The Commission Notice” 133.

\textsuperscript{1888} \textit{Ibid} 132-133. In this context it has been argued that ‘[t]he priority given to the “dawn raid sufficiency test” may in practice undermine the Commission’s ability to sufficiently reward valuable cooperation under the new Notice’. [...] Furthermore, [t]here is [also] a risk that the Commission excludes the grant of full immunity “prematurely” by granting
The introduction of this provision can be seen as an important improvement of the Commission’s leniency system. However, the wording of the 2002 Notice remained quite general as regards type of evidence which is necessary to reach the threshold of point 8(b). Although the Commission’s decisions provide useful guidance in this context, including some additional specifications in the Notice could arguably improve the level of certainty of the 2002 system and, hereby, its effectiveness.

4.2.2.4. The threshold of point 8(a): the evidence supplied should be enough for the Commission to order an inspection

The first revised version of the Leniency Notice replaced the condition that a firm had to be the first to adduce decisive evidence of the cartel’s existence. Under point 8(a) of the 2002 programme, in order to obtain immunity from fines, an undertaking had to ‘first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation’. Arguably, the “decisive evidence” requirement contained in the 1996 Notice imposed a burden which was relatively high on informers. Compared to this former condition, the revised threshold of point 8(a) of the 2002 Notice appeared easier to meet. A lower threshold has the effect of expanding the field of companies that are in principle eligible for the immunity reward. Accordingly, under the 2002 system, firms which were not in the possession of or had no direct access to key evidence about the working of the cartel also had a clear chance to qualify for full immunity to a company that is able to provide information which merely allows the Commission to initiate an investigation, rather than to establish the infringement. In the end, it may well be the timing rather than the quality of the co-operation that is decisive for the grant of full immunity’ (J. CARLE, “The new leniency” 270-271). It is true that rewarding cooperation which is useful to establish the infringement is necessary. Still, the comment above does not take into account the need of competition authorities to limit the leniency rewards and, thereby, preserve deterrence. Furthermore, it is logical that the Commission chooses to grant immunity to companies which reveal the existence of cartels instead than to companies which (help to) establish the existence of an infringement (supra). In addition, companies which reveal the existence of a cartel often contribute to further prove the violation when they provide full and continuous cooperation as required by the 2002 Notice. Although it follows from the wording of the Notice that the point 8(b) threshold corresponds to the one required under (now) Article 7 of Regulation 1/2003 for the Commission to be able to adopt an infringement decision, it appears that, in practice, applicants did not always know what kind of evidence was needed in a post inspection scenario. See S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 9. These authors indeed commented that ‘companies and their legal advisors have not always understood the difference with the 8(a) threshold’.

See further infra 4.2.4 of this Chapter. In this regard it is interesting to note that the 2001 Draft Notice limited applications for immunity to those cases where the Commission was ‘unaware of the alleged cartel’. See (Draft) Notice of the Commission relating to the revision of the 1996 Leniency Notice [2001] OJ C 205/18, point A(8). This condition is certainly more difficult to fulfil than the immunity standard finally contained in the 2002 Notice and the previous section B of the 1996 Notice. In particular, if immunity could only be granted when the Commission is unaware of a cartel, such benefit could not (have) be(en) granted in any of the cases where the Commission had been informed that an investigation on a global cartel had been opened in a different jurisdiction. See supra section 4.1.4 of this Chapter. See further supra section 4.1.2.2(b) of this Chapter. F. ARBAULT AND F. PEIRO, “The Commission’s new” 18; A. RILEY, “Cartel Whistleblowing” 91. According to A. RILEY the abolishment of the decisive evidence was one of the most noticeable developments of the new Notice. See also commenting on this point A. RILEY, “Cartel Whistleblowing” 92; J. CARLE, “The new leniency” 269-270; C. R. A. SWAAK AND D. J. ARP, “A tempting” 14, L. ORTIZ BLANCO et al, “Investigation of cases” 223.

See also J. CARLE, “The new leniency” 269-270.
immunity.\textsuperscript{1895} At the same time, as the number of potential immunity applicants increases, the leniency race becomes more intense.\textsuperscript{1896}

It can, however, be argued that, since the threshold to qualify for immunity was lower, the information provided by undertakings could be less valuable for the Commission. In this regard, it should be taken into account that the Commission has important powers of investigation. It is precisely the combination of the leniency policy with the powers of investigation that works effectively.\textsuperscript{1897} Once cartel participants have provided the Commission with enough information to launch an inspection, arguably, the Commission can proceed on its own with the investigation by using its investigation powers.\textsuperscript{1898} Nevertheless, when the Commission has received just enough evidence to launch an inspection, continuing the investigation by its own means can be considerably costly and time consuming. From this (enforcement) perspective, the threshold contained in point 8(a) may not have been the most cost-effective detection standard.

While the modified threshold of point 8(a) of the 2002 Notice offered certain advantages for both undertakings and the Commission, on the other hand, the lack of a predefined legal standard for ordering a dawn raid investigation may increase uncertainty for potential leniency candidates.\textsuperscript{1899} Providing some guidance as regards the type of information and evidence that is necessary to meet the threshold of point 8(a), could avoid uncertainties and further reinforce the system.\textsuperscript{1900}

\textsuperscript{1895} A. Riley observed that “[b]y lightening the evidential load the [Leniency Notice] widens the field of applicants to peripheral players in the cartel who are likely to have less evidence of its operations’ (emphasis added). This comment is however, considerably general, as it assumes that only the cartel ringleaders or members which played an important role in the agreement can be in possession of important evidence. While the important players of the cartel indeed often possess key evidence about its working, it should also still be kept in mind that cartel ringleaders were directly disqualified to obtain immunity. In addition, members with a less important role in the cartel could also have (access to) key evidence. A. Riley, “Cartel Whistleblowing” 92. See also in the same line as Riley, J. Carle, “The new leniency” 269-270. This author added that ‘[s]ome of the best results under the U.S. leniency programme were in fact achieved by informers who, because of their peripheral role in the cartel, would not have qualified under the decisive evidence standard’. This author, however, also commented that ‘the “decisive evidence” test had the advantage of great predictability. It may not have been well-defined on paper, but its meaning was relatively well-known’. See also supra section 4.1.3.2 of this Chapter.

\textsuperscript{1896} See also e.g. J. Carle, “The new leniency” 269-270; A. Riley, “Cartel Whistleblowing” 91; C. R. A. Swaak and D. J. Arp, “A tempting” 14. According to this last commentator the elimination of the decisive evidence standard reduces the subjectivity of the applicable immunity requirements and encourages the reporting of cartel activity.

\textsuperscript{1897} See also supra section 4.1.3.2 of this Chapter.

\textsuperscript{1898} B. Van Barlingen, “The European Commission’s 2002 Leniency Notice after one year of operation”, 2003 (2) EC Competition Policy Newsletter, 16-22, at 17 (hereafter: ‘B. Van Barlingen, “The European Commission’s 2002’’”). According to this author ‘the combination of the instrument of immunity with the Commission’s own powers of investigation […] makes the current Notice so effective’.

\textsuperscript{1899} See J. Joshua, “Session C- Tools of Enforcement” in C.-D. Ehlermann and I. Atanasiu (eds.) European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Hart Publishing, Oxford (2007), 736 p., at 386 (hereafter: ‘J. Joshua, “Session C’’’); L. Ortiz Blanco et al, “Investigation of cases” 224; A. Riley, “Cartel Whistleblowing” 92-93. This last author commented that the 2002 Leniency Notice ‘makes it clear in both points 8(a) and 8(b) that immunity is only available where the evidence submitted may in the Commission’s view enable it to adopt a decision under Article 14(3) of Regulation 17 or may enable it to find an infringement in connection with an alleged cartel. Clearly the Commission needs to be able to make an assessment as to the nature and quality of the evidence proffered. […] The existence of such a subjective element may well raise a question with potential applicants as to the extent to which they can in fact rely on the provisions of the Notice’. C. R. A. Swaak and D. J. Arp, “A tempting” 14. These authors comment that ‘[t]he new policy adopts different language, but it does not exactly reduce the subjectivity of the evidence standard’. J. Carle, “The new leniency” 270. This last author comments that ‘[t]he “dawn raid sufficiency” test thus appears arbitrary and open to manipulation, something which obviously increases the uncertainty of a would-be co-operating entity’.

\textsuperscript{1900} This aspect was also recognised by Commission’s staff members when the 2002 Notice was revised. See S. Suurnäkki and M. L. Tierno Centella, “Commission adopts” 8.
4.2.2.5. The exclusion of coercers

In order to be eligible for immunity, the 2002 policy required that the leniency applicant had not taken steps to ‘coerce other undertakings to participate in the infringement’.\footnote{Leniency Notice 2002, point 11(c).}

This is an important change which has a positive impact on the effectiveness of the system. Firstly, the revised wording of the ringleader exclusion eliminated the subjectivity and uncertainty of the 1996 system with respect to the question whether the company ‘had played a decisive role in the cartel’.\footnote{Cf. supra section 4.1.2.2(e) of this Chapter. See also Commission, Press Release MEMO/02/23. C. R. A. SWAAK AND D. J. ARP, “A tempting” 13.} Since the publication of the 2002 system, applicants knew with certainty that they would not be automatically disqualified for immunity, unless they affirmatively coerced other firms to participate in the infringement.\footnote{See also e.g. C. R. A. SWAAK AND D. J. ARP, “A tempting” 13; M. JEPHCOTT, “The European” 384.} Secondly, compared to the previous system, the 2002 Notice narrowed the type of cartel members which can be disqualified based on its role in the infringement.\footnote{See also e.g M. JEPHCOTT, “The European” 384.} According to the 2002 approach, only the company that coerced others could be excluded from immunity, while the rest of the cartel organisers are considered equal partners in forming the conspiracy and remain, thus, fully qualified to seek immunity.\footnote{It should be recalled that under the previous system it was possible that more than one company acted as cartel ringleaders and were, accordingly, disqualified under section B. See supra sections 4.1.2.2(e) and 4.1.3.2 of this Chapter.} Widening the scope of potential immunity applicants, encouraged the race to leniency and put pressure on cartel members to be first to submit their applications. In addition, companies that played a relevant role in the cartel frequently have evidence in their possession that can be of decisive importance to establish the infringement.\footnote{See supra section 4.1.2.2(e) of this Chapter.} From this perspective, extending the range of potentially qualifying applicants can be seen as a significant a step to encourage and facilitate qualitative immunity applications. At the same time excluding cartel members which coerced other firms to participate in the infringement certainly appears justified. With this exclusion the Commission can avoid that companies which adopt this reprehensible behaviour also remain entitled to obtain immunity.

4.2.2.6. The possibility to obtain (written confirmation of) conditional immunity

In addition to guaranteeing full immunity, companies which cooperated under the 2002 Leniency Notice could obtain a written confirmation of conditional immunity at an early stage of the proceedings. Particularly, in the 2002 Notice the Commission committed to granting a qualifying candidate conditional immunity in writing, as soon as the company concerned had disclosed its evidence to the Commission or had provided the evidence in hypothetical terms.\footnote{Leniency Notice 2002, points 13 and 15.}

This modification is a significant improvement with respect to the 1996 Leniency Notice, which only addressed this matter once the Commission’s entire investigation was concluded and the ultimate decision of the Commission was issued.\footnote{Leniency Notice 1996, section E, point 2. See further supra section 4.1.2.3 of this Chapter.} After the 2002 revision, undertakings could find out well in advance of the issuance of the infringement decision whether they would obtain
immunity. Therefore, this possibility made the advantages of the system tangible at a very early stage of the procedure and could motivate undertakings to come forward. Nevertheless, it can be argued that since the granting of immunity was only conditional, companies did not have complete certainty about the status of their application. Making immunity conditional is, however, absolutely necessary to secure the companies’ cooperation during the whole procedure. If the granting of immunity were final, companies would have no motivation to continue providing evidence and information during the proceedings. This could potentially jeopardise the investigation of the whole case.

4.2.2.7. The possibility to make hypothetical immunity applications

The 2002 Notice introduced the possibility to apply for immunity “in hypothetical terms”. In a hypothetical application, instead of immediately providing the Commission with all the relevant evidence of the cartel, a company presented a descriptive list of the evidence which it proposed to disclose at a later date. This list had to accurately reflect the nature and content of the evidence, without jeopardising the hypothetical nature of its disclosure.

A hypothetical application can be compared to a regular leniency application, except for the fact that the application process takes place in two phases. First, the Commission had to establish whether the evidence described in the list met the immunity conditions of point 8(a) or 8(b) of the 2002 Notice. Once the Commission had taken a decision in this respect and the applicant has disclosed the evidence of the list, the Commission had to verify whether the evidence received corresponded to the description provided in the list. If this was the case, immunity was granted.

The main advantage of hypothetical applications, compared to the regular procedure, is that leniency applicants could obtain a decision of the Commission ensuring them conditional immunity, before

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1909 See also A. RILEY, “Cartel Whistleblowing” 92. C. R. A. SWAAK AND D. J. ARP comment in this regard that “[u]nder the new policy, […] an amnesty applicant can apply simultaneously in the European Union, the United States, and Canada, with assurance that if it is first in the door and meets the immunity requirements, it can obtain full protection from government penalties and secure written confirmation of conditional protection promptly in all three jurisdictions. For government enforcers and counsel representing potential leniency applicants alike, this is a welcome development” (C. R. A. SWAAK AND D. J. ARP, “A tempting” 12).

1910 This was probably the reason why, under the previous system, companies only learned whether they had obtained a lenient treatment when the final decision was published.

1911 C. R. A. SWAAK AND D. J. ARP (“A tempting” 15) expressed their concern that ‘if the Commission appears inclined to deny full immunity to otherwise qualifying candidates in close cases based on subjective interpretive issues, the EC policy—and in turn the analogue policies of other jurisdictions—will not be as successful as they could be’. However, as it is examined below, the Commission’s practice showed that this concern did not materialise (“The application of the 2002 Notice”).

1912 Leniency Notice 2002, point 13(b).


1914 It is true that, since the substantial evaluation of the evidence takes place at the first stage, the hypothetical list initially supplied should be sufficiently detailed to permit a thorough and accurate evaluation of whether the actual evidence will meet the conditions of points 8(a) or 8(b). B. VAN BARLINGEN, “The European Commission’s 2002” 19. In this context it has been argued that since the hypothetical application process focuses on documentary evidence (see Leniency Notice 2002, point 13) ‘it is likely that only the major players in the cartel will have access to most if not all of the documentation. Minor players are likely to have access to far less documentation’. A. RILEY, “Cartel Whistleblowing” 94. While admittedly firms which played an important role normally have more evidence of the cartel in their possession, this does not imply that minor players do not have (access to) such information. In any event, the Commission also accepts non-documentary evidence provided in the context of leniency applications.
they had provided the actual evidence. In addition, if the company in question failed to satisfy the relevant conditions to obtain immunity, it had the possibility to withdraw the evidence it had disclosed for the purposes of an immunity application or to request the Commission to consider the application in the context of a fine reduction. This is an important advantage for companies which only wish to cooperate if they can obtain full immunity from fines. Alternatively, companies which remain willing to cooperate (even) if they can (only) obtain a reduction in fines still have this option and may use the material prepared in the context of their hypothetical application. The hypothetical application procedure offers great reassurance for leniency candidates while increasing the transparency of the system. This makes the Leniency Notice more attractive for cartel participants.

4.2.2.8. Reduction in fines: the “significant added value” test

Under the 2002 Notice, when immunity had already been granted, or the Commission had already enough evidence to find an infringement, reductions of fines up to 50% were still available for companies that provided significant added value to the Commission’s case.

The 2002 policy contained some guidance as to the meaning of the concept of “significant added value”. According to the Notice this concept implied that a company had to submit new evidence

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1915 B. Van Barlingen, “The European Commission’s 2002” 19. See however, M. Jephcott, “The European” 383. This commentator observes that although ‘[t]his idea seems to be a genuine attempt by the Commission to encourage confessions, in practice ‘it is unlikely [...] to be of much practical use: any potential confessor will likely have to narrow down the area in which the cartel is active to such an extent that he will be as good as confessing’. Admittedly, a leniency applicant using this procedure must exactly know which type of evidence it can obtain (or have access to) and subsequently submit. Still, this procedure has the advantage of buying the applicant some time before the actual evidence has to be provided. In addition, this author does not take other advantages of the hypothetical process into account. As it is analysed below, applicants have the (at least theoretical) possibility to withdraw their application if they do not qualify for immunity.

1916 To date, on the basis of the information published by the Commission this situation has not occurred yet.

1917 There were, however, doubts as to how the hypothetical application mechanism would work in practice. In particular, it was commented that the 2002 Notice did not specify whether the Commission would allow anonymous initial inquiries as to whether immunity was available in a particular industry (or with respect to a specific area of economic activity), without having to (hypothetically) apply for immunity. Without the possibility to make such anonymous inquiries, potential applicants would have to firstly, disclose their identity and, secondly, provide (on a “hypothetical” basis) sufficient details regarding an infringement. Since the Commission is – logically – not prevented from using its normal powers of investigation once a company has withdrawn evidence (see Leniency Notice 2002, point 17), there was a concern that companies could not provide a list of evidence without surpassing the boundaries of a hypothesis.

1918 Leniency Notice 2002, point 17.

1919 J. Carle, “The new leniency” 271-272. This author argues that ‘the lack of predictability as concerns the grant of full immunity under the new Notice is, at least partially, compensated for by the fact that a decision to cooperate with the Commission is not conclusive.’


1921 As to the amount of the reductions under the 2002 see infra section 4.2.2.9 of this Chapter.

that by its very nature or level of detail reinforced the Commission’s ability to prove the existence of the cartel infringement.\textsuperscript{1923} This revised criterion clarified the meaning and scope of the condition to obtain a reduction set out in section D of the 1996 regime, which only required that a company “cooperated”.\textsuperscript{1924}

This guidance is desirable as it made clear that, even if undertakings have good will to cooperate, unproductive cooperation is not sufficient to obtain a fine reduction. In fact, the “significant added value” test was designed to ensure that only cooperation of a certain value was rewarded under the 2002 Notice. Moreover, since the chances for an applicant to add significant value to the investigation diminish with every new application, this concept also served to encourage firms to apply as fast as possible.\textsuperscript{1925} In turn, the significant added value test also has the effect of excluding some forms of cooperation which were in fact rewarded under the 1996 Notice, even though they had very little value for the Commission’s case. This is, for instance, the case of the 10% leniency reward that was commonly granted to undertakings which did not substantially contest the factual description in the statement of objections.\textsuperscript{1926} \textsuperscript{1927} Although, from this point of view, the Notice may appear strict(er), the significant added value condition is necessary from an effective enforcement perspective to justify granting reductions once the Commission has already granted immunity.

4.2.2.9. The new sliding scale of reductions

The 2002 policy also offered important advantages for undertakings which did not qualify for full immunity, but still wished to obtain a reduction in fines by cooperating in the Commission’s investigation. The 2002 Notice introduced a system of sliding scale of reductions under which subsequent applicants were guaranteed a reduction in a certain band, based on how quickly they provided the evidence representing “significant added value” compared to other reduction

\textsuperscript{1923} Ibid, point 22. This standard clearly codified the practice of the Commission in the application of the 1996 Notice.

\textsuperscript{1924} See further supra section 4.1.2.2(d) of this Chapter. In this context, it was however argued that the lack of transparency of the Fining Guidelines had a negative impact on the improved wording of the Leniency Notice. M. BLOOM, “Despite” 547. This author pointed out that ‘[s]ome practitioners consider there has been a considerable variation in this standard. Some practitioners also consider that the level of transparency of fines is not all it might be. 50% reduction of what? Sceptics could allege that the Commission doubles the number to arrive at the result it wants to achieve after the deduction. It is important to be as transparent as possible in order to minimise the scope for any such scepticism’. The discretion in setting fines is however necessary for the Commission to develop competition policy. Having some discretion in setting fines is also necessary to avoid that companies simply calculate whether remaining in the cartel is a (more) profitable option.

\textsuperscript{1925} See also e.g. S. SUURNAKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 11; R. INCARDONA, “The Fight” 40. It is however important to take into account that it is the moment in time at which a company reaches the “significant added value” threshold that determines the band of the reduction in fines available under the 2002 Notice (see further infra section 4.2.4 of this Chapter. The quality of the evidence was only reflected in the precise percentage of reduction within the applicable reduction range. See also pointing out this aspect J. CARLE, “The new leniency” 271.

\textsuperscript{1926} See also J. CARLE, “The new leniency” 272.

\textsuperscript{1927} This aspect has indeed been acknowledged by the European Courts. In particular, in \textit{Arkema France v Commission}, the General Court held that ‘[b]y replacing the 1996 [Leniency] Notice […] by the 2002 [Leniency] Notice […], which makes no provision for a reduction of the fine in a simple case of non-contestation of the facts, the Commission unambiguously precluded the grant of a reduction of the fine on that basis in the context of the 2002 Leniency Notice or of the fourth indent of point 29 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Only where an undertaking supplies either evidence having significant added value, within the meaning of point 21 of the 2002 Leniency Notice, or evidence in the absence of which the Commission would not have been able to penalise the infringement in question in whole or in part in its final decision, is the Commission required to grant it a reduction of the fine’. Judgment of the General Court of 17 May 2011, Case T-343/08, \textit{Arkema France v Commission} [2011] ECR II-2287, paras 168-170.
candidates. As described above, under the 2002 system the first qualifying applicant was granted a reduction in the band of 30 to 50%. The second reduction consisted in a discount in the range of 20-30%. Finally, other subsequent qualifying undertakings were rewarded with a reduction up to 20%. In order to determine the level of reduction within each of these bands, the Commission specified in the Notice that it would take into account the timing of the cooperation, the extent to which the evidence submitted represented added value and the extent and continuity of the cooperation.

This sliding scale of reductions significantly differed from the system of reductions contained in the 1996 system, which only established that qualifying firms were entitled to a reduction in the range of 10-50%. By changing its policy and providing clear incrementally diminishing benefits for applicants who came second, third, and fourth after the first immunity applicant, the effectiveness of the system was improved in several ways.

Firstly, a system of incrementally diminishing reductions for later reporting applicants offers companies the guarantee of a specific discount range, based on how quickly they come forward compared to other non-immunity applicants. This new correlation between the timing and the applicable reduction puts the emphasis on the (significant) advantage that a successful reduction applicant may gain over other cartel members. This obviously motivates all cartel parties to cooperate with the Commission as fast as possible and, by doing so, secure the highest discount possible. Companies considering to come forward under the leniency system have in this sense a greater motivation to be second – rather than third – and third – rather than fourth – in the leniency

1928 See further commenting on this point J. CARLE, “The new leniency” 271.
1929 Leniency Notice 2002, point 23(b).
1930 Leniency Notice 2002, point 23. See further infra section 4.2.4.3 of this Chapter.
1931 Leniency Notice 1996, point D. See also comparing both systems e.g. C. R. A. SWAACK AND D. J. ARP, “A tempting” 12.
1932 The system of reduction bands for later reporting companies has been qualified as (another) ‘notable up-front guarantee’ of the revised Notice. C. R. A. SWAACK AND D. J. ARP, “A tempting” 12. See for a different opinion J. CARLE, “The new leniency” 271. According to this author compared to the 1996 Notice, ‘the reductions are more limited under the new Notice. This is true with regard to both the level of fine reduction granted and the number of companies being able to benefit from a reduction. The Commission has limited the fine reduction to a maximum of 50 per cent under the 2002 notice. It should be noted moreover that the 30 to 50 per cent reduction is available only to the first company in the door that fails to meet the criteria for full immunity’. As regards the level of reduction, it should be noted that this comment is based on a comparison between the reduction of former section C of 50% to 75% discount and the 2002 system of reductions. Considering the requirements that had to be met to obtain a reduction under former section C (see supra section 4.1.2.2(f) of this Chapter), it would be more appropriate to compare this reduction with the alternative immunity test of point 8(b) established under the 2002 Notice. This (more adequate) comparison clearly illustrates that the 2002 system provides more generous discounts. In addition, as regards the number of companies, it is true that the 2002 system only offers a 50 to 30% reduction to the first company meeting the “significant added value threshold”. Still, if multiple companies would be entitled to such substantial discounts, the race between applicants would be undermined.
1933 In this context the question has been raised ‘whether the fine reductions are too low to encourage applicants to come forward. There are no fine reductions over 50%. Only the first undertaking can obtain the maximum 50%, the second undertaking can only obtain a maximum of 30%, and after that the maximum is 20%’. A. RILEY, “Cartel Whistleblowing” 94. The amounts of these reductions are however also designed to emphasise the advantage that immunity applicant may gain with respect to subsequent applicants (see further supra section 4.1.2.2(f) of this Chapter). In addition, while it is true that later applicants may often provide evidence which is important for the establishment of the infringement, the decisions of the Commission adopted under the previous system have shown that fine reductions of 50% maximum constitute an appropriate incentive for subsequent applicants to cooperate in the case. See supra section 4.1.3.4 of this Chapter. See for a different opinion J. CARLE, “The new leniency” 271.
This approach is also in line with effective enforcement considerations according to which earlier cooperation generally has greater value for the competition authority than cooperation provided later in the procedure. Furthermore, the procedure to obtain leniency reductions was also improved by the 2002 regime. In particular, the Commission informed the company in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction in fines within a specified percentage band. The fact that the Commission officially committed to grant a fine reduction within a percentage range increases the transparency and certainty of the leniency system while reinforcing companies’ expectations with respect to the applicable reductions.

Last but not least, the fact that the precise percentage of reduction within the relevant band is determined based *inter alia* on ‘the extent to which the evidence submitted represented added value’ ensures that leniency applicants do not only provide prompt cooperation but also high quality evidence. This type of (qualitative) cooperation may be useful to speed up the investigative process and, most importantly, is crucial for the successful prosecution of the case. At the same time, the calibration of the reduction on the basis of the quality of the evidence could also be used by the Commission as a mechanism to stress the difference between the discounts which are finally granted to the first, second and later reduction applicants. Only when the gap in the leniency rewards is substantial, cartel participants will be encouraged to cooperate.

### 4.2.2.10. The possibility to obtain partial immunity

The 2006 leniency programme introduced the so-called “partial immunity” provision. Pursuant to point 23 when an undertaking provided evidence relating to facts unknown to the Commission, which had a direct bearing on the gravity or duration of the cartel, these elements were not taken into account to calculate the fine of the firm which provided such information. Or in other words, an undertaking which was granted partial immunity had to be treated as if it had not participated in these additional aspects of the cartel in question for the purposes of calculating the amount of the fine.

Punishing an undertaking which reveals this type of information to the Commission more severely than if it had not supplied such information goes, in fact, against the spirit of the policy of rewarding companies for their cooperation. The “partial immunity” provision is an important (but still logical) innovation of the 2002 system. This provision allows companies which apply for a reduction

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1934 Furthermore, since the difference between the discount for qualifying immunity applicants and the reduction for first qualifying applicant is considerable, companies will be even more motivated to be the first leniency applicant to come forward and disclose the existence of cartel.
1935 See OECD, “Leniency for Subsequent” 15. As this report points out, it is for this reason that Leniency policies sometimes provide for a cut-off point after which leniency is no longer available.
1936 Leniency Notice 2002, points 25-27. The final amount of the reduction will be known at the end of the procedure.
1940 See OECD, “Hardcore cartels: recent progress”.
under the leniency system to obtain a greater reduction than would have otherwise been available under the Notice.\textsuperscript{1943} This possibility reassures applicants that their own (crucial) submission will not have a negative impact on their liability, while motivating them to submit all the evidence in their possession as soon as possible before other applicants do so.\textsuperscript{1944}

4.2.2.11. Interaction with private enforcement

Just like the 1996 Leniency system the 2002 Notice specified that ‘the fact that immunity or reduction in respect of fines [had been] granted [did] not protect an undertaking from the civil law consequences of its participation in an infringement’.\textsuperscript{1945} Given the persistence of the lack of coordination between private actions and the leniency system, the risk of being prejudiced in civil damages actions following the publication of the Commission decision fining a cartel, remained one of the core (and unresolved) issues under the 2002 Leniency Notice. The Commission tried to address this issue in practice by accepting oral applications and, hereby, providing (partial) protection in the context of discovery and private actions.\textsuperscript{1946} Still, as is analysed in detail below, further initiatives were needed to find the right balance between the need to preserve the effectiveness of the leniency programme and the right of cartel victims to obtain compensation for their damage.\textsuperscript{1947}

4.2.3. Overview of cases and leniency discounts

On the basis of the 2002 system, the Commission granted some type of lenient treatment in 29 cartel decisions in total. These Commission’s decisions are listed in the table below.\textsuperscript{1948} The table shows how much leniency discount was granted in each case.
<table>
<thead>
<tr>
<th>Date</th>
<th>Decision</th>
<th>Discount granted under</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 October 2005</td>
<td>Raw Tobacco Italy</td>
<td>Deltafina lost conditional immunity 50% (1 firm), 30% (provisional band of reduction respected)</td>
</tr>
<tr>
<td>21 December 2005</td>
<td>Rubber chemicals</td>
<td>100% (provisional immunity respected)</td>
</tr>
<tr>
<td>3 May 2006</td>
<td>Hydrogen Peroxide and Perborate</td>
<td>100%</td>
</tr>
<tr>
<td>31 May 2006</td>
<td>Methacrylates</td>
<td>100%</td>
</tr>
<tr>
<td>13 September 2006</td>
<td>Bitumen Nederland</td>
<td>100%</td>
</tr>
<tr>
<td>29 November 2006</td>
<td>BR/ESBR</td>
<td>100%</td>
</tr>
<tr>
<td>24 January 2007</td>
<td>Gas insulated switchgear</td>
<td>100%</td>
</tr>
<tr>
<td>3 October 2007</td>
<td>Bitumen Spain</td>
<td>100%</td>
</tr>
<tr>
<td>21 February 2007</td>
<td>Elevators and escalators Belgium</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>Elevators and escalators Germany</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>Elevators and escalators Luxembourg</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>Elevators and escalators The Netherlands</td>
<td>100%</td>
</tr>
<tr>
<td>19 September 2007</td>
<td>Hard haberdashery: fasteners</td>
<td>100%</td>
</tr>
<tr>
<td>20 November 2007</td>
<td>Professional videotapes</td>
<td>100%</td>
</tr>
</tbody>
</table>

1949 When only one firm was granted a reduction under point 23 of the 2002 Notice the number of firms is not mentioned in the Table.
1950 Unless otherwise specified, the Commission granted final reductions within the band that had previously been communicated to the undertakings concerned.
1951 Unless otherwise specified, the provisional decision granting immunity was respected by the Commission and, consequently, final immunity was granted.
1952 In Elevators and escalators, the Commission found that the addressees of the decision participated in four separate single and continuous infringements in Belgium, Germany, Luxembourg and the Netherlands. Each of the four infringements covered the whole territory of a Member State. Since all four cartels displayed common elements (similar cartel participants, the same products and services in each Member State at issue, largely overlapping periods of infringement and comparable methods for allocation) the Commission decided to address its objections relating to the four cartels in one single Statement of Objections. As a consequence, only one decision was finally adopted by the Commission. The fact that various infringements were established implies that more than one undertaking were able to benefit from immunity, even if the case concerns only one decision.
1953 In this case both the 1996 and the 2002 Leniency Notices were applied.
<table>
<thead>
<tr>
<th>Date</th>
<th>Product</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>28 November 2007</td>
<td>Flat glass</td>
<td>50%, 25%</td>
</tr>
<tr>
<td>5 December 2007</td>
<td>Chloroprene rubber</td>
<td>100%</td>
</tr>
<tr>
<td>23 January 2008</td>
<td>Nitrile Butadiene Rubber</td>
<td>30%, 20% + partial immunity</td>
</tr>
<tr>
<td>11 March 2008</td>
<td>International removal services</td>
<td>50%+ partial immunity</td>
</tr>
<tr>
<td>11 June 2008</td>
<td>Sodium Chlorate</td>
<td>100%</td>
</tr>
<tr>
<td>25 June 2008</td>
<td>Aluminium Fluoride</td>
<td>100%</td>
</tr>
<tr>
<td>1 October 2008</td>
<td>Candle waxes</td>
<td>100%</td>
</tr>
<tr>
<td>12 November 2008</td>
<td>Carglass</td>
<td>50%</td>
</tr>
<tr>
<td>22 July 2009</td>
<td>Calcium carbide and magnesium based reagents</td>
<td>100%</td>
</tr>
<tr>
<td>7 October 2009</td>
<td>Power transformers</td>
<td>100%</td>
</tr>
<tr>
<td>11 November 2009</td>
<td>Heat stabilisers (tin stabilisers)</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>Heat stabilisers (ESBO/esters)</td>
<td>100%</td>
</tr>
<tr>
<td>19 May 2010</td>
<td>DRAMs</td>
<td>100%</td>
</tr>
<tr>
<td>23 June 2010</td>
<td>Bathroom fittings &amp; fixtures</td>
<td>100%</td>
</tr>
<tr>
<td>30 June 2010</td>
<td>Prestressing steel</td>
<td>100%</td>
</tr>
<tr>
<td>20 July 2010</td>
<td>Animal Feed Phosphates</td>
<td>100%</td>
</tr>
<tr>
<td>9 November 2010</td>
<td>Airfreight</td>
<td>100%</td>
</tr>
<tr>
<td>8 December 2010</td>
<td>LCD</td>
<td>100%</td>
</tr>
<tr>
<td>12 October 2011</td>
<td>Bananas</td>
<td>100%</td>
</tr>
</tbody>
</table>

As the table illustrates, under the 2002 Leniency Notice undertakings benefited from immunity in a considerable majority of cases. Individual reductions were also granted in almost every case. In addition, only in one case the Commission decided not to grant final immunity, even if it had granted provisional immunity. Further, the final leniency discounts which were granted to the undertakings which qualified for reductions always corresponded to the percentage band that was indicated by the Commission before the adoption of the Statement of Objections.

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1954 This decision concerns two separate single and continuous infringements of Article 101 TFEU and Article 53 of the EEA Agreement regarding two categories of heat stabilisers: tin stabilisers and ESBO/esters.

1955 See further infra section 4.2.5 of this Chapter.

1956 See further analysing this case infra section 4.2.4.2 of this Chapter.
4.2.4. The application of the 2002 Leniency Notice

The modifications included in the 2002 Leniency Notice reflect an important material change in the Commission’s approach towards the leniency policy. Although the improved design of the Notice appears, at a first sight, capable of creating greater incentives for companies to blow the whistle, the question how the Commission interprets and implements the system remains decisive for undertakings considering to submit a leniency application. Below, the most interesting cases in which the Commission granted immunity or a reduction in fines under the 2002 Leniency Notice are discussed. This examination also includes some cases in which the Commission decided not to grant some type of lenient treatment because, in its view, the conditions were not met.

4.2.4.1. Granting immunity under point 8(a) of the 2002 Notice

Under the 2002 system, immunity pursuant point 8(a) has been granted in 21 cases.

Under the 2002 system, immunity pursuant point 8(a) has been granted in 21 cases.

In Rubber chemicals, Flexsys was the first company to submit evidence which enabled the Commission to adopt a decision to carry out an inspection in connection with a suspected cartel in the rubber chemicals industry. Since prior to Flexsys’ application, the Commission did not have sufficient evidence to adopt a decision to conduct an inspection and Flexsys satisfied all the relevant conditions, this undertaking was firstly granted conditional immunity and full immunity in the final decision. It is, however, interesting to note that another undertaking, Crompton, argued that the Commission’s decision to grant Flexsys conditional immunity was unfounded. Particularly, Crompton argued that Flexsys did not immediately provide documentary evidence and that it had not terminated the infringement. The Commission, however, clearly stated that submitting documentary evidence is not a requisite to obtain immunity. On the other hand, it also found that the continuation of an infringement after applying for immunity may indeed lead to withdrawal of any favourable lenient treatment. Applicants must therefore ‘be careful in its relations with the other cartel members in order not to raise suspicions about the immunity application and, thereby, about the Commission’s investigations’.

That being said, withdrawal of immunity is a very serious matter, which cannot be based on assertions and evidence leaving scope for any doubt.


1957 In this context it was rightly argued that if the Commission appeared inclined to deny or withdraw (provisional) immunity based on subjective issues, the success of the leniency policy would be at risk. C. R. A. Swaan and D. J. Arp, “A tempting” 15. See also stressing the importance of the application and interpretation of the 2002 Notice M. Jephcott, “The European” 384-385. According to this author “[t]he effectiveness of the entire regime now depends a most exclusively on the way in which the bare bones of this notice are fleshed out in its application. The real proof will come in the interpretation of the notice and it is the Commission’s responsibility to apply it properly, and to inspire confidence in potential whistleblowers that they will be treated fairly and will enjoy the tantalisingly enormous benefits that are on offer.”


1960 Ibid, para 353.

1961 Ibid, para 358. In particular, Crompton provided proof of a telephone call on 2 September 2002 by Mr. […] of Crompton to Mr. […] of Flexsys. According to Crompton, ‘this e-mail shows that the Flexsys employee signalled concern about accelerator margins, disclosed issues relating to production capacities and costs, disclosed information concerning Flexsys’ contractual arrangements with its customers and confirmed Flexsys’ likely future pricing strategy with regard to other products’.

1962 Ibid, paras 354-356. In addition, ‘Flexsys provided the Commission the information it needed to locate the evidence, including the names and locations of the participating companies and individuals, as well as a description of certain essential events, such as when collusive price increases took place. The information provided by Flexsys uncontestably allowed the Commission to carry out inspections and to uncover the cartel, whereas Crompton’s evidence strengthened the Commission’s ability to prove the infringement. If there were no weaknesses or uncertainties in the case after the immunity applicant’s submissions and the inspections, there would have been no scope for Crompton to provide significant added value to the evidence in the Commission’s possession at the time of its application’.

Whereas in this case the Commission admitted that there was some ambiguity, it concluded that there was not sufficient proof that Flexsys did not terminate its infringement at the moment it applied for immunity.\textsuperscript{1964}

Comparably, in \textit{Candle waxes} \textsuperscript{1965} Shell was the first undertaking to inform the Commission about the existence of this cartel. In addition, the documentary evidence and corporate statement provided by Shell subsequently enabled the Commission to establish the existence, content and the participants of a number of cartel meetings as well as to undertake inspections. However, another cartel participant suggested that Shell did not fulfil all the requirements to obtain immunity. In particular, it was suggested that Shell disclosed its leniency application to Sasol, other cartel member.\textsuperscript{1966} The Commission emphasised that ‘[a]ny allegation in this respect must be based on undeniable evidence’.\textsuperscript{1967} Since the information about Shell’s internal investigation was contradictory and unclear, the Commission did not consider that Sasol was aware of the Commission’s investigation.\textsuperscript{1968}

Immunity was also granted to Degussa in \textit{Hydrogen Peroxide and Perborate}.\textsuperscript{1969} Degussa was the first to inform the Commission of the existence of a cartel in the HP market as well as in the HP-linked PBS market. This company provided the Commission with all evidence available to it relating to the suspected infringement, giving details of meetings between competitors as concerns both products and enabling the Commission to prove the existence of a cartel for both products.\textsuperscript{1970} Degussa was also the first to inform the Commission of the existence of the \textit{Methacrylates} cartel and was also granted full immunity from fines in this case.\textsuperscript{1971, 1972}

The \textit{Bitumen NL} \textsuperscript{1973} and \textit{Bitumen Spain} \textsuperscript{1974} were both opened on the basis of an immunity application filed by BP.\textsuperscript{1975} These decisions are interesting because in both Statements of Objections the Commission provisionally found that BP had failed to meet its cooperation obligations.\textsuperscript{1976} In contrast, the final decision (simply) stated that ‘BP cooperated genuinely, fully, on a continuous basis and expeditiously throughout the administrative procedure and that it provided the Commission with all evidence as soon as it came in its possession or was available to it, thereby fulfilling the conditions set out in point 11(a) of the Lienency Notice’. To conclude the Commission found that BP fulfilled all the relevant conditions and it qualified for immunity.\textsuperscript{1977}

In \textit{Elevators and escalators} \textsuperscript{1978} Otis admitted to having discussed the sale, installation, service and maintenance of elevators and escalators in the Netherlands with a number of firms. In particular, the unlawful behaviour included the sharing of the contents, including prices of bids submitted, and the entering into a number of explicit or tacit agreements not to undercut the bid with the lowest price. Since this information enabled the Commission to carry out inspections in the Netherlands.

\textsuperscript{1966} Ibid, para 734.
\textsuperscript{1967} Ibid, paras 735-736.
\textsuperscript{1968} Ibid, paras 735-736.
\textsuperscript{1970} Ibid, paras 501-502.
\textsuperscript{1972} As it is argued in the next section, the fact that one undertaking reveals the existence of different cartels demonstrates that the Commission does not need, as such, a leniency plus policy.
Otis was granted full immunity. It is also noteworthy that, in this case, KONE argued that its submission enabled the Commission to carry out a successful (second) inspection in Germany and it should consequently have been granted full immunity under point 8(a) of the Leniency Notice. The Commission logically rejected this argument and held that since a first inspection had already taken place, immunity under point 8(a) of the Leniency Notice was no longer available.

In Flat glass, Glaverbel and Asahi’s application for immunity under point 8(a) of the Notice was rejected for the simple reason that the Commission had already conducted inspections and immunity under this provision was no longer available. In Carglass, the Commission also rejected Asahi/Glaverbel's application for the same reason.

In Chloroprene rubber, the Commission showed its willingness not to withdraw the benefit of conditional immunity even if it had doubts as to whether a company had fulfilled its cooperation obligations. More precisely, in this case Bayer was granted conditional immunity from fines pursuant to point 8(a) of the Notice because it was the first undertaking to provide information about a secret cartel, which enabled the Commission to carry out inspections. However, in response to a request for information, Bayer submitted documentation that had not been submitted to the Commission before, but was submitted to another jurisdiction. The Commission therefore considered that Bayer did not submit all evidence in its possession spontaneously. After stressing the importance of the duty to provide genuine cooperation, the Commission observed that Bayer’s failure to provide the documents concerned was not the result of unwillingness to genuinely cooperate. On the contrary, Bayer, would not have obtained any advantage from withholding the information. Taking also into account that the documents in question were not fundamental to establish the infringement, and that Bayer had provided other important information spontaneously, the Commission concluded that withdrawing immunity would be disproportionate.

Immunity pursuant to point 8(a) was also granted in Bananas. In this decision the Commission clarified that when the same immunity application leads to separate investigations, an immunity applicant has the duty to cooperate in both investigations and must continue doing so even after obtaining final immunity with regard to the infringement covered by one of the investigations. In addition, in this case the Commission also doubted that Chiquita had fulfilled its obligation to cooperate and had terminated the infringement timely. Regarding this last obligation, the Commission stated that since the date of the last collusive contact could not be demonstrated, there was no evidence that Chiquita did not comply with this duty. With respect to the duty to cooperate and had terminated the infringement timely. Regarding this last obligation, the Commission stated that since the date of the last collusive contact could not be demonstrated, there was no evidence that Chiquita did not comply with this duty.

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1979 Ibid, para 836.
1984 In Car glass, immunity under point 8(a) was no longer available because inspections had already been carried out before the immunity application. See Case COMP/39.125 — Car glass OJ [2009] C 173/13, paras 714-715.
1985 In addition, in both cases, the Commission collected sufficient evidence during the inspections to prove the infringement. Therefore, immunity under point 8(b) was also denied in both cases. See Case COMP/39165 - Flat glass [2008] OJ C 127/9, paras 524-529 and Case COMP/39.125 — Car glass OJ [2009] C 173/13, paras 717-718.
1989 In particular, the Commission clearly stated that ‘a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part’. See Case COMP/38.629 — Chloroprene Rubber [2008] OJ C 251/11, para 613. See also Case C-301/04 P, Commission v SGL Carbon AG [2006] ECR I-5915, paras 68-70; Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission [2005] ECR I-5425, paras 395-399.
continuously cooperate, the Commission emphasised that it is the ‘responsibility of the applicant to come forward with its account of the facts buttressed by evidence and to demonstrate that it cooperates genuinely, fully, on a continuous basis and expeditiously’. However, since Chiquita’s contribution originally triggered the Commission’s investigation and Chiquita had also provided several submissions explaining among other the collusive contacts with Pacific, the Commission concluded that the obligation to continuously cooperate had been respected. As a consequence, the Commission did not withdraw the benefit of immunity.

The investigation in Airfreight was initiated after information was brought to the attention of the Commission by LH, which applied for immunity under the 2002 Leniency Notice. The information provided by LH enabled the Commission to adopt a decision to carry out inspections and LH was granted conditional immunity. It is, however, interesting to note that in their replies to the Statement of Objections two firms, AF and BA, argued that LH continued to have anticompetitive contacts after it had submitted its immunity application. The Commission noted that it was aware of these contacts and that, given the particular circumstances of this case, there was no reason to withdraw immunity.

The Commission decision in Calcium carbide is interesting because Ecka claimed that, as it was Akzo Nobel’s agent, it should benefit from the immunity application submitted by Akzo Nobel. This claim was however rejected by the Commission, which stated that Ecka was a separate undertaking and that Akzo Nobel exercised no decisive influence over the commercial policy of Ecka. In November 2014, the General Court issued its judgments in Alstom Grid (formerly Areva). This judgement concerned the appeal against the Commission’s decision in Power transformers. In this case, basically, Alstom Grid did not agree with the refusal of the Commission to grant immunity to Areva on the basis of point 8(a) of the 2002 Notice. This undertaking argued that the information that the Commission claimed to have collected during its inspection, prior to Alstom Grid’s leniency application, was insufficient to enable the it to conduct an inspection. In Alstom Grid’s view, since the Commission was only able to launch an inspection based on the information it provided, it should have obtained immunity. The General Court disagreed and observed that the evidence found – before the application of Alstom Grid’s – during the inspection of the premises of other undertakings in the context of a different investigation (namely the Gas Insulated Switchgear investigation) had revealed the existence of the power transformers cartel and enabled the Commission to carry out an inspection. Furthermore, the General Court rejected Alstom Grid’s argument that the Commission was not entitled to use the information obtained during a different investigation, for the purposes of the power transformers investigation. The General Court clarified that information obtained during inspections cannot be used for purposes other than those indicated in the order of the decision. Still, this does not preclude the Commission from relying on its knowledge of such information to adopt a decision to carry out an inspection in a different case. Therefore, the Commission was entitled to rely on its knowledge of the documents concerning the power transformers cartel to carry out an investigation.

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2001 Case COMP/39.129 - Power Transformers [2009] OJ C 296/21. In this context, the non-confidential version of this decision only mentions that ‘it should be concluded that the evidence supplied by AREVA does not constitute significant added value within the meaning of the 2002 Leniency Notice. AREVA should therefore not be granted a reduction of fines’. Non-confidential version of this decision, para 322.
in the *Power transformers* case. To conclude, the General Court confirmed the Commission’s view that Alstom Grid did not meet the requirements of the 2002 Leniency Notice.\(^{2006}\)

Immunity was also granted in *Sodium chlorate,\(^{2007}\) Synthetic rubber,\(^{2008}\) Aluminium fluoride,\(^{2009}\) Heat stabilisers,\(^{2010}\) DRAMs,\(^{2011}\) Animal Feed Phosphates,\(^{2012}\) Gas Insulated Switchgear\(^{2013}\) and LCD.\(^{2014}\)

The application of point 8(a) of the Leniency Notice clarified a number of important aspects, including: the issue of withdrawal of immunity, the meaning of the condition contained in point 11(a) regarding full and continuous cooperation, the availability of immunity under point 8(a) and the type of evidence necessary to qualify for immunity under this provision.

The Commission clearly expressed its view that the withdrawal of immunity is a very serious matter. As a result, ambiguity or doubts as regards the fulfillment of all the relevant immunity conditions and in particular of the obligation to fully cooperate, were not enough to withdraw this benefit.\(^{2015}\) In this regard the Commission also found that other undertakings were not in a position to judge whether an immunity applicant satisfied the requirements to qualify for immunity or not. In all the decisions applying the 2002 Notice, no company was denied final immunity based on challenges or hostile arguments of other cartel participants. However, it is important to keep in mind that, as the General Court ruled in Toshiba’s appeal against the Commission decision in *Power transformers* ‘no provision or any general principle of EU law prohibits the Commission from relying, as against

\(^{2006}\) In this case the General Court also discussed the question whether by granting conditional immunity concerning a cartel in a number of Member States, the Commission created legitimate expectations for the applicant to be granted conditional immunity with regards to a cartel operating between the EU and Japan. The General Court dismissed this claim on the basis of the argument that the letter granting conditional immunity was limited to a presumed cartel in Austria, Germany, and the Netherlands, while the Commission decision concerned a separate cartel (between the European and Japanese power transformers producers). See Case T-521/09, *Alstom Grid SAS v Commission*, paras 95-109.

\(^{2007}\) Commission Decision of 11 June 2008 (Case COMP/38695 — *Sodium Chlorate*) [2009] OJ C 137/6 (paras 558-559). In this case EKA satisfied the conditions of point 8(a) of the 2002 Notice as it was the first undertaking to submit evidence which enabled the Commission to adopt a decision to carry out an investigation. The conditions of point 11 of the 2002 Leniency Notice were also fulfilled. Consequently, EKA qualified for immunity.

\(^{2008}\) In *Synthetic rubber* the Commission granted immunity to Bayer. This undertaking was the first to inform the Commission of the existence of cartels for BR and ESBR and also satisfied the obligation to cooperate fully, on a continuous basis and expeditiously throughout the Commission’s administrative. The rest of conditions to obtain immunity were also satisfied. See Commission Decision of 29 November 2006 (Case COMP/F/38.638 — *BR/ESBR*) [2008] OJ C 7/11, para 504.

\(^{2009}\) Commission Decision of 25 June 2008 (Case COMP/39.180 — *Aluminium fluoride*) [2011] OJ C 40/22. In this case Boliden was granted immunity because it was the first to inform the Commission about a worldwide secret cartel for aluminium fluoride and also cooperated fully throughout the Commission’s administrative procedure (see paras 257-259).


an undertaking, on statements made by other undertakings accused of having participated in the cartel’. On the contrary, ‘particularly high probative value may be attached to statements which (i) are reliable, (ii) are made on behalf of an undertaking, (iii) are made by a person under a professional obligation to act in the interests of that undertaking, (iv) go against the interests of the person making the statement, (v) are made by a direct witness of the circumstances to which they relate, and (vi) were provided in writing deliberately and after mature reflection’.

The decisions also confirmed that the condition contained in point 11(a) of the 2002 Notice concerning the transmission of evidence in the possession or available to the applicant, implies in practice that companies have to provide all elements of evidence in their possession immediately without any delay. Further, as the 2002 Notice specified, the requirement to provide full and continuous cooperation includes an obligation to remain at the Commission’s disposal to answer swiftly any request that may contribute to the establishment of the facts concerned. The importance of this condition was reflected in the decisions applying the 2002 Notice, which suggested that employees must also remain available to be questioned. A different, but equally important, aspect of the obligation to cooperate is that when one same immunity application leads to separate investigations, the applicant is responsible to cooperate fully in both investigations. All these requirements form part of the more general obligation of the leniency applicant to demonstrate a genuine spirit of cooperation, as established by the European Courts.

The Commission’s decisions provide limited guidance as regards the precise type of evidence that should be submitted by undertakings to reach the threshold of point 8(a). Still, one of the aspects that was underlined in the Commission’s decisions is that submitting documentary evidence is not

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2017 In this case, the applicant claimed that the probative value of the leniency statements of two firms was significantly reduced because they were made with the objective of benefiting from the Commission’s leniency programme and therefore in their own interest. Case T-519/09, Toshiba Corp. v Commission, paras 45-51. See also Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, JFE Engineering Corp., formerly NKK Corp. (T-67/00), Nippon Steel Corp. (T-68/00), JFE Steel Corp. (T-71/00) and Sumitomo Metal Industries Ltd (T-78/00) v Commission [2004] ECR II-2501, paras 205-210; Case T-112/07, Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v Commission [2011] ECR II-3871, para 71).

2018 Case No COMP/F/C.38.443 — Rubber chemicals [2006] OJ L 353/50. This obligation, in effect, also follows from (the wording of) point 11(a) of the 2002 Notice.

2019 Ibid, para 373. In this decision the Commission considered that ‘where an individual within an undertaking is not forthcoming, as in the case of Mr. […] of Bayer, effective cooperation under the Leniency Notice supposes that the undertaking in question assumes its responsibility and does not hide behind its individual employees’.

2020 Case COMP/39.482 — Exotic Fruit (Bananas) [2012] OJ C 64/10, para 351.


2022 In its Competition Policy Newsletter (spring 2007) staff members of the Commission stressed that ‘it is also important to avoid any uncertainty concerning the scope of the conditions that the applicants must meet under the duty of continuous cooperation’. Therefore, ‘[i]n practice, the Commission Directorate General for Competition has specified in its acknowledgement of receipt of an application various facets of the cooperation obligation. In particular, the acknowledgement of receipt has spelled out that the duty of continuous cooperation encompasses not destroying, falsifying or concealing information that is of relevance for the investigation as well as not revealing the facts or the contents of the application during a period when doing so can jeopardise the investigation. By way of exception from the rule that cooperation obligation starts at the time of the application, it is necessary that this condition covers also the period when a company prepares to come forward with a leniency application. It cannot be tolerated that an applicant destroys, falsifies or conceals information and can still be entitled to get immunity or reduction of fines. Such actions can seriously undermine the investigation of the case and are flagrantly against the spirit of cooperation under the Leniency Notice’. Including specifically such obligations in the Notice would provide more certainty to potential leniency applicants. S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 13.
as a requisite to obtain immunity. In this regard the General Court has indeed observed that the information submitted in the context of an immunity application does not necessarily need to be provided in documentary form. The practical utility of purely oral information is indisputable when it allows the Commission, for example, to find direct evidence of the infringement. Oral information is also useful when it encourages the Commission to continue an investigation it would have abandoned without that information. Nevertheless, documentary evidence and, in particular, corporate statements are, as a general rule, greatly valuable for the Commission in the context of immunity applications. Likewise, detailed evidence had logically more weight in the investigation of the case than information regarding the general background of the agreement.

The Commission also dealt with the question whether immunity on the basis of point 8(a) of the 2002 Notice was available. As the 2002 Notice clearly stated, the relevant criterion to obtain immunity pursuant to point 8(a) is whether an applicant provided the Commission with sufficient evidence to adopt a decision to carry out an inspection. Once the Commission had sufficient evidence in its possession to conduct an inspection, immunity pursuant to this provision was no longer available. Furthermore, the Commission’s practice also indicated that immunity on the basis of point 8(a) remains unavailable when the first Commission’s inspection was unsuccessful or failed to provide sufficient evidence or information regarding the infringement. Notably, immunity according to point 8(a) can no longer be obtained when an undertaking provides evidence that enables the Commission to conduct a more focused inspection, after a first inspection has been conducted by the Commission.

4.2.4.2. Granting immunity under point 8(b) of the 2002 Notice

Immunity pursuant point 8(b) of the 2002 Notice has been granted in 5 cases.

In Raw Tobacco Italy, Deltafina applied for immunity under point 8(b) of the Leniency Notice. Deltafina’s application fulfilled the relevant conditions and this firm was granted conditional immunity pursuant point 8(b) of the 2002 Notice has been granted in 5 cases.

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2023 Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon Co. Ltd and others v Commission [2004] ECR II-1181, para 431. CFI 15 March 2006, Case T-15/02, BASF AG v Commission [2006] II-497, para 506. In this last case the (now) General Court clearly stated that decisive evidence submitted in the context of an immunity application can also be adduced orally. It should be noted that both cases concerned the application of the 1996 Notice.


2025 In BASF the (now) General Court explained why the Commission attaches so much importance to documentary evidence. In particular it stated that ‘the oral disclosure of information, precisely because of the need for cooperation from the Commission, must be regarded in principle as a slower means of cooperation than the disclosure of information in writing, which requires no cooperation on the part of the Commission and is not therefore subject to the availability of the Commission’s resources’. Interestingly, the Court added that ‘[i]f [a company] chooses to disclose information orally, the undertaking in question must accordingly know that it runs the risk that another undertaking may disclose to the Commission, in writing and before it, decisive evidence of the cartel’s existence’. Case T-15/02, BASF AG v Commission [2006] ECR II-497, para 505.

2026 See e.g. Case COMP/E-38.620 — Hydrogen Peroxide and perborate [2006] OJ L 353/54, para 502; Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19, para 836. This decision states that Kone provided ‘information about the unlawful behaviour including the sharing of the contents, prices, bids submitted, and the entering into a number of explicit or tacit agreements not to undercut the bid with the lowest price’.


immunity.\textsuperscript{2031} However, in the course of the investigation, the Commission considered that Deltafina had breached the cooperation obligation contained in point 11(a) of the Notice because it had ‘divulged its immunity application on the occasion of a meeting of APTI’s managing committee which was also attended by representatives of Dimon, Transcatab and Trestina, other cartel participants’.\textsuperscript{2032} Such disclosure occurred before the Commission had an opportunity to carry out the investigations and was, as a consequence, capable of jeopardising them.\textsuperscript{2033} The Commission clearly stated in its decision that the obligation to cooperate includes a duty of confidentiality with respect to the immunity application, which is justified by the need to ensure that the result of the inspections is not compromised.\textsuperscript{2034} Moreover, it added that although ‘a certain degree of difficulty in keeping an immunity application confidential is inherent in all cases’,\textsuperscript{2035} such difficulty does not licence the immunity applicant to voluntarily disclose its immunity application at meetings with competitors’.\textsuperscript{2036} The Commission accordingly decided that final immunity could not be granted to Deltafina.\textsuperscript{2037} Furthermore, the Commission clarified two additional and important aspects concerning the consequences of losing the benefit of conditional immunity. Firstly, the fact that final immunity was not granted to Deltafina did not have any direct bearing on the way the Leniency Notice should apply to other leniency applicants. Other applicants could thus not upgrade their positions following the withholding of final immunity to Deltafina.\textsuperscript{2038} Secondly, the Commission firmly stated that once conditional immunity is granted to a company, any subsidiary application for reduction loses all purpose and legal effect.\textsuperscript{2039} Subsidiary applications for reduction can only be accepted in cases where conditional immunity cannot be granted at the time an application is made. Given that Deltafina was initially granted conditional immunity and lost it for breaching the cooperation obligation, it could not benefit from a reduction.\textsuperscript{2040} On appeal, both the General Court and the Court of Justice confirmed the decision of the Commission not to grant final immunity to Deltafina.\textsuperscript{2041}


\textsuperscript{2032} \textit{Ibid}, para 445.

\textsuperscript{2033} \textit{Ibid}, para 443. In addition, the decision clarified that ‘Deltafina was aware of the Commission’s intention to carry out surprise investigations. Inspection were actually organised and occurred as announced to Deltafina at a meeting between Deltafina and the Commission services’.

\textsuperscript{2034} \textit{Ibid}, paras 432-436.

\textsuperscript{2035} The Commission explained in this regard that ‘the end of the involvement in the infringement following an application for leniency may cause the other cartel members to suspect that the undertaking has applied for immunity. It may also cause practical difficulties, especially in cases where the applicant’s business is strictly dependent on contacts with other competitors. These are, however, considerations which are valid in general and which immunity applicants should consider before seeking the benefits which the Leniency Notice offers to them. In this case, in addition, Deltafina has failed to prove how its legitimate commercial behaviour could be hampered by the termination of its involvement in the illegal practices and its refusal to meet its competitors’. Case COMP/C.38.281/B.2 \textit{— Raw tobacco Italy} [2006] OJ L 353/45, para 452. \textit{Cf}, Case No COMP/F/C.38.443 \textit{— Rubber chemicals} [2006] OJ L 353/50, para 361.

\textsuperscript{2036} See Case COMP/C.38.281/B.2 \textit{— Raw tobacco Italy} [2006] OJ L 353/45, para 434. It appears that in this case Deltafina had informed the Commission about such difficulty. However, the decision of the Commission in this case suggests that the Commission accepts the disclosure of a leniency application by a company if such disclosure had been previously authorised. (\textit{Raw tobacco Italy}, para 445). In this case the Commission further stated that ‘contrary to Deltafina’s and Universal’s contentions, the Commission services did not agree that Deltafina could disclose its immunity application at the upcoming APTI meeting’. (\textit{Cf.} conditions to obtain immunity under the 2006 Leniency Notice).

\textsuperscript{2037} \textit{Ibid}, para 460.

\textsuperscript{2038} \textit{Ibid}, para 487.

\textsuperscript{2039} \textit{Ibid}, para 466.

\textsuperscript{2040} \textit{Ibid}, paras 464-467. However, the Commission accepted that the cooperation provided by a company which has been denied final immunity could be considered as having an attenuating effect under the Fining Guidelines (paras 386-388).

\textsuperscript{2041} After recalling that a company could only benefit from a lenient treatment when it demonstrates a spirit of genuine cooperation, the General Court stated that Deltafina had failed to inform the Commission of the disclosures of the application for immunity, even though those facts were capable, at least potentially, of affecting the proper conduct of the investigation. Considering these circumstances, Deltafina did not demonstrate genuine cooperation and breached the obligation to cooperate arising from point 11(a) of the 2002 Leniency Notice. Judgment of the General Court of 9 September 2011, Case T-12/06, \textit{Deltafina SpA v Commission} [2011] ECR II-5639, paras 144-149. See confirming this Judgment of the Court of 12 June 2014, Case C-578/11 P, \textit{Deltafina SpA v Commission}, paras 45-54. In particular the ECJ rejected Deltafina’s argument that the Commission had given prior authorisation to make such disclosure, since
In *Elevators and Escalators*, KONE’s submission enabled the Commission to find an infringement in respect of the infringements in Belgium and Luxembourg and, therefore, it qualified for full immunity under point 8(b) of the Notice in respect of these infringements. As regards the infringement in Belgium, the Commission commented in its decision that ‘[t]he evidence submitted by KONE confirmed the Commission’s earlier suspicions that KONE, Otis, Schindler and ThyssenKrupp participated in illegal activities in the elevator and escalator sector in Belgium’. With respect to the cartel in Luxembourg, KONE was first to submit the information regarding the infringements in the NEB and SEB sectors. KONE’s submission enabled the Commission to find a cartel consisting of consecutive agreements during a certain period. KONE also supported this information with incriminating evidence. In contrast, with regard to the infringement in Germany, the Commission refused to grant KONE immunity under point 8(b). According to the decision ‘KONE’s leniency submission [was] ambiguous and unsupported by incriminating evidence other than own written statements based on memory’.

In *Fasteners* although the Commission had already carried out inspections it did not have enough factual evidence to uncover the full picture, namely the nature and scope of the bilateral price fixing scheme. Prym was the first undertaking to apply for leniency with regard to the bilateral scheme between Prym Fashion and Stocko/YKK. This undertaking provided the Commission with a detailed description of the collusive activities and submitted corroborating documentary evidence. In particular the evidence submitted by Prym allowed the Commission to prove the existence of the bilateral cartel, to establish its objectives, to establish the contents of various meetings and understand the methodology followed by the parties in the fixing of prices. Moreover, information submitted by Prym allowed the Commission to establish the scope of the agreement and the direct involvement of YKK. Based on Prym’s leniency application the Commission could also establish the duration of the infringement. Since the rest of the immunity conditions were also fulfilled Prym qualified for full immunity.

In *Prestressing steel* the Commission had already launched an investigation at the time that DWK applied for leniency. Still, DWK was the first undertaking to submit evidence which enabled the Commission to find an infringement of Article 101 of the TFEU and, consequently, obtained immunity. More precisely, DWK, submitted detailed and supporting evidence about that company had failed to demonstrate that it had, in advance, duly informed the Commission of its intentions. Furthermore, since the disclosure to the other companies was in any event unsolicited, it was not inevitable.

| Ibíd, para 761. The Commission added in its decision that ‘[a]fter KONE’s submission, the Commission organised a second round of inspections at [***]. However, the information provided by KONE already enabled the Commission to find an infringement in Belgium’ | Ibíd, para 761. The Commission added in its decision that ‘[a]fter KONE’s submission, the Commission organised a second round of inspections at [***]. However, the information provided by KONE already enabled the Commission to find an infringement in Belgium’. |
| Furthermore, the decision added that since the Commission already possessed information on the cartel from other sources, ‘an undertaking wishing to obtain immunity under point 8(b) would have to provide the Commission with information which represents a very significant shortcut in its investigation. Further ‘KONE’s submission for Germany contains less precise descriptions of the cartel activities than its submissions for Belgium and Luxembourg and it is not supported by incriminating and documentary evidence (other than its own statements). Thus KONE cannot claim that its submissions for Belgium and Luxembourg on the one hand and Germany on the other hand were “of the same quality”’. Case COMP/E-1/38.823 — *Elevators and Escalators* [2008] OJ C 75/19, paras 788-789. See confirming this view Case T-151/07, *Kone Oyj, Kone GmbH and Kone BV v Commission*, [2011] ECR II-5313, paras 86-109. It should, still be noted that the fine imposed on Kone was reduced by 50 per cent under the first indent of para 23(b) of the 2002 Leniency Notice. |
| Ibíd, para 668. | Ibid, paras 105 and 1073. Apparently, in this case the Commission obtained the information from the German competition authority. |
essential elements of the agreement, in particular regarding the quota and price fixing and the client allocation in the pan-European arrangements, as well as on the arrangements with the Italian producers and within Club Italia, and the involvement of DWK and several other addressees in the cartel.\footnote{Ibid, paras 1074-1075.}

In flat glass the Commission rejected Glaverbel and Asahi’s application for immunity under both points 8(a) and (b) of the Leniency Notice.\footnote{In this case, immunity under point 8(a) was no longer available because inspections had already been carried out before this company applied for leniency. See Case COMP/39165 - Flat glass [2008] OJ C 127/9, paras 524-525.} As regards the application for immunity under point 8(b), the Commission noted that during the inspections it had copied contemporaneous notes of cartel meetings which were used to find the infringement.\footnote{See Case COMP/39165 - Flat glass [2008] OJ C 127/9, paras 524-525} Since Glaverbel and Asahi brought few elements with additional evidentiary value (except for corroborating statements), the Commission found that at the time Glaverbel and Asahi applied for leniency, the Commission already disposed of sufficient contemporaneous evidence to find an infringement.\footnote{Ibid, para 528.}

Full immunity under point 8(b) was granted to Siemens in Power transformers.\footnote{Case COMP/39.129 - Power Transformers [2009] OJ C 296/21.} In this case Siemens was the first undertaking to submit evidence which enabled the Commission to find an infringement. Siemens continued to cooperate fully with the Commission throughout the administrative procedure, ended its involvement in the infringement and had not taken steps to coerce other undertakings to participate in the infringement.\footnote{Ibid, para 290.}

The Commission’s practice (and the European Court’s case-law) clearly indicate that the duty to cooperate includes an obligation not to disclose the existence of an immunity application to other cartel members.\footnote{Case T-12/06, Deltafina SpA v Commission [2011] ECR II-5639, paras 144-149. See also Case C-578/11 P, Deltafina SpA v Commission, paras 45-54.} The duty to preserve the confidentiality of an immunity application is meant to protect the essential purpose of surprise inspections. Although in some cases the Commission interpreted the obligation to cooperate flexibly – even when it doubted that this condition had been fully respected –\footnote{See supra section 4.2.4.2 of this Chapter.} it made clear that the benefit of immunity can be withdrawn when companies put at risk the conduct of (surprise) inspections. This approach is justified and necessary. The Commission should (and can) only grant immunity when companies may make a crucial contribution in the investigation and establishment of cartel infringements.\footnote{See supra section 4.1.3.2 of this Chapter. See also e.g. CFI 25 October 2005, Case T-38/02 Groupe Danone v Commission [2005] ECR II-4407, para 505. (‘In order for an undertaking to be able to benefit from a reduction in its fine on account of its cooperation during the administrative procedure, its conduct must facilitate the Commission’s task of establishing and punishing infringements of the competition rules’.}

On the other hand, it should be accepted that the obligation to terminate the participation in the cartel can, in certain cases, be at odds with the obligation to keep the application confidential. This aspect

\footnote{Case T-12/06, Deltafina SpA v Commission [2011] ECR II-5639, para 107. In this case the General Court indeed confirmed that “[t]he leniency programme pursues the objective of investigating, suppressing and deterring practices forming part of the most serious infringements of Article 81 EC”. See also supra section 1 and 2 of this Chapter.}
was indeed acknowledged by the Commission which observed that putting a sudden end to the infringement could alert other cartel members. However, and understandably, such difficulties do not justify every simple disclosure of the leniency application by the immunity candidate. The (not so infrequent) incompatibility between the obligation to keep the leniency submission confidential and the requirement to end the involvement in the infringement emphasises the need to find an appropriate consensual solution in this context.

With respect to the consequences of not obtaining final immunity the Commission clarified that the fact that an undertaking loses the benefit of conditional immunity does not have any direct consequences on the way the Notice should be applied to other applicants in the sense that the Leniency policy does not warrant any up-grading. This seems logical as later applicants simply do not satisfy the first corner requirement. On the other hand, the company that has not fulfilled the conditions to obtain final immunity cannot qualify to obtain a fine reduction under the Notice. This consequence is arguably more controversial, certainly if the company in question provided useful cooperation in the Commission’s investigation. To address this issue, the Commission accepted the exceptional possibility to reward a company which had been excluded from final immunity in the context of the Fining Guidelines by applying attenuating circumstances.

The decisions applying the 2002 Notice also stressed that – as the wording of point 8(b) indicates – there is a hierarchical relationship between immunity on the basis of point 8(a) and immunity on the basis of point 8(b). It follows from this hierarchy that the threshold required to obtain immunity under point 8(b) is higher than that required for obtaining conditional immunity under point 8(a).

One of the most important practical consequences resulting from the higher threshold is that, even

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2067 Case COMP/C.38.281/B.2 — Raw tobacco Italy [2006] OJ L 353/45, paras 465-466. This aspect was confirmed by the General Court in Case T-12/06, Deltafina SpA v Commission [2011] ECR II-5639, para 127. In particular, the General Court considered that ‘a reduction of the fine under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part’ (referring to Joined cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission [2005] ECR I-5425, para 395; Case C-301/04 P, Commission v SGL Carbon AG [2006] ECR I-5915, para 68; and Joined cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, Erste Group Bank AG and others v Commission [2009] ECR I-868, para 281).
2069 In Transcatab (one of the appeals in the Italian raw tobacco cartel case), the applicant claimed that by not applying that attenuating circumstance to it, but applying it to Deltafina, the Commission breached the principle of equal treatment. The General Court, however, found that ‘Deltafina’s situation is not comparable to that of Transcatab. Deltafina was the first undertaking to contact the Commission and to request immunity under the Leniency Notice, whereas Transcatab was the third undertaking to make an application to the Commission under that notice. Thus, after having granted Deltafina conditional immunity under the Leniency Notice, the Commission, having found that Deltafina was in breach of its obligation to cooperate as an immunity applicant, decided at the close of the proceedings not to grant it definitive immunity. The Commission considered that Deltafina should not be granted any reduction of the fine under the Leniency Notice, which, in the Commission’s view, was no longer applicable to it. It was for that reason that the Commission considered that Deltafina’s situation had exceptional characteristics that justified granting it a reduction in respect of the attenuating circumstance in question. It follows […] that Deltafina’s situation and Transcatab’s situation were very different so far as the assessment of their cooperation is concerned’. Case T-39/06, Transcatab SpA v Commission [2011] ECR II-6831, paras 335-339.
if no immunity has been granted on the basis of point 8(a), undertakings must submit high quality evidence to qualify under point 8(b) of the 2002 Notice.\(^{(2071)}\) Companies can thus only meet the threshold if they provide the Commission with sufficient evidence to find an infringement.\(^{(2072)}\) As regards the precise type of evidence to be submitted to obtain immunity under point 8(b), the Commission found that detailed descriptions of the cartel and information regarding essential elements of the agreements (such as its objectives, the methodology to fix prices or allocate markets and the scope of the agreement) supported with incriminating evidence and documentary evidence (such as notes of the contents of meetings)\(^{(2073)}\) enabled it to prove the existence of the infringement.\(^{(2074,2075)}\) In contrast, elements of evidence that merely supplemented or corroborated elements already in the possession of the Commission did, expectably, not meet conditions of point 8(b).\(^{(2076)}\)

4.2.4.3. Granting of reductions in fines under point 23 of the 2002 Notice

The Commission granted reductions on the basis of the 2002 Notice in 26 decisions.

\(^{(2071)}\) Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19, para 810. In addition the Commission stressed in this decision that while ‘[i]t is true that no immunity under point 8(a) of the Leniency Notice was granted to any other undertaking with respect to the violations in Germany […] the Commission also enjoys a margin of discretion in assessing whether the cooperation in question was ‘decisive’ in establishing the existence of an infringement’.

\(^{(2072)}\) See confirming this aspect Case T-521/09, Alstom Grid SAS v Commission, para 82. In this case the General Court stated in particular that ‘as is apparent from paragraph 8(b) of that notice, in [this] case immunity from fines is only justified where the undertaking does not limit itself to reporting the existence of the cartel, but also provides evidence enabling the Commission to establish its existence in a decision finding an infringement of Article 81 EC’.

\(^{(2073)}\) Case COMP/39165 - Flat glass [2008] OJ C 127/9, para 528.

\(^{(2074)}\) Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19, para 788; Case COMP/E-1/39.168 – PO/Hard Haberdashery: Fasteners, [2009] OJ C 47/8, paras 666-670. (‘Prym provided a detailed description of the cartel and to submitted corroborating documentary evidence. In particular the evidence submitted by Prym allowed the Commission to prove the existence of the bilateral cartel, to establish its objectives, to establish the contents of various meetings and explain the methodology followed by the parties in the fixing of prices’). Case COMP/38.344 — Prestressing Steel [2011] OJ C 339/7, paras 1073-1075. (‘DWK submitted detailed information and supporting evidence about essential elements of the violation agreement, in particular regarding the quota and price fixing and the client allocation in the pan-European arrangements, as well as on the arrangements with the Italian producers and within Club Italia, and the involvement of DWK and several other addressees in the cartel’).

\(^{(2075)}\) The General Court has confirmed the probative value of incriminating statements. In this regard it has found that an admission by one firm, which is contested by several other undertakings, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence. Nevertheless, the degree of corroboratory required in this case is lesser, in terms both of precision and of depth, in the case of a statement that is of high reliability than in the case of a statement that is not particularly credible. Thus, […] when a body of consistent evidence corroborated the existence of the practices mentioned in a particularly reliable statement, that statement might be sufficient in itself, to constitute evidence of other aspects of the Commission decision. Judgment of the General Court of 16 June 2011, Case T-240/07, Heineken Nederland BV and Heineken NV v Commission [2011] ECR II-3355, paras 92-94. In the same context the General Court has also held that ‘[e]ven if some caution as to the evidence provided voluntarily by the main participants in an unlawful cartel is generally called for, considering the possibility that those participants might tend to play down the importance of their contribution to the infringement and maximise that of the others, the fact remains that seeking to benefit from the application of the Commission notice on immunity from fines and reduction of fines in cartel cases in order to obtain immunity from, or a reduction of, the fine does not necessarily create an incentive to submit distorted evidence in relation to the participation of the other members of the cartel. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of the cooperation of the person seeking to benefit from leniency, and thereby jeopardise his chances of benefiting fully under the Leniency Notice’. Case T-112/07, Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v Commission [2011] ECR II-3871, para 72.

In *Raw Tobacco Italy*,2077 Dimon and Transcatab received the highest reduction of the fine within the applicable band, namely 50% and 30% respectively.2078 In this case the Commission stressed the importance of the timing and the value of the cooperation in establishing the infringement to determine the specific level of reduction. In particular, it stated that both Dimon and Transcatab applied for leniency before the Commission took any active investigative measures against them. Furthermore, both applications covered the entire period of the infringement and the evidence supplied corroborated other evidence which the Commission possessed.2079

In *Rubber chemicals*,2080 Crompton was the first undertaking to meet the requirements for a reduction. Based on the timing, the value and the continuity of its cooperation, Crompton qualified for the maximum reduction of 50%. This firm fulfilled the condition of significant added value very early in the proceedings, in the month following the Commission’s inspections of its premises. Next, the submissions represented substantial added value. Crompton’s statement corroborated other statements and provided further details on the anticompetitive contacts. It also explained the context of several documents collected during the inspections. Significantly, Crompton submitted contemporaneous documents which allowed the Commission to add solid elements to the previously known duration of the infringement. The Commission also found that Crompton’s cooperation had been extensive and continuous. After its initial submission Crompton submitted additional valuable evidence.2081 In the same case, Bayer was the second undertaking to reach the added value threshold and meet the relevant requirements, thereby qualifying for a reduction in the band of 20-30%. However, the Commission considered that Bayer only qualified for the minimum reduction within this band. Despite the fact that Bayer applied for leniency relatively early in the proceedings, in the month following the inspections, the extent to which Bayer’s cooperation added value to the Commission’s case remained limited throughout the proceedings.2082 Remarkably, Bayer did not admit the infringement for the whole period. Furthermore, the Commission observed that Bayer had attempted to weaken the Commission’s ability to prove the infringement which put the extent and continuity of Bayer’s cooperation into serious doubt.2083 General Quimica was the next qualifying applicant and was entitled to a reduction of up to 20% of the fine.2084 The Commission observed that General Quimica satisfied the condition of significant added relatively late in the proceedings (over a year and a half after the Commission’s inspections of its premises) and the added value of the application was limited.2085 General Quimica was finally granted a 10% reduction.2086

2078 Ibid, paras 792-499.
2079 Ibid, para 495. As for Dimon, the evidentiary value of its contribution was significant for the establishment of many aspect of the conduct of the parties between 1995 and 1997. In respect of 1997-98, Dimon provided significant evidence concerning the agreement. As for the year 1998-99, ‘the evidence submitted was particularly valuable in establishing the bid-rigging practices, which were unknown to the Commission. However its bearing on the gravity and the duration of the infringement is not significant, as it only constituted one instance in the context of a very serious infringement of long duration for which, during each year, several other practices were put in place’ (para 496). The documents supplied by Transcatab, were particularly useful in the understanding of the infringement, but they related to facts that were known to the Commission (para 497).
2081 Ibid, paras 369-370.
2082 Ibid, para 372. In this regard the decision adds that ‘while Bayer’s statements largely corroborate those of Flexsys and Crompton with regard to the period 1998-2001, the Commission already had a clear picture of the cartel from two separate sources, supported by abundant documentary evidence even before Bayer’s first submission. The contemporaneous documentary evidence Bayer provided is also very limited compared to that submitted by Crompton, consisting essentially of travel expense records and documents already found at the inspection’.
2083 Ibid, para 373.
2084 Ibid, para 375.
2085 In particular the decision stated that, ‘the added value of the application is limited to further details and explanation of the context of a number of documents found during the Commission’s inspections with regard to the period prior to 1997, and disclosure in its corporate statement of further details and contacts concerning its participation in the January 2000 price increase, as well as certain other contacts with its competitors. The contemporaneous written evidence provided by GQ is limited to a fax concerning the travel arrangements for the crucial meeting of 28 October 1999 in which GQ adhered to the agreement on the January 2000 price increase’. Ibid, para 377.
In Hydrogen Peroxide and Perborate, EKA was the second undertaking to provide the Commission with evidence which represented significant added value. The timing of EKA’s leniency application was early after the inspections. EKA voluntarily submitted evidence of the infringement in the week following the Commission’s inspections without itself undergoing such inspections. EKA’s evidence enabled the Commission to trace the existence of the cartel back to 31 January 1994. Furthermore, EKA’s evidence for the period before October 1997 related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel. Accordingly, the Commission granted EKA partial immunity pursuant to point 23 of the Leniency Notice on the one hand, and a final reduction of 40%, on the other hand. Arkema was the second undertaking which qualified for a reduction. A first leniency application was made, only one week after the inspections, and additional explanations and new documents were provided later on. The documents provided by Arkema enabled the Commission to corroborate the information already provided by Degussa and were used exhaustively in the decision. The Commission, accordingly, granted Arkema a 30% reduction. Solvay was the third undertaking to meet the reduction requirements. Solvay submitted its application also soon after its premises had been inspected. The Commission found that the submission of 4 April 2003, had significant added value and thus met the requirements of point 21 of the Notice. However, Solvay submitted that it contacted the Commission by telephone on the morning of 3 April 2003 to inform of its intention to make a leniency application. This firm argued that the application by Arkema – which was made on 3 April 2003 at 15:50 hrs – enclosed some documents which were illegible without some form of explanation and the Commission was unable to use them until 26 May 2003, that is, after Solvay’s application. Since, according to Solvay, its application was properly made by telephone on the morning of 3 April 2003, it had to qualify for a 50% reduction. The Commission found that ‘[t]he first submission by Solvay only occurred on 4 April 2003, when it submitted evidence constituting significant added value’. In order consider a leniency application as valid, it should contain information about the infringement. That was not the case for Solvay’s telephone call of the morning of 3 April 2003 nor the fax sent at midday. The Commission, therefore, rejected Solvay’s argument and granted this firm a 10% reduction. On appeal, the General Court upheld the finding regarding the filing date of the leniency application. In the General Court’s view, in order to establish the time at which the leniency application is lodged, the material time is not when an undertaking contacts the Commission to make an oral statement, but instead when the evidence with the potential significant added value is submitted to the Commission.

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2088 Ibid, paras 503-505.
2089 Ibid, paras 507-508.
2090 Ibid, paras 510-512. In this case Arkema also claimed that the evidence it submitted to the Commission was of a higher added value than the one produced by EKA, in terms of both quantity and quality, justifying a reduction of fine by 50%. The Commission rejected Arkema’s claim and emphasised that ‘[i]t is clear from point 23 of the Leniency Notice that the time of the submission of any submission that meets the threshold of significant added value is determinant for the band of reduction. The evidence submitted is compared with the evidence already in Commission’s possession at the time such evidence is provided. Therefore, in order to establish whether this submission represents significant added value, only the elements already in the Commission’s file and the evidence provided by the applicant are taken into account’.
2091 Ibid, para 513.
2092 Ibid, para 514.
2093 Ibid, para 515.
2094 Ibid, para 520.
2095 Ibid, paras 520-524.
2096 Judgment of the General Court of 16 June 2011, Case T-186/06, Solvay SA v Commission [2011] ECR II-2839, paras 365-371. Finally, the Court found that the information provided by Solvay had been widely used by the Commission and that the Commission was wrong to find that the evidence only corroborated certain information already in its possession. As a result, the Court reduced Solvay’s fine by 20% instead of the 10% reduction provided by the Commission (paras 428-439).
2097 In this case the Commission also found that two undertakings, Solexis and Kemira, did not submit evidence of added value and could, therefore, not qualify for reductions on the basis of the 2002 Notice. See Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate [2006] OJ L 353/54, paras 526-528. With respect to Solexis the Commission stated that ‘Solexis’ submission of 7 July 2003 merely included for the time period 1997 until 1999 information [Deleted] already known to the Commission prior to Solexis’ leniency application’. As regards Kemira, the information from this
In *Methacrylates*, Kuwait Petroleum was the first applicant for reductions in fines. In this case the Commission noted that although the first application of Kuwait Petroleum’s was submitted relatively early in the proceedings – *i.e.* in the month following the inspections – Kuwait Petroleum only reached the added value threshold when it provided more detailed submissions. Furthermore, the extent to which Kuwait Petroleum added value to the Commission’s case remained limited throughout the proceedings. Namely, Kuwait Petroleum failed to outline the nature and duration of its involvement and was vague in its submissions on more recent collusive contacts. Based on the foregoing, Kuwait Petroleum was granted a 40% reduction of the fine. Lucite was the second undertaking applying for a reduction. Lucite fulfilled the condition of significant added value relatively early in the proceedings (*i.e.* just over three months after the Commission’s inspections). The Commission stressed on the one hand that Lucite’s application was clear, well structured and detailed and, on the other, that it provided evidence which enabled the Commission to extend the duration of the cartel. Accordingly, the Commission granted Lucite a 30% reduction of the fine as well as partial immunity under point 23 of the Notice.

In *Bitumen NL*, Kuwait Petroleum was the first undertaking which qualified for a reduction. To reach the “added value” threshold Kuwait Petroleum provided evidence that strengthened by its very nature the Commission’s ability to prove the facts in question. The level of added value was also significant because it corroborated the existing information and, together with the information already in the Commission’s possession, assisted the Commission in proving the infringement. Kuwait Petroleum therefore qualified for a reduction of the fine between 30% and 50%. For the exact reduction of the fine, the Commission took into account that the application was made more than 11 months after the Commission had conducted inspections and only after the Commission had sent the parties a request for information asking for detailed factual information about the events. Moreover, Kuwait Petroleum reformulated certain important statements made initially in respect of the alleged participation in the cartel of ExxonMobil and, as a result, such statements could not be used in evidence against this undertaking. Based on these considerations the Commission concluded that Kuwait Petroleum was entitled to the minimum reduction within the applicable band (i.e. 30% reduction).

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2099 Ibid, para 403.
2100 Ibid, para 405.
2101 Ibid, para 409.
2102 Ibid, para 410.
2103 Ibid, para 411.
2104 Ibid, para 412.
2105 Ibid, paras 413-415. The Commission found in particular that Lucite’s evidence for the period of the infringement after 28 February 2001 related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel. Therefore and, in accordance with point 23 of the Leniency Notice, the Commission did not take the period 1 March 2001 until 12 September 2002 into account to calculate the fine.
2106 In this case the undertaking ICI also applied for leniency, after the Commission had received leniency submissions from Degussa. The Commission informed ICI that the evidence submitted by ICI did not represent significant added value within the meaning of the Leniency Notice. The Commission was only able to use the information provided by ICI as background information. This decision clarified that “even the total number of documents relied upon is not in itself critical but, rather, how the content of the documents provided, by its very nature and/or its level of detail, enabled the Commission to strengthen its ability to prove the facts in question. […] contemporaneous documents are more probative than non contemporaneous documents”. Case No COMP/F/38.645 — Methacrylates [2006] OJ L 322/20, paras 416-419.
2108 Ibid, para 383. Kuwait Petroleum was the first to give direct evidence on the fact that BP was not a regular attendant of the bitumen consultation meetings.
2109 Ibid, para 383.
2110 Case COMP/38.456 — Bitumen (NL) [2007] OJ L 196/40, para 385. In addition in this case, Shell also filed an application under section B of the Notice but no reward was granted due to lack of significant added value. The finding was made as regards Nynas and Total. Finally, Wintershall claimed that it ought to be covered by the immunity
In *Bitumen Spain*, 2111 Repsol was the second firm to approach the Commission under the Leniency Notice. 2112 The evidence submitted by Repsol provided significant added value as it consisted of incriminating information on the conduct of the cartel participants. This information enabled the Commission to prove several facts related to the infringement. 2113 However, the Commission stressed that Repsol filed its leniency application over a year and a half after the Commission carried out surprise inspections and only after the Commission had sent detailed requests for information to the undertakings investigated. 2114 Accordingly, only a 40% reduction of the fine was granted instead of the maximum reduction. 2115 Proas, the next company qualifying for a reduction, also submitted incriminating information on the conduct of the cartel participants which helped the Commission prove various facts related to the cartel. 2116 Still, like Repsol, Proas only filed its application over a year and a half after the surprise inspections and after the Commission had sent requests for information. This firm finally obtained a reduction of 25% of the fine. 2117 In this case Petrogal, (a cartel participant which had not applied for leniency) argued that (i) Repsol and Proas provided incorrect information on Petrogal in their leniency applications and that a reduction should not be granted and (ii) that it did not apply for leniency because it had very little information given limited role in the cartel on the cartel and feared retaliation by the three market leaders. The Commission rejected both arguments and stated that ‘that Petrogal’s argument cannot secure a more favourable treatment for itself and that […] Petrogal may not rely in support of its claim on an allegedly unlawful act committed in favour of third parties’. 2118 As regards the second argument, the Commission clearly stated that ‘the question that must be asked is not whether Petrogal was in a position to co-operate with the Commission but whether it did, in fact, cooperate and in such a way that it assisted the task of the Commission. The mere willingness of an undertaking to cooperate is of no significance’. 2119

In *Nitrile Butadiene Rubber*, 2120 Bayer was the first undertaking to meet the conditions to obtain a reduction. However, this undertaking was granted only a 30% because the extent of the evidence submitted was limited. The Commission clarified that – although the Notice does not require an applicant to provide evidence for the whole infringement in order to receive a reduction of fines – the extent to which evidence represents added value depends, among others, on whether it relates to the whole infringement or merely certain (limited) parts thereof. 2121 In addition, Bayer was also denied partial immunity because the evidence it submitted ‘was so limited that it was not sufficient to establish the existence of an infringement, or certain facts thereof having a direct bearing on duration’. 2122

In *Elevators and escalators*, 2123 Otis was the first company which qualified for a reduction as regards the infringements in Belgium and Luxembourg. 2124 The evidence submitted by Otis relating application of BP. However, Wintershall was a separate undertaking from BP and only BP decided to apply for immunity (ibid, paras 386-398). 2111 Case COMP/38710 — Bitumen Spain [2009] OJ C 321/15.
2112 Ibid, para 574.
2113 Ibid, para 576-578.
2114 Ibid, para 579.
2115 Ibid, para 580.
2116 Ibid, paras 583-584.
2117 Ibid, paras 587-588.
2118 Ibid, para 595.
2119 Ibid, paras 594-596. In its decision the Commission added that ‘Petrogal’s argument shows that it was well aware of the illegal nature of its competitors’ behaviour but, by not reporting this illegality to public authorities, Petrogal effectively encouraged the continuation of the infringement and compromised its discovery’.
2121 Ibid, paras 196-197.
2122 Ibid, para 208. Zeon was the second undertaking to meet the conditions of point 21 of the Leniency notice and was granted a reduction of 20 %. In contrast to Bayer, Zeon was also granted partial immunity for a significant period to which its submissions relate (paras 216-221).
2124 Similarly, KONE’s application in relation to the cartel in Germany, as well as ThyssenKrupp's submission in relation to the cartel in the Netherlands, represented significant added value within the meaning of the Leniency Notice. These
to these strengthened the Commission’s ability to prove the infringement and, therefore represented significant added value.\textsuperscript{2125} For instance, Otis explicitly confirmed the start and end dates of the cartel. However, new information contained in the submission was very limited and Otis was granted a 40\% reduction of the fine for both infringements.\textsuperscript{2126 2127}

In \textit{Professional videotapes},\textsuperscript{2128} Fuji was the first undertaking to approach the Commission shortly after the inspection. The information supplied by Fuji provided the Commission with a clear understanding of the case at an early stage and enhanced the Commission’s ability to pursue its investigation in a successful manner.\textsuperscript{2129} Therefore, the Commission considered that the evidence handed in by Fuji represented significant added value.\textsuperscript{2130} To determine the precise percentage of reduction, the Commission took into account that at the time Fuji approached the Commission, it already possessed compelling evidence which would have allowed it to find an infringement for a certain period. However, the additional information supplied by Fuji allowed the Commission to establish new facts while clarifying and corroborating other facts which were still ambiguous. The details offered by Fuji were also useful in advancing the investigation successfully.\textsuperscript{2131} The Commission accordingly concluded that Fuji was entitled to a reduction of 40\% of the fine.\textsuperscript{2132}

In \textit{Flat glass},\textsuperscript{2133} Glaverbel and Asahi applied for leniency a few days after the Commission undertook its first set of inspections. Glaverbel and Asahi mostly provided evidence which strengthened the Commission’s ability to prove the facts for a certain period and, thus, met the added value threshold.\textsuperscript{2134} Considering the value of their contribution to this case, the early timing of the contribution and the extent of their cooperation following their submissions, Glaverbel and Asahi obtained the maximum fine reduction of 50\%.\textsuperscript{2135} In addition, although the Commission had collected certain evidence of the infringement during its inspection, Glaverbel and Asahi’s provided oral statements as well as circumstantial evidence which enabled the Commission to extend the duration of the cartel. Therefore, Glaverbel and Asahi also obtained partial immunity in accordance with point 23 of the Leniency Notice.\textsuperscript{2136}

Glaverbel and Asahi was also the first to submit an application for a reduction in \textit{Carglass} .\textsuperscript{2137} Glaverbel and Asahi provided detailed explanations on how and where the cartel members met and communicated with each other, how the cartel operated, including the functioning of a market share stability mechanism and of a compensation system put in place. These explanations were useful for the Commission to understand the documents collected during the inspection in their correct context. Furthermore, this firm also submitted documentary evidence in the form of

two undertakings were first to meet point 21 of the Leniency Notice in relation to the respective cartels, and the Commission granted KONE a 50\% reduction of the fine in respect of the infringement in Germany and ThyssenKrupp a 40\% reduction of the fine in respect of the infringement in the Netherlands.


\textsuperscript{2126} \textit{Ibid}, paras 763-768 and 822.

\textsuperscript{2127} In addition, this case other reductions were granted under Point 23(b) of the 2002 Notice second indent and third indent. As regards the second indent, the evidence submitted by Otis relating to the cartel in Germany strengthened the Commission’s ability to prove this infringement and Otis was granted a 25\% reduction. Similarly, in respect of the infringement in Belgium, ThyssenKrupp’s submission represented a significant added value and was granted a 20\% reduction of the fine. With respect to point 23(b), third indent, the evidence submitted by Schindler relating to the cartel in Germany represented significant added value and Schindler was granted a 15\% reduction of the fine in respect of this infringement.


\textsuperscript{2129} Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19, para 252.

\textsuperscript{2130} \textit{Ibid}, para 253.

\textsuperscript{2131} \textit{Ibid}, para 255.

\textsuperscript{2132} \textit{Ibid}, para 256.

\textsuperscript{2133} Case COMP/39165 - \textit{Flat glass} [2008] OJ C 127/9.

\textsuperscript{2134} \textit{Ibid}, paras 530-533.

\textsuperscript{2135} \textit{Ibid}, para 535.

\textsuperscript{2136} \textit{Ibid} paras 536-539. Glaverbel and Asahi, however, claimed that they should also be granted partial immunity for a different period. The Commission rejected this argument because it already had contemporaneous document relating to a meeting which referred to some of the previously agreed price increases.

contemporaneous handwritten notes by the employees of the applicant. Considering the value of the contribution, the early timing of the application and the extent of the cooperation following the submission the Commission decided to grant a reduction of 50%.

In Chloroprene rubber, Tosoh was the second company to approach the Commission and the first to obtain a reduction. In determining the precise percentage of reduction, the Commission took into account that it already possessed some evidence that had been submitted by Bayer and had been seized during the inspections. Still, the information supplied by Tosoh allowed the Commission to establish new facts and corroborated various aspects that were still unclear for the Commission. The Commission admitted that the quantity, quality and value as well as the timing of the information submitted by Tosoh allowed it to better prove the facts and to interpret the documents obtained. Given the extensive value of Tosoh’s submission to pursue the investigation, Tosoh was rewarded with a 50% reduction of the fine. The next reduction applicant, DDE/DPE approached the Commission 10 months after the first surprise inspections. The Commission also pointed out that DDE/DPE terminated its involvement in the infringement at the latest at the time at which it first submitted the evidence. In view of the foregoing, this undertaking was granted a reduction of 25% of the fine.

In Sodium Chlorate, Arkema France SA was the second company to approach the Commission. Nevertheless, the Commission considered that the information and evidence provided by Arkema France SA did not have significant added value and, therefore, no reduction was granted. Finnish Chemicals also submitted an application under the 2002 Notice. Taking as a point of comparison the information that was in its possession, the Commission found that the leniency submission of Finnish Chemicals enabled it to establish new facts and, therefore, represented significant added value. Finnish Chemicals’ submission provided the Commission with a clear understanding of the case and enhanced its ability to pursue the investigation. Furthermore, Finnish Chemicals submitted its application shortly after it had learned about the Commission’s investigation. As a result, Finnish Chemicals was granted a reduction of 50% of the fine.

In Aluminium Fluoride Fluorsid was the second undertaking to approach the Commission under the Leniency Notice. Fluorsid’s application was submitted quite late, some two years after the beginning of the Commission’s investigation. The Commission noted in this regard that ‘[t]he Leniency Notice is a publicly available document and Fluorsid had ample time to submit an application under it. It is not for the Commission to evaluate the company’s internal circumstances which may have led to the decision to make such an application and when to make it’. In addition, Fluorsid had been informed by the Commission that it was finalising its provisional

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2138 Ibid, para 721.
2140 Ibid, paras 622-623.
2141 Ibid, paras 635-637. Regarding Polimeri and a second subsidiary of Eni, which submitted an application under the Leniency Notice in April 2005, the Commission came to the conclusion that none of them provided significant added value within the meaning of point 21 of the 2002 Leniency Notice. Therefore, no reductions were granted (paras 639-654).
2142 Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6. This decision was subsequently partially annulled by the General Court and had to be readopted by the Commission. However, the amendments only affect the duration of the infringement and are not related to the application of the Leniency Notice.
2143 Ibid, paras 561-580. The reasons why Atochem’s submission was not regarded as constituting significant added value are unfortunately not specified in the decision.
2144 At the time Finnish Chemicals approached the Commission, the Commission already possessed some evidence. This evidence had been submitted by EKA, Finnish Chemicals (in its reply to the information request dated 10 September 2004, as far as Finnish Chemicals did not go beyond the scope of that request) and Atochem. Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6, para 581
2145 Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6, para 588.
2146 Ibid, paras 589-590. However, the Commission rejected Finnish Chemicals’ argument that it provided the Commission with facts previously unknown which enabled the Commission to extend the duration of the cartel (para 595).
2148 Ibid, para 261.
conclusions and its cooperation had to be provided as soon as possible if was to be taken into account.\textsuperscript{2149} Taking into account these circumstances the Commission did not consider that the evidence submitted constituted significant added value.\textsuperscript{2150}

In \textit{Candle waxes}\textsuperscript{2151} Sasol was the second company to submit a leniency application. The information provided by Sasol allowed the Commission to establish facts which were unknown to the Commission.\textsuperscript{2152} The quantity, quality and value as well as the timing of the information submitted by Sasol allowed the Commission to better understand the infringement and interpret the documents obtained. Considering the value of its contribution to this case, the early stage at which it provided its contribution and the extent of its cooperation following its submissions, Sasol obtained the maximum fine reduction.\textsuperscript{2153} In this case, Sasol also argued that it should benefit from partial immunity. However, the Commission rejected this argument because the first evidence relating to facts previously unknown to the Commission – which had a direct bearing on the duration of the cartel – were not provided by Sasol but were found during the inspections.\textsuperscript{2154} 2155

In this case, after the adoption and receipt by the addressees of the Statement of Objections, the Commission also received an application for immunity or alternatively, reduction of fines, from RWE.\textsuperscript{2156} RWE claimed that it should benefit from the immunity granted to Shell because the documents and statements that had been provided by Shell relate to RWE and its employees.\textsuperscript{2157} The Commission rejected this view and stated that ‘[i]mmunity is granted to the first undertaking that submits evidence which fulfils the requirements of points 8-10 of the 2002 Leniency Notice.’\textsuperscript{2158} In addition, the Commission noted that the previous relationship between RWE and Shell\textsuperscript{2159} was not relevant for the immunity application. If RWE were to benefit from the immunity granted to Shell on this basis, immunity would be extended to an undertaking which did not provide at the time of submission, sufficient evidence to find an infringement. This would indeed undermine the leniency policy.\textsuperscript{2160} 2161

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{2149} Ibid, para 261.
\item \textsuperscript{2150} Ibid, paras 260-263.
\item \textsuperscript{2151} Case COMP/39181 – \textit{Candle Waxes} [2009] OJ C 295/17
\item \textsuperscript{2152} Ibid, para 741. The evidence submitted by Sasol in […] constitutes significant added value in the sense of the Notice as it strengthens the Commission’s ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine.
\item \textsuperscript{2153} Ibid, para 749. It is worth noting that another cartel participant suggested that Sasol may not have complied with the requirements of the 2002 Leniency Notice and that Sasol may have been aware of Shell’s immunity application. However, the Commission found that this argument was not sufficiently supported by evidence (paras 746-748). See also supra section 4.2.4.1 of this Chapter.
\item \textsuperscript{2154} Ibid. Namely the Commission had found notes and other debriefing notes and were contained in Shell’s application for immunity.
\item \textsuperscript{2155} Ibid, paras 750-756. In this case Repsol was also granted a discount of 25%. Repsol, corroborated Shell’s and Sasol’s submissions and provided further evidence on the cartel as well as self-incriminating evidence. ExxonMobil was also rewarded with a reduction of 7%. This undertaking offered corroborating evidence, although only to a limited extent. Moreover, ExxonMobil’s submissions were vague and to a large extent contained useless information. Finally, throughout the investigation, ExxonMobil answered the Commission’s requests but it did not exceed its obligations under Article 18 and 23 of Regulation (EC) 1/2003 (paras 757-770).
\item \textsuperscript{2156} Ibid, para 89.
\item \textsuperscript{2157} Ibid, paras 767-768.
\item \textsuperscript{2158} Ibid, para 768. In the decision the Commission elaborated on this aspect and explained that the fact that RWE could not benefit from Shell’s immunity application is based on the principle that ‘when assessing leniency, it is the undertaking, as it exists at the time of application for immunity and which meets the requirements under the 2002 Leniency Notice, that can benefit from immunity’.\textsuperscript{2159}
\item \textsuperscript{2159} In the course of the infringement, Shell had taken over the subsidiary from RWE that had participated in the infringement and who had filed an immunity application with the Commission.
\item \textsuperscript{2160} The Commission’s view in this case was confirmed in Judgment of the General Court of 11 July 2014, Case T-543/08, \textit{RWE AG and RWE Dea AG v Commission}, para 138. In particular, the General Court explained that unlike Article 23(2) and (3) of Regulation No 1/2003, which refers to the undertaking during the period of the infringement, the 2002 Leniency Notice focuses on the date of the submission of the leniency application. This implies that under the Leniency Notice the notion of ‘undertaking’ refers to the economic entity as it exists at the time of the submission of the application (para 145).
\item \textsuperscript{2161} Similarly, in the \textit{Calcium carbide} decision, SKW claimed that it should benefit from Degussa’s leniency application because the evidence provided by Degussa came from SKW during the time of the cartel. The Commission rejected this
\end{enumerate}
\end{footnotesize}
In Animal Feed Phosphates,\textsuperscript{2162} the evidence submitted by Tessenderlo represented significant added value within the meaning of the Leniency Notice. Tessenderlo provided information which was new to the Commission with respect to a certain period and allowed it to extend the duration of the infringement.\textsuperscript{2163} In addition, the quality and quantity of the evidence decisively strengthened, both by its very nature and by its level of detail, the Commission’s ability to prove the infringement in a different period. Therefore, Tessenderlo was granted a 50 % reduction of the fine\textsuperscript{2164} as well as partial immunity for the extended period. The next company qualifying for a reduction under the Notice was Quimitecnica. The Commission observed that before Quimitecnica applied for leniency, its file contained abundant evidence for the whole duration of the infringement.\textsuperscript{2165} Still, Quimitecnica’s submission enabled the Commission to establish a single and continuous infringement extending to Portugal and also corroborated previous incriminating information.\textsuperscript{2166} This company therefore obtained a 25 % reduction of the fine.\textsuperscript{2167}

In Airfreight,\textsuperscript{2168} the Commission granted a reduction of the fine of 50 % for its cooperation under the 2002 Notice to Martinair.\textsuperscript{2169} The evidence submitted by this company strengthened the Commission’s ability to prove the facts pertaining to this cartel. Martinair provided evidence which proved its presence at a number of unknown meetings and exchanges. The Commission also noted that the evidence had been provided in a timely manner.\textsuperscript{2170} \textsuperscript{2171}

In LCD\textsuperscript{2172} LG Display, the first qualifying undertaking for a reduction was granted a 50 % discount and ‘partial immunity’ for the year 2006.\textsuperscript{2173} AUO also filed a leniency application some three months after having received a first request for information. Its application strengthened the Commission’s ability to prove the facts for the period from 2001 to 2006.\textsuperscript{2174} Nevertheless, the Commission found that AUO tried to minimise the content and meaning of the evidence\textsuperscript{2175} and by

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\textsuperscript{2162} Case COMP/39.396 – Animal feed phosphates [2011] OJ C 301/18, para 357.

\textsuperscript{2163} Ibid, para 219. This decision was the first settlement adopted in a hybrid case. See further infra Chapter 9. Accordingly, two decisions were adopted, one for the settling parties and other for Timab, the non-settling party.

\textsuperscript{2164} Ibid, para 218.

\textsuperscript{2165} Ibid, para 220. This information also included some evidence regarding the existence of local anticompetitive arrangements in Portugal in the period from October 1993 until at least December 2003.

\textsuperscript{2166} Ibid.

\textsuperscript{2167} Ibid, para 132. In addition, two other undertakings-parties in the same proceedings but to which a separate (non-settlement) decision is addressed, Timab Industrie S.A. and Compagnie Financière et de Participation Roullier, submitted applications under the Leniency Notice. The Commission considered that both undertakings qualified for a reduction of 5% for the reasons set out in detail in the decision addressed to those undertakings.

\textsuperscript{2168} Case C.39258 – Airfreight [2014] OJ C 371/11.

\textsuperscript{2169} Ibid, para 1285. Throughout the investigation, Martinair answered the Commission’s requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation 1/2003.

\textsuperscript{2170} Ibid, para 1286. This decision does not reveal many details about the type of evidence submitted by Martinair due to confidentiality reasons.

\textsuperscript{2171} Ibid, paras 1295-1373. In this case other discounts were granted to Japan Airlines (25 %), Air France and KLM (20 %), Cathay Pacific (20 %), Lan Chile (20 %), Qantas (20 %), Air Canada (15 %), Cargolux (15 %), SAS (15 %) and British Airways (10 %).


\textsuperscript{2173} Ibid, paras 460-468. The decision does not reveal any details about the granting of this reduction.

\textsuperscript{2174} Ibid, para 469.

\textsuperscript{2175} According to the decision AUO insisted that ‘the information exchanged during the meetings was unsuitable for any infringement of the kind alleged by the Commission, that there was no intention to reach an agreement […]’, referring to the alleged discrepancy between the English words used by non-native speakers and their actual intentions, and that
doing do did not show a spirit of cooperation. The Commission therefore considered that AUO was entitled to a reduction of 20%. It is noteworthy that, in this case, Chunghwa Picture Tubes did not formally apply for leniency, but was still granted a 5% reduction. In its decision the Commission explained that undertakings which do not formally apply for leniency may still be eligible for a reduction if it appears that they voluntarily supplied evidence which represents significant added value in the sense of point 21 of the 2002 Notice. This was indeed the case of Chunghwa Picture Tubes which voluntarily provided self-incriminating evidence in reply to requests for information, which went beyond the scope of the questionnaire.

In the *Bananas* case, although no reductions were granted by the Commission, on appeal, the General Court found that the fine against Del Monte had to be lowered to recognise the value of the information provided voluntarily by Weichert in reply to requests for information, even if this firm did not cooperate under the 2002 Notice. The ECJ, in contrast, annulled the General Court’s judgment on this point. In particular, the Court observed that ‘a reduction of a fine, as provided for in the 2002 Leniency Notice, is justified only where an undertaking provides information to the Commission without being asked to do so’. Most importantly, the ECJ also underlined that ‘the conduct of the undertaking concerned must not only facilitate the Commission’s task of establishing the existence of the infringement but also reveal a genuine spirit of cooperation.'

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the only conclusion which can be drawn from the evidence is that the market was highly competitive and that effective competition is incompatible with the finding of an agreement to fix prices or limit production'. *Ibid*, para 470.

More precisely, the Commission stated that ‘its cooperation was not genuine in the sense that it did not cooperate sincerely, in good faith, by providing accurate and complete information that was not misleading’. *Ibid.*

*Ibid*, para 471-472. In addition, in this case the Commission also considered that no reduction should be granted to CMO. By the time CMO submitted an application the Commission had already contemporaneous evidence. The Commission found that CMO ‘did not continue to cooperate with the Commission in the spirit of the Notice after the date of its submission and did not come forward with further evidence, either on its own initiative or in reply to requests for information’. In particular, CMO ‘did not provide explanations or translations of the documents submitted. Furthermore, the documents were submitted in reply to the request for information […]. This is an additional element that puts into question the voluntary nature of CMO’s co-operation. In the light of the foregoing, no reduction should be granted to CMO.'

It should be noted that this decision does not make any references as to the application of the 2002 Leniency Notice with respect to reductions.

Weichert was a banana importer linked to Del Monte at the time of the cartel.


Judgment of the Court of 24 June 2015, Joined cases C-293/13 P and C-294/13 P, *Fresh Del Monte Produce Inc. v Commission* (C-293/13 P) and *Commission v Fresh Del Monte Produce Inc.* (C-294/13 P), paras 184-185. Interestingly, the ECJ added that ‘[a]ny other interpretation would undermine both the purpose and the incentive effect of the leniency provisions’. First, ‘it would have the effect of granting to all parties participating in a cartel a reduction of the fine if they provided to the Commission, […] useful information and evidence and, second, it would encourage undertakings to adopt a ‘wait-and-see’ approach’.

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The decisions applying the 2002 Notice show that the concept of undertaking has certain limits when it comes to qualifying as leniency applicant. A leniency submission of one entity of an undertaking suffices for the whole undertaking to benefit from the leniency programme. Nevertheless, entities which did not cooperate with the Commission under the Leniency Notice but were part of the undertaking at the time of the infringement cannot benefit from the applications of the Notice. Without this interpretation, entities which did not contribute to the detection or the finding of the infringement directly or indirectly (i.e. through their cooperation as a part of the whole undertaking) would be unfairly rewarded.

Further, the Commission’s decisions provide some insight in the Commission’s assessment of the criterion regarding “significant added value”. The concept of added value is intrinsically related to the information that is already known or in the possession of the Commission. The question whether this threshold can be reached is thus assessed on the basis of a comparative method, taking as a point of comparison the information that is already in the Commission’s possession. Accordingly, leniency submissions are only considered by the Commission when they contain information which was new or not in its possession. In particular, (i) information relating new aspects of the cartel and (ii) information which, related known aspects of the infringement, but was not yet in the possession of the Commission and could be used to corroborate facts, could represent significant added value.

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2184 Case COMP/39.129 - Power Transformers [2009] OJ C 296/21 (para 290). In this case the fine for Fuji was reduced by 40 %. The confidential version of this decision only comments that Siemens fulfilled all the relevant requirements to obtain a reduction. In addition, the leniency applications by ABB, AREVA T&D and Hitachi were rejected for not having provided significant added value compared to the information already in the Commission’s possession.


2186 Case COMP/38.589 — Heat Stabilisers [2010] OJ C 307/9. In this case CECA/Arkema France/Elf Aquitaine was granted a reduction of 30 % for tin stabilisers and of 50 % for ESBO/esters. Baerlocher was granted a reduction of 20 % for tin stabilisers. Akzo was granted a reduction of 0 % for tin stabilisers and of 0 % for ESBO/esters and BASF was granted a reduction of 15 % for tin stabilisers and of 25 % for ESBO/esters. See summary decision, para 16. In the non-confidential decision of the case all the information regarding the leniency applications has been deleted due to confidentiality reasons.

2187 Case COMP/39.092 — Bathroom fittings and fixtures [2011] OJ C 248/12. In this case the fines for Grohe and Ideal Standard were reduced by 30 %. Furthermore Ideal Standard was granted partial immunity by not taking the facts regarding ceramics in Belgium and taps and fittings and ceramics in France into account. Finally, the leniency applications of Hansa, Roca, Dornbracht and Artweguer were rejected for not having provided significant added value. See summary decision, para 16.

2188 Case COMP/38.344 — Prestressing Steel [2011] OJ C 339/7, paras 1076-1129. In this case the Commission granted a reduction of the fine for cooperation under the 2002 Leniency Notice to Italcables/Antonini (50 %), Nedri (25 %), Enesa and Galycas (5 %), ArcelorMittal and its subsidiaries (20 %) and WDI/Pampus (5 %). Redaelli and SLM did not meet the requirements for cooperation and therefore received no reduction of the fine.

2189 See e.g. Judgment of the General Court of 23 January 2014, Case T-384/09, SKW Stahl-Metallurgie Holding AG and SKW Stahl-Metallurgie GmbH v Commission, paras 234-239. See further supra section 4.2.4.3 of this Chapter.


2191 See e.g. Sodium Chlorate (Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6) and Elevators and escalators (Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19).

2192 See e.g. Sodium Chlorate (Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6) and Elevators and escalators (Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19). However, this type of evidence did not
Once it has been established that the information contained in a leniency application was new or not in the possession of the Commission, the next step was to analyse whether the quality and quantity of the evidence was sufficient to reach the “added value” threshold of point 21 of the Notice. The Commission firmly underlined in its decisions that the quality and quantity of the evidence should decisively strengthen (both by its very nature and by its level of detail) the Commission’s ability to prove the infringement. This is commonly the case when the information allows the Commission to prove new facts concerning the infringement which it could not have otherwise established.

Furthermore, an analysis of the decisions suggests that, as a general rule, some type of evidence represents added value. Normally, evidence consisting of incriminating information on the conduct of the cartel participants, enabled the Commission to prove the facts related to the infringement and had, thus, significant added value. Documentary and contemporaneous evidence, such as handwritten notes by the employees of the applicant commonly reached the threshold. This was also the case of evidence relating a given period of the infringement, such as explicit documentation confirming the start and end dates of the cartel. Indirect information, which helped the Commission to interpret the documents obtained or which provided a clear understanding of the case was generally less valuable.

In order to determine the level of the reduction within a band, firstly, the Commission took into account the time at which the evidence fulfilling the condition in point 21 was submitted. In this regard, it is essential to keep in mind that ‘[i]n order to establish the time at which the leniency application is lodged, the relevant moment is that when the evidence with potential significant added value is submitted’. The date in which the evidence with the potential significant added value is submitted to the Commission may, however, not coincide with the date when the company contacted with the Commission for the first time. This implies that being the fastest firm in the race to suffice to obtain the maximum reduction within the applicable band. In addition, the General Court has ruled in this regard that ‘in the light of the wording of Section 21 of the Leniency Notice, it cannot be ruled out that the submission of evidence of a certain probative value, but which contains facts established by other evidence, will not result in any reduction’, Case T-112/07, Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v Commission [2011] ECR II-3871, paras 178-180.


See e.g. Case COMP/39.125 — Car glass OJ [2009] C 173/13. Still, in Case COMP/38.432 – Professional Videotapes [2008] OJ C 57/10 the Commission considered that “[t]he information supplied by Fuji provided the Commission with a clear understanding of the case at an early stage and enhanced the Commission’s ability to pursue its investigation in a successful manner. […] that evidence handed in by Fuji represented significant added value (see paras 252-253).


leniency does not imply that the firm concerned will obtain a discount. Reduction applicants should, thus, make sure that both the timing and the quality of the application are appropriate to obtain a reduction.

The importance of the timing factor has been frequently stressed in the decisions. In this sense, the Commission generally considered that the condition of significant added value was fulfilled “early in the proceedings” when the undertakings concerned submitted the relevant evidence (i) before the Commission took any active investigative measures against them, (ii) in the month following the Commission’s inspections and also (iii) over three months after the Commission’s inspections. Conversely, the Commission found that companies satisfied the added value condition “quite late in the proceedings” when the evidence was provided (i) ten months after the first surprise inspections, (ii) more than 11 months after the Commission’s inspections and only after the Commission had sent the parties a detailed request for information, (iii) over a year and a half after the Commission carried out surprise inspections or had sent requests for information to the undertakings investigated. Despite the value of the timing factor, the decisions also suggest that providing significant added value at an early stage is not a guarantee to obtain the maximum reduction within a range. On the other hand, the fact that the evidence representing added value was submitted late in the proceedings regularly led the Commission to lower the discount. Furthermore, it should be taken into account that undertakings which provided their cooperation at a very late stage logically run the risk of not contributing at all to the Commission’s case and, thus, being disqualified for a discount.

In order to determine the precise level of reduction within a given band, the extent to which the evidence submitted represented added value played a decisive role. In assessing the extent to which a leniency submission represented added value, the Commission compared all the evidence submitted by an undertaking to the evidence that was necessary to reach the “added value” threshold. Or put differently, the Commission analysed to which extent the evidence contained in a leniency application exceeded the added value threshold of point 21 of the 2002 Notice.

2202 See e.g. Commission decision in Hydrogen Peroxide and Perborate, the Commission found that the reduction applicant cooperated early ‘in the week following the Commission’s inspections without itself undergoing such inspections`.
2205 See e.g. Case COMP/38.456 – Bitumen (NL) [2007] OJ L 196/40.
2206 See e.g. Case No COMP/F/C.38.443 — Rubber chemicals [2006] OJ L 353/50.
2210 In Case COMP/39.180 — Aluminium fluoride [2011] OJ C 40/22 (para 261), the Commission found that when an application is submitted some two years after the beginning of the Commission’s investigation, it runs the risk of not satisfying the added value requirement at all.
Based on an analysis of the Commission’s practice, a number of factors which generally enhance the added value of a leniency application can be identified. Applications which covered the whole period of the infringement had more added value than applications which only covered part of the cartel.\textsuperscript{2211} The Commission also attached significant importance to information which could be used to corroborate the existing evidence,\textsuperscript{2212} to evidence providing further details on the anticompetitive contacts, to documents explaining the context of documents collected during the inspections and, in general, to information which assisted the Commission in proving the infringement.\textsuperscript{2213} The amount of new information contained in the submission was also considered.\textsuperscript{2214} The Commission also appeared to value the fact that an application was clear, well-structured and detailed.\textsuperscript{2215}

The 2002 Leniency Notice also specified that ‘[i]n order to determine the level of reduction within each of band, the Commission ‘may’ also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission’.\textsuperscript{2216} Although the word “may” could lead us to underestimate the importance of this factor, in practice, the extent and continuity of the cooperation played an important role. The fact that companies provided further cooperation after their initial submission was seen as an indication of their genuine spirit of cooperation and was thus used by the Commission to confirm whether an applicant deserved the maximum reduction within the applicable range.\textsuperscript{2217} Conversely, when the added value and the extent of the cooperation remained limited throughout the proceedings, the Commission put into doubt the undertakings’ will to cooperate.\textsuperscript{2218} Notably, the fact that companies did not admit the infringement (for the whole period) or attempted to weaken the Commission’s ability to prove the infringement, had a negative impact on the calculation of the level of the reduction.\textsuperscript{2219}

A separate aspect that was clarified by the decisions is that the Commission always rejected the arguments of non-immunity applicants intended to devalue the cooperation of another undertaking.

\textsuperscript{2211} See e.g Commission decisions in Tobacco Italy (Case COMP/C.38.281/B.2 — Raw tobacco Italy [2006] OJ L 353/45), Nitrile Butadiene Rubber (Case COMP/38628 — Nitrile Butadiene Rubber) [2009] OJ C 86/7).


\textsuperscript{2213} See e.g Case No COMP/F/38.443 — Rubber chemicals [2006] OJ L 353/50.


\textsuperscript{2215} See e.g Case No COMP/F/38.645 — Methacrylates [2006] OJ L 322/20.

\textsuperscript{2216} Leniency Notice 2002, point 23 (emphasis added). See also stressing the importance of this aspect Case T-347/06, Nynäshammar Petroluem AB and Nynas Belgium AB v Commission, para 66.


\textsuperscript{2219} See e.g Commission decisions in Rubber chemicals (Case No COMP/F/C.38.443 — Rubber chemicals [2006] OJ L 353/50), Bitumen NL (Case COMP/38.456 – Bitumen (NL) [2007] OJ L 196/40), Methacrylates (Case No COMP/F/38.645 — Methacrylates [2006] OJ L 322/20) and LCD (Case COMP/39.309 — LCD [2011] OJ C 295/8). In Methacrylates, the Commission found that Atofina failed to outline the nature and duration of its involvement and was vague in its submissions on more recent collusive contacts (Methacrylates, para 409). In LCD the Commission found that AOU tried to minimise the content and meaning of the evidence and by doing so did not show a spirit of cooperation (LCD, para 470).
and to secure a more favourable treatment for themselves. \(^{2220}\) Comparably, arguments trying to justify the failure by a company to submit a leniency application and provide evidence earlier in the procedure were also rejected. \(^{2221}\)

Last but not least, the Commission granted partial immunity in cases where an undertaking provided evidence relating to facts previously unknown to the Commission which had a direct bearing on the gravity or duration of the suspected cartel. \(^{2222}\) On the other hand, when the evidence submitted was very limited and, consequently, it was not sufficient to establish the existence of (a part of) an infringement having a direct bearing on its gravity or duration, the Commission did not hesitate to deny this benefit. \(^{2223}\) Partial immunity was logically also denied in cases where the relevant facts were not previously unknown to the Commission. \(^{2224}\)

4.2.5. Measuring the effectiveness of the 2002 Leniency Notice

4.2.5.1. The number of cartel decisions

One of the methods to assess the effectiveness of the leniency programme to detect cartels is to observe the population of discovered cartels across time. \(^{2225}\) The chart below shows the number of cartel decisions adopted before and after the adoption of the 1996 Leniency Notice, in the period from 1990 to 2007.


\(^{2221}\) See Case No COMP/F/38.645 — Methacrylates [2006] OJ L 322/20, para 420; Case COMP/38710 — Bitumen Spain [2009] OJ C 321/15, para 596. In this last case the undertaking argued that it did not apply for leniency because it its role in the cartel was very limited and, therefore, it had very little information on the cartel. Moreover, it feared retaliation by the three market leaders. The Commission, however, answered that ‘the mere willingness of an undertaking to cooperate is of no significance’. See also Case T-112/07, Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v Commission [2011] ECR II-3871, para 171 in which the General Court considered that ‘the limited extent of Fuji’s knowledge can be explained by its secondary role within the cartel’.

\(^{2222}\) See e.g Commission decisions in Hydrogen Peroxide and Perborate (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate [2006] OJ L 353/54) and Flat glass (Case COMP/39165 - Flat glass [2008] OJ C 127/9).

\(^{2223}\) See e.g Case COMP/38628 — Nitrile Butadiene Rubber [2009] OJ C 86/7.


\(^{2225}\) See also e.g. E. COMBE et al., “Cartels: the probabilities”.

\(^{2226}\) It should be recalled that the concept of cartel should be understood as a hardcore restriction in the sense of Article 101 TFEU. See further supra Chapter 4.
As the chart illustrates, during the period from 1990 to 1996, previous to the introduction of the programme, the Commission adopted a total of 18 cartel decisions. This corresponds to almost three cartel decisions per year on average. In contrast, from 1996 to 2002, the Commission was able to adopt a total of 30 cartel decisions, i.e. approximately four decisions per year, on average. In the next five years, from, 2003 to 2007, the Commission adopted 29 cartel decisions, i.e. nearly six cartel decisions on average.

These ciphers illustrate a steady increasing trend in the average number of decisions per year after the introduction of the 1996 Notice. Further, after the introduction of the revised 2002 Notice until 2007, the Commission was able to adopt almost two decisions more on average, compared to the 1996-2002 period. While it is not excluded that the increase in cartel decisions is also influenced by a combination of factors,\textsuperscript{2227} it should be accepted that both the introduction of the 1996 leniency policy as well as the 2002 revision, had a positive impact on and contributed to this increase.

It should, however, be noted that the chart reflects the number of decisions according to the date of their adoption. Since administrative procedures can take several years to complete and, therefore, decisions are only adopted a few years after the launch of the investigation,\textsuperscript{2228} the individual impact of the 2002 Notice on the number of cartel decisions is not properly illustrated by the first couple of years in which the system was applicable In fact, the influence of the 2002 Notice did not become fully visible until 20 October 2005, i.e. the date in which the 2002 Notice was applied for the first time.

\textsuperscript{2227} W. Wils, “Leniency” 33-34 of the online version of this article. W. Wils comments that ‘an increase or decrease in the number of detected cartels can be equally due to improved or worsened detection as to an increase or decrease in the cartel population’.

\textsuperscript{2228} See further supra section 4.1.4 of this Chapter.
4.2.5.2. The method of cartel detection

The effectiveness of the leniency policy in the area of cartel detection can also be examined by looking at the method that led the Commission to detect the existence of cartel agreements in the decisions adopted during the period in which the 2002 Notice was applicable.

Since the beginning of 2003 until the end of 2007, a total of 29 cartel decisions were adopted. In these decisions three main methods of detection have been identified. These are: (i) the (1996 or 2002) Leniency Notice; (ii) investigations of the Commission and (iii) parallel procedures.

More precisely, the 1996 leniency system served as a basis to detect cartel agreements and subsequently open procedures in 13 cases: Electrical and mechanical carbon and graphite products (2003), Industrial tubes (2003), Organic peroxide (2003), Sorbates (2003), Copper plumbing tubes (2004), Choline chloride (2004), French beer market (2004), Needles

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2229 This period has been chosen as representative for the application of the 1996 Notice because although the 1996 Notice was replaced in February 2002, given the considerable length of the proceedings, none of the cartel decisions adopted during 2002 involve the application of the 2002 Notice, but that of the 1996 Notice. In addition, the examination of the effectiveness of the 1996 Notice included the cartel cases adopted from the adoption of the 1996 Notice until the end of 2002.

2230 It should be taken into account that, as Table 1 shows, the 2002 Leniency Notice was also applied in a considerable number of decisions adopted after 8 December 2002, that is, the date on which the 2002 system was replaced by the 2006 Notice. However, given that since this date, the 2006 Leniency Notice was also applicable, it is difficult to measure impact of the 2002 system separately by looking at the total number of cartel decisions adopted after the 2006 Leniency Notice was published.

2231 Case No C.38.359 — Electrical and mechanical carbon and graphite products [2004] OJ L 125/45, para 182. (‘On 1 March 1999, Mr. Ian Norris, Morgan’s senior representative on the Board of the ECGA withdrew from the Board, to be replaced from May of that year and for the remainder of the year by Mr. Kroef of Morgan. Morgan withdrew from the ECGA with effect from the year 2000. The reason stated to the Commission was that “a large proportion of ECGA members (but not Morgan) had been implicated in the graphite cartel”. Morgan representatives continued, however, to attend meetings of the cartel for electrical and mechanical carbon and graphite products until the end of 1999. Morgan filed an application for immunity from fines with the Commission on 5 October 2001’).


2233 Case COMP/E-2/37.857 – Organic Peroxides [2005] OJ L 110/44. In this case Akzo representatives met the Commission and informed it about an infringement relating to OP, involving Akzo and others. In this context, Akzo expressed its expectation to benefit from the Commission’s Leniency Notice (see para 56 of the non-confidential version of this decision). It is, however, noteworthy that simultaneous investigations on an infringement concerning OP were being conducted by the US Department of Justice (para 79). Akzo received immunity in this case because it informed the Commission about a secret cartel and the Commission had not undertaken an investigation and it did not have sufficient information to establish the existence of the cartel. Therefore, it should be considered for the purpose of this discussion that the Leniency Notice was the detection method.


2235 Case COMP/E-1/38.069 – Copper Plumbing Tubes [2006] OJ L 192/21, paras 76 et seq.


2237 Commission Decision of 29 September 2004 (Case COMP/C.37.750/B2 — Brasseries Kronenbourg — Brasseries Heineken) [2005] OJ L 184/57, paras 2-7. This case started on the basis of information provided by Interbrew NV in the framework of the Belgian brewery cartel case (Case IV/37.614/F3 PO/Interbrew and Alken-Maes [2003] OJ L 200/1). On the basis of this information, the Commission was able to conduct several inspections and to send requests for information.
The Commission conducted inspections which led to the opening of proceedings in 7 cases: 

- *French Beef* (2003),  
- *Raw Tobacco Spain* (2004),  
- *Raw tobacco (Italy)* (2005),  
- *Thread Hydrogen Peroxide and perborate* (2006),  
- *Hydrogen peroxide and perborate* (2006),  
- *Methacrylates* (2006),  
- *Synthetic rubber (BR/ESBR)* (2006),  
- *Chloroprene Rubber* (2007),  

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2238 Case COMP/F-1/38.338 — *PO/Needles* [2009] OJ C 147/23, para 48. In this decision the Commission stated that ’[t]he present findings arise out of investigations carried out by the Commission on 7 and 8 November 2001 pursuant to Article 14(3) of Regulation No 17 at the premises of several Community producers of hard and soft haberdashery [...] By means of said investigations and subsequent enquiries under Article 11 of Regulation No 1752, the Commission obtained documentary evidence indicating that infringements of Article 81 of the EC Treaty had been committed [...] The investigations were a result of information provided by Mr Martin Ellis of Entaco between 23 August 200053 and 6 August 2001. The relevant services of the Commission considered these pieces of information as a leniency application by Mr Martin Ellis of Entaco in a letter dated 21 August 2001’.

2239 Case No C.37.773 — *MCAA* [2006] OJ L 353/12, paras 43-46.


2242 Case COMP/B-2/37.766 – *Nederlandse biermarkt*, paras 34 et seq. In July 1999, a complaint about a possible abuse of a dominant position led the Commission to conduct inspections at the headquarters of Interbrew in Leuven (Belgium). Following the inspection, the Commission opened the case regarding the Belgian beer cartel. In the course of this investigation, Interbrew submitted an application under the 1996 leniency notice regarding a second cartel on the Belgian market (concerning private label beer and involving more brewers) as well as other anticompetitive practices in France, Luxembourg, Italy and the Netherlands. As a result of Interbrew's statement, investigations were carried out in the Netherlands on 22 and 23 March 2000. On 30 August 2005, the Commission initiated proceedings in the present case, and adopted a Statement of Objections which was notified to the addressees of the present Decision.


2247 Case No COMP/F/38.645 — *Methacrylates* [2006] OJ L 322/20, paras 84-85. The case was also revealed to the Commission in December 2002 by the German company Degussa. This undertaking was also the revelator of the *Hydrogen Peroxide and perborate* cartel.


2251 Some of these cartel decisions simply mention that the proceedings were opened as a result of a Commission’s inspection. It can, however, be inferred that such “spontaneous inspections” may have probably resulted from other sources such as (anonymous) complaints, referrals or informants. Such assumption is also based on the fact that the Commission is obliged to define the subject of its inspection. See further supra Chapter 7.

2252 See Case COMP/C.38.279/F3 — *French beef* [2003] OJ L 209/12, paras 1-6. (The non-confidential version of this decision is not available). In this case six French federations had concluded a written agreement to set a minimum purchase price for certain categories of cattle and suspend imports of beef into France. ‘Having learned of the signature of the agreement’ the Commission sent requests for information and in the light of the information thus obtained, the Commission formally informed the six federations that the competition rules had been infringed.

2253 Commission Decision of 20 October 2004 (Case COMP/C.38.238/B.2) — *Raw tobacco — Spain* [2007] OJ L 102/14, para 3. According to this decision the Commission carried out following inspections (under Article 14(3) of Regulation No 17) ‘[o]n the basis of information to the effect that the Spanish raw tobacco processors and producers had infringed Article 81 of the Treaty’.

2254 Case COMP/C.38.281/B.2 — *Raw tobacco Italy* [2006] OJ L 353/45, para 3. In this case, ‘[t]he Commission received information indicating that since 1999 the national association of processors of raw tobacco APTI had concluded agreements with UNITAB concerning price ranges for distinct qualities for one or more varieties of raw tobacco’. On the basis of the information received, the Commission subsequently send requests for information.
Last, the opening of the Commission’s procedures Sodium Gluconate II (2004) and Flat glass (2007) was possible due to parallel or previous procedures in other jurisdictions.

The following figure illustrates the proportion of cases detected by each of these methods, from 2003 until the end of 2007.

<table>
<thead>
<tr>
<th>Method of detection 2003-2007</th>
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<tbody>
<tr>
<td>Leniency Notice 1996</td>
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<tr>
<td>Leniency Notice 2002</td>
</tr>
<tr>
<td>Commission investigation</td>
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<tr>
<td>Parallel procedures</td>
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</table>

In this period, the 1996 and 2002 Notice led to the adoption of a decision in 45% and 24% of cases respectively. In total, 69 % of the cases were thus detected on the basis of the Commission’s leniency

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2255 Commission Decision of 14 September 2005 (Case COMP/38.337 — PO/Thread) [2008] OJ C 21/10, para 78. According to this decision ‘a]n ex-officio procedure was opened after the Commission received a letter from Entaco […] a manufacturer of sewing needles [which] accused Coats and Prym GmbH, a leader in the hard haberdashery market in Europe, of anticompetitive behaviour regarding the market for haberdashery products (needles, pins, tape measures, elastics, scissors, fasteners, etc.).’

2256 Case COMP/E-1/39.168 – PO/Hard Haberdashery: Fasteners. [2009] OJ C 47/8, para 40. ‘This Decision arises out of investigations carried out by the Commission on 7 and 8 November 2001 pursuant to Article 14 (3) of Council Regulation No 17 of 6 February 1962, […] at the premises of several Community producers of hard and soft haberdashery and thread [*]. By means of those investigations and subsequent enquiries under Article 11 of Regulation No 17 […], the Commission discovered documentary evidence in relation to ‘other fasteners’, attaching machines and zip fasteners, which showed that infringements of Article 81 of the Treaty had been committed’.

2257 Case COMP/38.432 – Professional Videotapes [2008] OJ C 57/10, para 44. This decision simply states that this case started as an ex officio investigation with dawn raids on 28 and 29 May 2002 at a total of eleven premises belonging to members of the Sony, Fuji and Maxell groups in five Member States.

2258 Case COMP/E-1/38.823 — Elevators and Escalators [2008] OJ C 75/19, paras 91-92. ‘In the summer of 2003, an informant approached the Commission with information concerning the possible existence of a European-wide and/or national Belgian cartel among the four major manufacturers of elevators and escalators engaged in business activities throughout the EU. Starting on January 28 2004, inspections under Article 14(3) of Regulation No. 17 took place, among others, at KONE’s European Headquarters in Belgium’.

2259 The non-confidential version of this decision, para 93, available at http://ec.europa.eu/competition/antitrust/cases/dec docs/36756/36756_68_16.pdf. The summary decision of this decision is not available. In March 1997, the US Department of Justice informed the Commission about an ongoing investigation of the SG market. In October 1997, the Commission was informed about the existence of an international price fixing and market sharing cartel in the United States and other countries

2260 Case COMP/39165 - Flat glass [2008] OJ C 127/9, paras 60-61. In this case, ‘[t]he Commission initiated the investigation leading to this Decision as a result of information exchanged under Article 12 of Regulation (EC) No 1/2003 as well as informal exchange of information from the German, French, Swedish and British Competition Authorities in late 2004 and early 2005. The information received consisted mainly of letters and/or informal complaints from some customers of the largest Community flat glass suppliers, namely Glaverbel, Saint-Gobain, Pilkington and Guardian, about systematic parallel price increases for similar product ranges and the parallel application of an energy surcharge calculated in similar fashion by those suppliers. On 22 and 23 of February 2005 the Commission carried out unannounced inspections’.
system. Investigations conducted on the initiative of the Commission, led to a decision fining a cartel in 24% of the cases. Last, only 7% of the cases the Commission opened proceedings following parallel investigations in other jurisdictions. As the figure above illustrates, compared to other methods of cartel detection, the Leniency Notice seems to have a greater detection potential. It is true that, on the basis of the figure, the 1996 system seems more effective than the 2002 version of the Notice. However, the fact that more cases were detected on the basis of the 1996 Notice is most probably due to the length of the proceedings. Except for three cases, all the cartel decisions in which the 1996 Notice was applied date from the period 1998-2005. On the other hand, the decisions in which the 2002 Notice was applied date from the period from October 2005 to December 2010.

4.2.5.3. Detection method across the years

The evolution of the effectiveness of the programme, compared to other detection methods, can also be examined across time.

The detection of cartels in Europe across the years, shows the (evolution of the) success of the Leniency Notice. Each year from 2003 to 2007, the (1996 or 2002) Leniency Notice was used to detect at least half of the cartel cases fined by the Commission. As for the individual impact of the 2002 Notice, the graphic indeed illustrates that its proper working starts to become apparent after 2005. In effect, in 2006, leniency applications made under the 2002 system triggered 80% of the proceedings. In 2007, 25% of the cases were opened on the basis of an immunity submission made on the grounds of the 2002 system. Although the overall impact of the 2002 Notice can be assessed

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2261 These decisions date from 2006, 2007 and 2011. See Table providing the overview of cases where the 1996 Notice was applied.

2262 Except for the decision in the Bananas case which dates from 2011. See supra Table 2.

2263 This implies that the full impact of the 2002 revision can only be assessed by taking into account the application of the 2002 Notice in these years.
more accurately by also looking at the application of the regime after 2007, the graphic above illustrates that companies did certainly not lose their motivation to come forward under the first revised version of the Commission’s Leniency Notice.

4.2.5.4. The effect of the granting of leniency

Finally, (i) the granting of immunity when an undertaking enabled the Commission to carry out an inspection, (ii) the granting of immunity when an undertaking enabled the Commission to find an infringement and (iii) the granting of reductions to companies which provided added value to the case, can be assessed individually in order to evaluate the specific type of contribution of the 2002 leniency system made to anti-cartel enforcement.

Under the 2002 leniency programme, some type of lenient treatment has been granted in 29 cases in total. More precisely, immunity under point 8(a) has been granted in 21 cases to undertakings which enabled the Commission to conduct an inspection. In percentage terms, this type of immunity has been granted in 72% of the cases.

Immunity on the grounds of point 8(b) has been granted in 4 cases to firms which enabled the Commission to prove the infringement. This means that point 8(b) of the Notice was applied in 14% of the cases.

Finally, reductions under point 21 of the 2002 Leniency Notice have been granted in 26 decisions, corresponding to almost 90% of the cases.

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2264 It should be taken into account that the 2006 Leniency Notice came into force in December 2006. At the moment of the adoption of the 2006 system, other proceedings in which the 2002 Notice had been applied were still ongoing. The fact that in a same year cartel decisions applying both systems were issued complicates, at this stage of the research, the assessment of the full individual impact of the 2002 Notice.

2265 2002 Leniency Notice, point 8(a).

2266 2002 Leniency Notice, point 8(b).

2267 2002 Leniency Notice, point 21.

2268 In 18 of these cases one or more reductions were also granted under section B of the 2002 Notice.

2269 In these four cases multiple reductions were also granted under section B of the 2002 Notice.

2270 For a concrete overview of the leniency discounts see supra Table 2.
As these figures illustrate, immunity pursuant to point 8(a) of the Notice has been granted in a great majority of cases. Given that the Commission only granted immunity under this provision when a company enabled it to undertake an inspection, it can be affirmed, the 2002 Leniency Notice played a key role in terms of detection.\textsuperscript{2271} Furthermore, the detection potential of the Commission leniency system appears to have increased following the 2002 reforms. While the Commission granted immunity under section B of the 1996 Notice\textsuperscript{2272} in 50\% of the cases where the 1996 Notice was applied, under the 2002 regime immunity has been granted in 72\% of the cases.\textsuperscript{2273} This 22\% increase suggests that reforms have successfully enhanced the certainty of the system, thereby encouraging undertakings to break the wall of silence (even more) often.\textsuperscript{2274} 2275 As VAN BARLINGEN explained, ‘[S]ome applicants have taken the opportunity of full immunity offered by the [2002] Notice to make a clean sweep in the company and present the Commission with immunity

\textsuperscript{2271} This important detection role was however, only apparent after 2001, when the Commission decisions granting immunity started being adopted. See \textit{supra} section 4.1.3.2 of this Chapter. In effect, in the first nine decisions applying the 1996 Notice, covering a period from 1996 to mid-2001, no discounts under section B were granted.

\textsuperscript{2272} That is, the comparable provision to point 8(a) of the 2002 Notice.

\textsuperscript{2273} See \textit{supra} section 4.1.4 of this Chapter.

\textsuperscript{2274} In this regard B. VAN BARLINGEN, a member of DG Competition, indeed accepted that ‘apart from the strongly increased number of applications, the main difference with the 1996 Notice is therefore that under the 1996 Notice most leniency applications were made following Commission inspections, with the objective of receiving a reduction in the fines to be imposed, whereas under the 2002 Notice, most applications are immunity applications, made before the Commission has taken any investigative steps’. B. VAN BARLINGEN, “The European Commission’s 2002” 16.

\textsuperscript{2275} See comparing the number of applications under the 1996 and 2002 Notice Commission, Press Release MEMO/02/23. According to these documents, during the 1996-2002 period more than 80 leniency applications were filed, while the Commission received 167 applications in the 2002-2005 period. M. Bloom also compared the number of applications under the 2002 and 1996 Notice. In particular she stated that “[t]wice as many applications for leniency have been submitted during nearly four years of the 2002 Notice than during five and a half years of the 1996 Notice”. M. BLOOM, “Despite” 550. Although the number of applications is certainly not the ultimate criterion to assess whether the Leniency Notice is useful to discover cartel and establish infringements, it is true that the number of applications provides an indication of the motivation of firms to come forward. In this sense, the fact that the number of application increased under the 2002 Notice, indeed, confirms that companies were highly motivated to come forward.
applications for every cartel they could discover internally, while pursuing at the same time strict internal compliance programs to ensure a new business philosophy for the future.\textsuperscript{2276}

With respect to the application of point 8(b) of the 2002 Notice, the Commission found in 14\% of the cases that the cooperation of undertakings enabled it to establish the infringement and, consequently, granted immunity. The fact that the Commission granted immunity under this provision in a much lower number of cases than under point 8(a) of the 2002 Notice is most likely due to the higher threshold of point 8(b)\textsuperscript{2277} and to the fact that immunity under this provision could only be obtained if immunity under point 8(a) had not already been granted. Collecting sufficient information and evidence to enable the Commission to prove the cartel infringement is indeed a highly demanding task from the perspective of cartel participants. Still, it can be observed that the number of cases in which point 8(b) has been applied, has increased considerably, compared to the application of the comparable provision of the previous Notice, namely section C.\textsuperscript{2278} In particular, the Commission applied section C of the 1996 Notice in almost 3\% of the cases, while point 8(b) of the 2002 Notice has been applied in 14\% of the cases. This considerable increase may be due \textit{inter alia} to the fact that the Commission decided to grant full immunity under the 2002 Notice while the previous system only guaranteed a 50\% to 75\% reduction. Arguably, the reforms contained in the revised 2002 Notice encouraged companies to do their best and collect all the evidence available to them in order to obtain immunity.

Finally, the fact that the Commission granted reduction under point 23 in 90\% of the cases in which the 2002 Leniency Notice was applied indicates that, once an inspection had been conducted, companies felt major pressure to cooperate with the Commission in the investigation of the case. This was in effect also the case under the 1996 Notice, according to which one or more companies applied for reduction in 36 out of 38 or, in percentage terms, in 95\% of the cases.\textsuperscript{2279} The fact that such a high number of reductions were granted under the 2002 system indicates that undertakings were able to help the Commission by providing information and evidence sufficiently useful for the Commission to prove the full extent of the infringement and corroborate facts.\textsuperscript{2280}

\textbf{4.2.6. Conclusion on the 2002 Notice}

The analysis of the design of the 2002 Notice has shown that many of the key shortcomings of the 1996 Notice have been addressed in the 2002 Notice. The Commission’s flexible and open response to the comments made by practitioners and fellow competition authorities is a clear illustration of its determination to make the Notice work optimally.\textsuperscript{2281} In several respects, the 2002 Leniency Notice reflects a considerable change of approach from that reflected in the 1996 Leniency Notice. The abolition of the decisive evidence test, the extension of leniency to undertakings already under

\textsuperscript{2276} B. VAN BARLINGEN, “The European Commission’s 2002” 16.
\textsuperscript{2277} See further \textit{infra} section 4.2.2 of this Chapter.
\textsuperscript{2278} See \textit{supra} section 4.1.4 of this Chapter.
\textsuperscript{2279} B. VAN BARLINGEN, “The European Commission’s 2002” 16. Van Barlingen called this the “snowball effect”. According to this author, under the 2002 ‘as the Commission started to investigate the cartels denounced to it, a second wave of applications was made by companies seeking the largest possible reduction of fines. These new applicants have sometimes also brought in new cases in other product areas. And so, one case leads to the next’.
\textsuperscript{2280} For an overview of all the individual discounts granted under this section, see the table above. For a more detailed discussion of the advantages of a Leniency system rewarding subsequent applicant see \textit{supra} section 4.1.2.2 of this Chapter.
\textsuperscript{2281} M. JEPHCOTT, “The European” 378-379.
investigation, the availability of upfront conditional immunity, and the clear coherer exclusion are some of the improvements incorporated in the 2002 policy that may encourage more applicants to come forward.

The revision of the 2002 leniency programme did not only improve the design of the Commission’s system. As the analysis of the Commission’s decisions indicated, the straightforward, clear and consistent interpretation and application of the Notice maximized the certainty of the system in practice. As a result, undertakings were further encouraged to come forward and cooperate in the Commission’s case. This was for instance well illustrated by the facts that conditional immunity was only withdrawn in one case and that the range of applicable reductions as communicated to applicants were always respected.

Despite the advantages of the 2002 leniency system, admittedly, certain aspects of the Notice still left some room for improvement. In particular, the 2002 leniency system was not very specific as regards the precise information that had to be submitted by leniency applicants in order to qualify for immunity or a reduction in fines. The (analysis of the) Commission’s decisions, on the other hand, suggested that the Commission takes a number of (decisive) factors into account in order to decide whether immunity or a discount in fines should be granted. Formally incorporating the criteria developed in practice, and providing some additional guidance in this context, could enhance even more the (already improved) transparency and certainty of the system.

Further, the analysis of the effectiveness of the 2002 Notice indicated that the leniency system was an appropriate means to detect and facilitate the task of proving complex cartel infringements. This was not only illustrated by the increasing number of cartel cases that were detected on the basis of the leniency policy. Also the final number of undertakings which qualified for immunity or a reduction in fines under the 2002 regime demonstrated that the 2002 Leniency Notice achieved the pursued objectives. Borrowing the words of A. SWAAK AND D. J. ARP, it can be affirmed that: ‘[i]n the global effort to identify, punish, and deter hardcore collusion among competitors, the 2002 Leniency Notice is a welcome notable strengthening of EU enforcement policy’.

4.3. The 2006 Leniency Notice

In December 2006, the Commission conducted the last revision of its original 1996 leniency policy. The 2006 Leniency Notice benefits from all the experience gathered in the application of the two previous notices, which made a very important contribution to anti-cartel enforcement. The main modifications of the Commission’s policy seek to address the remaining shortcomings or...
weaknesses of the 2002 Notice. In particular, the 2006 Notice was designed to provide additional guidance for applicants and to increase the predictability of the leniency procedure, while providing companies (at least) the same incentives to cooperate with the Commission. This additional guidance would, in turn, improve the quality of leniency applications and generally enhance the effectiveness of the policy from an enforcement perspective.

4.3.1. The main modifications to the 2002 Notice

The 2006 Notice introduced a number of relevant changes. First, the 2006 Notice clarifies the immunity threshold as well as the (additional) conditions to obtain immunity. Moreover, these (additional) conditions are now also applicable to leniency applicants who wish to obtain a reduction in fines. Second, the threshold to benefit from a reduction in fines is also further enlightened. Third, the procedure to obtain immunity is more flexible as a result of the introduction of a discretionary marker system. Finally, the 2006 Notice formally includes a procedure to protect corporate statements made by companies within the leniency programme from discovery in civil damage proceedings. As is discussed below, the 2006 amendments mainly codify the Commission’s practice under the 2002 (and 1996) system and are fully in line with the relevant case-law. In addition, the 2006 system also follows the principles established in the ECN’s Model Leniency Programme.

The Commission’s leniency policy is currently based on the 2006 Leniency Notice. Still, it is important to keep in mind that, to a large extent, the basic principles and the functioning of the 2002 and 2006 Notices are the same or very similar. Therefore, the next part is limited to a review of the most significant amendments introduced by the 2006 Leniency Notice.

The table below provides an overview of the main modifications introduced in the 2006 system, compared to the 2002 leniency regime.

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2286 S. SUURNAKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 7. See J. S. SANDHU, “The European”. This author, for instance, argues that by conducting the 2006 reform ‘the Commission […] sought to increase the incentive to would-be leniency applicants to self-report secret cartels’. See also in the same line A. KAYHKO “The European Commission’s 2006 Leniency Notice - for better or for worse?”, 2008 (4) *Competition Law International*, 42-46, at 42 (hereafter: ‘A. KAYHKO “The European”’). While it is true that providing additional certainty and transparency may attract additional leniency applicants, on the other hand, it could be argued that the reforms not only increase the predictability of the system, but also had the effect of setting higher thresholds to obtain immunity or reductions. From this perspective, the question whether the 2006 Notice would attract more applicants than its predecessors is not fully clear. The revised thresholds to obtain immunity and reductions in fines are further analysed below.

2287 It has indeed be commented that ‘the Commission was not as such concerned about the number of applications for immunity and/or leniency – those were plentiful – but rather about the quality of the applications and the increasing battles before the Court of First Instance concerning the Commission's decisions based on these applications’ A. KAYHKO “The European” 42. This aspect also been accepted by Commission staff members who observed that ‘[i]his further guidance is expected to result into leniency applications of better quality for the purpose of the investigation’. S. SUURNAKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 7.

2288 The ECN Model Leniency Programme has been discussed in Chapter 5, section 2.3.1.2(d).

<table>
<thead>
<tr>
<th>Comparison of the 2002 and 2006 Leniency systems</th>
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<tbody>
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<td><strong>Scope of application</strong></td>
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<tr>
<td>‘Cartels between two or more competitors’</td>
</tr>
<tr>
<td><strong>Guarantee of full and automatic immunity?</strong></td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td><strong>Immunity available after the Commission had undertaken an inspection</strong></td>
</tr>
<tr>
<td>The undertaking is the first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation (point 8(a)) or first to submit evidence which in the Commission’s view may enable it to find an infringement (point 8(b)).</td>
</tr>
<tr>
<td><strong>Threshold to qualify for immunity</strong></td>
</tr>
<tr>
<td>(a) A (detailed) corporate statement and (b) other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement. This information should only be provided to the extent that this, in the Commission’s view, would not jeopardize the inspections.</td>
</tr>
<tr>
<td><strong>Additional conditions to obtain immunity</strong></td>
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<tr>
<td>Scope of the obligation to cooperate</td>
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<td>Exclusion from immunity</td>
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<td>Procedure to qualify for immunity: when does the applicant learn level of leniency granted?</td>
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<tr>
<td>Reductions available to subsequent firms?</td>
</tr>
</tbody>
</table>
4.3.2. Analysis of the main changes

4.3.2.1. The (clarified) conditions to reach the immunity threshold

The 2006 Leniency Notice provides full immunity from fines for the first undertaking making a decisive contribution to the Commission case, provided that one of the two thresholds set out in the Notice are met. In particular, under point 8(a) of the 2006 Notice the undertaking concerned must submit information and evidence which, in the Commission’s view, will enable it to carry out a targeted inspection in connection with the alleged cartel. Alternatively, under point 8(b) the leniency applicant must submit information which enables the Commission to find an infringement of Article 101(1) TFEU. As is examined below, the threshold of point 8(a) has been slightly modified, although the essence of both immunity standards remains unchanged under the last Notice. Furthermore, the 2006 leniency system clarifies what precise information must be submitted in order to reach both thresholds.

a. Immunity under point 8(a) of the 2006 Notice: enabling the Commission to carry out a targeted inspection

According to the 2002 Leniency Notice, in order to obtain immunity under point 8(a) an undertaking had to be ‘first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation’. The 2006 version of the Notice slightly modified this immunity standard by linking the immunity threshold to the information needed by the Commission to carry out a targeted inspection. Immunity under point 8(a) of the 2006 system will not be granted if, at the time of the submission, the Commission already has sufficient evidence to adopt a decision to carry out an inspection or if it has in fact already carried out an inspection.

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2290 See further analysing this condition supra section 4.2.2.4 of this Chapter.
2291 Leniency Notice 2006, point 10.
Compared to the point 8(a) of the 2002 Notice, the 2006 threshold is more specific. From the perspective of cartel participants it may thus seem that the revised threshold is more difficult to meet than the former standard. In practice, the (less specific) 2002 threshold had the positive effect of attracting a very high number of immunity applications which, at the same time, intensified the leniency race. However, in order to satisfy this threshold and to qualify for immunity, undertakings often (only) provided information which was (just) enough for the Commission to start an inspection. Once the inspection had been launched, the Commission had to proceed on its own by using its investigation powers. This situation was considerably costly, time consuming and therefore not fully efficient.

The 2006 Notice seeks to remedy this situation. The modified point 8(a) has the advantage of enabling the Commission to conduct a more focused inspection. When the Commission knows in advance which type of information it is searching for and where it should find it, both undertakings and the Commission can save time and resources. From this perspective, the threshold contained in point 8(a) constitutes a more cost-effective detection standard and is also in line with effective enforcement considerations.

Furthermore, although under the 2006 regime companies must provide more accurate information to satisfy the “targeted inspection” threshold than under the previous system, it should be kept in mind that under the 2002 system, immunity applicants also had the obligation to provide full, continuous and expeditious cooperation. This obligation implied, inter alia that immunity applicants had to submit all the information in their possession or available to them. Taking into account the extent of the obligation to fully cooperate, the slightly modified 2006 threshold only had a minimal impact on undertakings.

b. Information and evidence necessary to qualify for immunity under point 8(a)

One of the main criticisms of the 2002 regime in the context of immunity under point 8(a), was that the lack of a predefined legal standard to order an inspection increased uncertainty for potential candidates. In effect, it appears that companies had difficulties to know exactly which type of information had to be submitted to obtain immunity when the Commission did not have enough

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2292 See A. KAYHKO “The European” 43. According to this author the targeted inspection test raised the threshold for immunity. See also e.g. P. VERMA AND P. BILLET, “Why would” 7.
2293 See e.g. J. CARLE, “The new leniency” 269-270; A. RILEY, “Cartel Whistleblowing” 91; C. R. A. SWAAK AND D. J. ARP, “A tempting” 14. See further supra section 4.2.2.4 of this Chapter.
2294 See J. JOSHUA, “Session C” 386. This commentator argued that under the 2002 system “[i]n practice, […] the "dawn raid sufficient" test was applied generously, and if you came in you were pretty certain to get immunity. There has been a sea of change in the last half year or so, the bar is now being placed much higher, and Olivier Guersent actually said the Commission would like to get rid of "8(a)" applications. That is indeed what is happening in practice now. How did this change come about? We all know about the huge caseload, and for an administrative mindset, one way to address caseloads is to find administrative solutions to clear what you have already and heavy obstacles to new cases coming in, so you keep your backlog down. There is a feeling in DG COMP-perhaps I am exaggerating slightly for the purpose of effect-that in a number of cases they gave away immunity far too easily in the beginning: what happened was that the company that came in first gets its immunity and banks it. The Commission does a dawn raid, does not find very much, then goes back to the immunity applicant reminding it of the duty of continuous cooperation, but suddenly the applicant has an attack of amnesia and is unable to help. At this stage the Commission is in a dilemma: does it drop the case, or does it do what it has been doing, which is to recycle 8(a) evidence into proof of the cartel?.”
2296 Leniency Notice 2002, point 11(a).
First, the Notice states that the undertaking must provide a ‘corporate statement’. By introducing this requirement the Commission formalises this concept and underlines the well-known importance of such a document in the context of a leniency application. The 2006 Notice also sets out the information that a corporate statement must contain. In particular, this document should firstly include a very detailed description of the cartel, specifying – to the extent of the applicant’s knowledge – its aims, activities and functioning, the product, the geographic scope, duration, estimated market volumes and the specific dates, locations and content of the meetings. Second, the corporate statement must specify the names and addresses of all the cartel participants, including obviously that of the applicant. Third, the names, positions, office locations and, where necessary, home addresses of individuals who have been involved both on the applicant’s behalf and on behalf of the other cartel members should also be stated. Finally, this document should mention whether other competition authorities (within or outside the EU) have been approached or are intended to be approached in relation to the cartel.

Besides providing a corporate statement, the applicant must submit any other evidence in its possession including, in particular, any contemporaneous evidence of the infringement.

The evidence specified in point 9 of the Notice largely corresponds to the evidence provided by companies to obtain immunity under point 8(a) of the 2002 system. The most important modification is that the information submitted under point 8(a) must be precise enough to enable the Commission to conduct an inspection which is better focused or targeted. To make this possible, the information required from immunity candidates as specified in point 9 of the Notice is, in effect, very extensive and detailed. In the Commission’s view, leniency applicants should be capable of providing the Commission with “insider” knowledge of the cartel, since they have been deeply

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2299 In practice, the decisions of the Commission show that the Commission indeed attached great importance to corporate statements. See further supra section 4.2.4.1 of this Chapter. See also A. KAYIKO “The European” 44.
2300 See Leniency Notice, point 9(a).
2301 This requirement is meant to allow the Commission to use its power to conduct inspections in private premises including the homes of directors, managers or other members of staff, of the companies concerned. As set out in Article 21 of Regulation 1/2003 this power can only be exercised if ‘a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises’. (See further supra Chapter 7). However, it should be kept in mind that the requirement to specify the home addresses of individuals is not an absolute condition. This is indicated by the wording of the Leniency Notice which clearly states that home addresses need to be provided only “where necessary” and in so far as known to the applicant. The Commission has also clarified that this information is processed in conformity with its obligations under Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies. Commission, MEMO/06/469.
2302 See Leniency Notice, point 9(b).
2303 See supra section 4.2.4.1 of this Chapter.
2304 See also e.g. R. INCARDONA, “The Fight” 40.
involved in the functioning of the cartel. Based on such specific knowledge, the Commission should know what to look for in terms of evidence and where to find it and thus to conduct a more focused inspection. From the enforcer’s perspective, the information listed in point 9 can indeed contribute to save considerable time and resources and, thus, to bring the infringement faster to an end.

From the applicant’s perspective, it can be argued that the evidence listed in point 9 is extensive. In order to collect this information, companies must undertake a deep internal investigation. However, once they have gathered the required evidence as specified in point 9, they can be practically sure that – if the rest of relevant conditions are satisfied – they will benefit from immunity. In this sense, the extensive (although not exhaustive) guidance concerning the evidence that must be submitted to meet the threshold of point 8(a) of the 2006 Notice, minimizes uncertainty for immunity applicants and enhances the working of the Notice.

This conclusion is further reinforced by the fact that the assessment of the “targeted inspection” threshold is conducted ex-ante. In other words, the question whether the evidence submitted is enough to conduct a targeted inspection is answered exclusively on the basis of the type and quality of the information submitted by the applicant and, thus, without taking into account whether the inspection has been fruitful or successful. This ex-ante approach increases the objectivity of the system. Even if the Commission is not completely satisfied with the findings or the results of the (targeted) inspection, applicants who have submitted the evidence stipulated in the list of point 9 should normally be rewarded with immunity.

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2305 S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 8; Commission, MEMO/06/469. See also A. KAYHKO “The European” 43. This author stated that practitioners ‘interpreted the ‘target inspection’ requirement as meaning that leniency applicants must provide a sort of road map permitting Commission officials to conduct surprise inspections knowing what type of evidence (eg, minutes of meetings, e-mail correspondence, personal notes) to look for, from where (eg, personal computers or hand-held devices, hard-copy files, home offices) and even in whose possession this evidence could be presumed to be (ie, the identity of representatives of the company concerned who had either participated in the cartel or were aware of its existence’.

2306 A. KAYHKO “The European” 43. This last author adds that the notion that the Commission’s surprise inspections should be ‘targeted’ must be welcomed by all parties involved. Surprise inspections, or ‘dawn raids’, are always disruptive to the everyday business of the companies involved and thus the faster and more efficiently they can be conducted the better.

2307 See in this regard A. KAYHKO “The European” 43-44, commenting on the difficulties for cartel member/leniency applicants to collect evidence of the cartel agreement given their secret nature. More precisely, this author states that as a result of the secret nature of cartels ‘it will be a considerable challenge for a would-be applicant to produce tangible evidence for the Commission regarding its own participation in a cartel, let alone to produce evidence showing the participation of the other cartel members. There simply may not be any minutes or contemporaneous notes of cartel meetings. It is even less likely that a would-be applicant would know whether other cartel participants retained any evidence regarding the cartel, let alone where such evidence was stored’. The argument that a given applicant did not apply for leniency because it has little evidence in its possession has however never been accepted by the Commission. The relevant question for the Commission is whether an applicant cooperated under the Leniency Notice or not (see generally supra section 4.2.4 of this Chapter).

2308 This aspect was also recognised by Commission’s staff members when the 2002 Notice was revised. See S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 8. See also J. S. SANDHU, “The European” 152; R. INCARDONA, “The Fight” 40;

2309 Leniency Notice 2006, footnote 3.

2310 The Commission indeed stressed that ‘[t]he purpose of the Notice is that by providing the information and evidence listed in point 9, the applicant can qualify for point 8(a) immunity’. Furthermore, the Commission added that ‘[i]n line with the spirit of cooperation expected from the applicant, the latter should not, however, limit itself strictly to providing only the things specified in point 9, if it has at the time of the application more information or evidence available’. Commission, MEMO/06/469.
c. Information and evidence necessary to qualify for immunity under point 8(b)

In order to reach the threshold of point 8(b) of the 2002 system, companies had to enable the Commission to establish the existence of the infringement. The Commission acknowledged that, under the 2002 system, applicants did not know with certainty what kind of evidence they needed to provide to obtain immunity after an inspection had been conducted.\textsuperscript{2311}

The 2006 Notice now clarifies that in order to qualify for immunity under point 8(b) applicants should provide ‘contemporaneous, incriminating evidence’. The 2006 Notice is more specific because it formally codifies the practice of the Commission.\textsuperscript{2312} In effect, the decisions applying the 2002 Notice suggested that, in order to find an infringement against all the (suspected) cartel members – and not only against the firm that reports the cartel – the applicant needed to submit incriminating evidence originating from the time of the infringement.\textsuperscript{2313} Nevertheless, under both Notices, the point 8(b) threshold remains unchanged and corresponds to the standard of Article 7 of Regulation 1/2003, which is the standard that must be satisfied by the Commission to adopt an infringement decision.\textsuperscript{2314}

Furthermore, the 2006 Notice also states that under point 8(b), applicants must provide a corporate statement covering the same information as is required to obtain immunity under point 8(a) of the 2006 Notice. The practice of the Commission in the context of point 8(b) showed that to prove the existence of an infringement detailed information, explanations and descriptions of the cartel activities and its participants are, as a general rule, necessary. The Commission also considers that, as only companies which have participated in a cartel can have access to this type of information,\textsuperscript{2315} they should provide it to the Commission if they wish to qualify for immunity.

These clarifications have the effect of minimising uncertainty for immunity applicants. Companies now know in advance which type of information they have to collect in order to obtain immunity. The clarifications contained in the 2006 Notice as regards the conditions that must be fulfilled to obtain immunity under point 8(b) should encourage the race for leniency after the Commission has conducted an inspection.

\begin{itemize}
\item \textsuperscript{2311} See S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 9.
\item \textsuperscript{2312} As explained above the need to submit this type of evidence is linked to fact that qualifying for immunity under point 8(b) is more difficult than qualifying for immunity in a situation where the Commission does not yet have any knowledge of the cartel in question. Commission, MEMO/06/469. See further supra section 4.2.4.2 of this Chapter. For a more critical view of this condition see P. VERMA AND P. BILLET, “Why would” 7.
\item \textsuperscript{2313} See supra section 4.2.4.2 of this Chapter. For instance, in Elevators and Escalators (Case COMP/E-1/38.823 — Elevators and Escalators) [2008] OJ C 75/19, para 789), the Commission refused to grant immunity under point 8(b). The decision clearly stated that ‘KONE’s submission for Germany contains less precise descriptions of the cartel activities than its submissions for Belgium and Luxemburg and it is not supported by incriminating and documentary evidence (other than its own statements). Comparably, in Raw Tobacco Italy the Commission granted conditional immunity under point 8(b), to reward the applicant for providing the Commission with decisive incriminating evidence for the establishment of objections which the Commission included in the Statement of Objections and in the final Decision. Case COMP/C.38.281/8.2 — Raw tobacco Italy [2006] OJ L 353/45, para 426. See also stressing this aspect S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 9; Commission, MEMO/06/469.
\item \textsuperscript{2314} In addition, this form of immunity will only be available where the Commission did not have sufficient evidence, at the time of the leniency application, to find an infringement in respect of the alleged cartel and no other undertaking has been granted conditional point 8(a) immunity. Leniency Notice 2006, point 11.
\item \textsuperscript{2315} See S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 9.
\end{itemize}
d. The relativity of the immunity obligations: the protection of the Commission inspection

As discussed above, point 9 of the 2006 Notice specifies that in order to obtain immunity, leniency candidates have to provide a corporate statement and other evidence relating to the cartel in their possession. The extent of this obligation should, however, be nuanced. According to point 9, leniency applicants should only provide the Commission with this information and evidence ‘to the extent that this, in the Commission’s view, would not jeopardize the inspections’. Otherwise put, the 2006 Leniency Notice does not compel companies to submit information and evidence in their initial application for immunity, when the collection of such evidence would jeopardise a Commission’s inspection.

This specification confirms the Commission’s view that safeguarding the surprise effect and, more generally, the protection of the purpose of its inspections is the ultimate goal of the leniency system. In practice, the Commission expects that a leniency applicant contacts the Commission and communicates its concerns, if it fears that its own internal inspection carried out to complete an application, may alert other cartel members prior to a Commission’s inspection. In this scenario, the Commission may permit applicants to provide such information under the obligation of point 12 of the Notice provide full cooperation. As such, the continuous cooperation obligation implies, on the one hand, that if the applicant finds additional information which is listed in point 9 after its initial submission, this evidence should be provided promptly to the Commission. On the other hand, if the immunity applicant has not been able to complete its internal inquiries due to confidentiality risks prior to a conditional immunity decision and/or a Commission inspection, the applicant should complete such inquiries directly thereafter, unless the Commission otherwise requires.

4.3.2.2. Threshold for reduction in fines: the clarified concept of significant added value

As in the previous Notices, decisive contributions to the investigation of the case may still be rewarded with a reduction of the fine under the 2006 regime when immunity is not (or no longer) available.

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2316 See further supra section 4.2.4 of this Chapter. Under the 2002 Leniency Notice, practice indicated that the obligation to maintain the confidentiality of the application was in tension with other obligations contained in the Notice. 2317 S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 8-9; Commission, MEMO/06/469. Nevertheless, it should be kept in mind that this is only an exception. As a general rule, immunity applicants are expected to be diligent in safeguarding the element of surprise of the inspections, as far as they are concerned. This last aspect was indeed highlighted in the decisions applying the 2002 Leniency Notice (see supra section 4.2.4 of this Chapter). 2318 The continuous cooperation obligation is further analysed below. 2319 Commission’s staff members commented that ‘the Commission services have a practice of discussing with an applicant the collection and submission of information and evidence. In such discussions the applicants have been able to raise any queries they have for instance on the immunity thresholds or measures they intend to take to collect evidence. Any supplementary submissions by an applicant can be taken into account as part of its application, until such time as the Commission receives another application for immunity in the same case or, if the applicant has been granted a marker (a new concept in the revised Notice, see point on Marker system below for details), until the marker period expires’. S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 8; Commission, MEMO/06/469. The possibility to obtain a marker is discussed below.
The essence of the reduction system remains the same after the last revision of the Notice. In particular, point 24 of the 2006 Notice (also) requires applicants to provide evidence of the cartel which represents “significant added value”, compared to the evidence already in the Commission’s file, in order to obtain a reduction in fines. The 2006 system maintains the same decreasing reduction bands, depending on the order in which they provided the Commission with evidence representing added value. Moreover, the precise level of reduction within each band is determined taking into account both the time at which the evidence was submitted and the extent to which it represents significant added value. 

Like its predecessor, the 2006 Notice also contains some guidance on the criteria considered by the Commission to assess the added value of the evidence. In essence, point 25 of the 2006 Notice, reiterates the basic principles of the 2002 Notice. Accordingly, written evidence originating from the period of the facts and evidence directly relevant to the facts (e.g. handwritten notes from the cartel meeting) have normally greater value than evidence subsequently established or which only has indirect relevance (such as travel records, which aim at establishing occurrence of a cartel event at a certain date and participation therein). In contrast to the 2002 Notice, the 2006 system underlines that the degree of corroboration from other sources – which is necessary for the Commission to rely on evidence against other firms – has an important impact on the assessment of the significant added value. Consequently, incriminating evidence and compelling evidence which require little or no corroboration, is greatly valuable for the Commission.

From the point of view of a leniency applicant, the fact that the information specified in the 2006 Notice is more extensive than that required under the 2002 Notice, may create the impression that the 2006 threshold is stricter. However, the criteria to assess the added value of the evidence as

2320 The General Court has ruled that in order to reach this threshold, an undertaking may focus on facts which, in its opinion, have not been proved to the requisite standard in order to provide the Commission with significant added value compared with the evidence the Commission already has in its possession. Case T-132/07, Fuji Electric Co. Ltd v Commission [2011] II-4091, para 239.
2322 Ibid. When the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value and that the undertaking has met the rest of relevant conditions, the applicant is informed in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band. The 2006 Notice adds that ‘[t]he Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine’. (Leniency Notice 2006, point 29). This last specification, which has been incorporated by the 2006 system, has been qualified as a welcome development which enhances transparency (see e.g. J. S. SANDHU, “The European” 153). Still, the truth is that if a reduction applicant had not been informed by the Commission about the applicable reduction band before the issuance of the statement of objections, the concerned firm could also assume that it had been unqualified for a lenient treatment. From this perspective the real impact of this provision is rather limited.
2323 In this context, the General Court has underlined that the Commission has significant discretion in assessing the usefulness of the information supplied by the leniency applicant and in determining the appropriate reduction in fines. Case T-343/08, Arkema France v Commission [2011] ECR II-2287, paras 168-170, para 135.
2324 Compare Leniency Notice 2002, point 22. See also e.g. Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S and others [2004] ECR I-123, paras 263-424.
2325 See also stressing this point See OECD, “Leniency for Subsequent” 6.
2326 Leniency Notice 2006, point 25. See also commenting on the 2006 “added value” threshold e.g. R. INCARDONA, “The Fight” 40; J. S. J. S. SANDHU, “The European” 153.
2327 See e.g. J. S. SANDHU, “The European” 150, A. RILEY, “The modernization of EU anti-cartel enforcement: the Commission will grasp the opportunity”, 2010 (31-5) ECLR, 191-207, at 195 (also available at available at http://www.ceps.eu/system/files/book/2010/01/Modernisation%20Final%20e-version.pdf) (hereafter: ‘A. RILEY, “The modernization”). This author argues that “this high evidence standard can act as a barrier to leniency applicants from coming forward. Furthermore, it is unclear what exactly is required by “substantially added value”. Leniency applicants
specified in the 2006 Notice should be understood in the light of the fact that the Commission bears the burden of proving the infringement. In effect, in order to prove the existence of a violation of the European competition rules, the evidence used by the Commission must meet a certain standard. Only if a company can help the Commission in this task of public interest, it may be rewarded by the Leniency Notice. In this context the General court has held that conclusive, stand-alone evidence that requires little or no corroboration to prove the case, provides higher contribution to discharge the Commission’s burden of proof than evidence, which largely requires corroboration if it is contested. This does not mean that corporate statements can never represent significant added value. Still, this is more likely the case when such statements confirm other corporate or witness statements or other pieces of evidence.

The new specifications concerning the value of incriminating and compelling evidence contained in the 2006 Notice are thus only meant to fully align the Notice with the view of the European Courts and to offer further additional guidance with respect to the factors relevant in the Commission’s assessment. While the threshold for reduction of fines remains the same, the “added value” concept is now clearer, which enhances the transparency of the system. On the other hand, the clarification of the criteria to grant reductions in fines is meant to motivate leniency reduction applicants to conduct a thorough internal investigation to gather as much relevant information available to it as quickly as possible. As the interpretation of the “added value” condition suggests, the information and documentation submitted to obtain a reduction must have an important evidential value. This approach is not only understandable but also necessary in light of effective enforcement considerations. In cases where immunity is no longer available, the Commission must only grant reductions when – and to the extent that – leniency applicants provide evidence and information that have considerable value for the Commission to prove the existence of the infringement.

4.3.2.3. Additional conditions for immunity and reduction of fines

According to the 2006 leniency system, in order qualify for some type of lenient treatment leniency applicants must reach the threshold of point 8(a) or 8(b) and satisfy the conditions stipulated in point 12. In contrast with the 2002 system, which only required immunity candidates to satisfy these

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2331 As regards corroboration and contestation of corporate and witness statements, see e.g. Joined Cases C-403/04 P and C-405/04 P, Sumimoto Metal Industries Ltd., Nippon Steel Corp. v Commission [2007] ECR I-729, paras 60 to 76 and 101 to 109. This ECJ judgement upholds Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, JFE Engineering Corp., formerly NKK Corp. (T-67/00), Nippon Steel Corp. (T-68/00), JFE Steel Corp. (T-71/00) and Sumitomo Metal Industries Ltd (T-78/00) v Commission [2004] ECR II-2501. See in the same line CFI 5 December 2006 in Case T-303/02, Westfalen Gassen Nederland BV v Commission [2006] II-4567, paras 79-104. See also S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 12; Commission, MEMO/06/469; V. ROSE AND D. BAILEY, “The Leniency” 1158.

2332 S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 11-12; Commission, MEMO/06/469.

2333 See also J. S. SANDHU, “The European” 153.
additional conditions, the 2006 system extends the obligations contained in point 12 to entities applying for a reduction in fines.

Basically, pursuant to point 12 of the 2006 Notice, successful leniency applicants have the obligation to fully cooperate and to terminate the infringement. Although these conditions were also present in the previous Notice, the 2006 leniency policy is (even) more specific describing what these obligations precisely imply.

**a. The obligation to provide genuine, full, continuous and expeditious cooperation**

As the European Courts have held, under the leniency policy an undertaking may only receive favourable treatment if it reveals a genuine spirit of cooperation and if that cooperation allowed the Commission to establish an infringement with less difficulty. In line with the case-law, the 2006 Notice puts extra emphasis on the essential nature of the cooperation obligation and highlights that applicants need to cooperate genuinely, fully, on a continuous basis and expeditiously from the time they submit their application. This requires the applicants to provide accurate and complete information that is not misleading. Or in other words, undertakings must cooperate sincerely and in good faith.

The 2002 Notice already stated that the full cooperation obligation required in particular that (i) the undertaking provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement and (ii) that it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned. These obligations have been complemented by the 2006 Notice, which adds that leniency applicants must (iii) make current (and, if possible, former) employees and directors available for interviews with the Commission, (iv) not destroy, falsify or conceal relevant information or evidence relating to the alleged cartel and (v) not disclose the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed. These new aspects of the obligation to cooperate are examined in more detail below.

**b. Making current (and, if possible, former) employees and directors available for interviews with the Commission**

In order to comply with the obligation to provide full and genuine cooperation, undertakings must use their best efforts to ensure that their employees cooperate with the Commission. This practice of interviewing directors and employees in the context of leniency applications was firstly established by the Commission under the 2002 Leniency Notice and has been formalised under the 2006 system.

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2335 Leniency Notice 2006, point 12(a); compare Leniency Notice 2002, point 11(a).


2337 Leniency Notice 2002, point 11.

2338 See also commenting the scope of the obligation to cooperate V. ROSE AND D. BAILEY, “The Leniency” 1155 et seq.
This condition is a clear recognition of the fact that a decision to form and operate in a cartel is always taken by individuals (and not undertakings). In fact, internal investigations conducted in the context of a leniency application commonly involve interviews with a high number of current and former employees. In order to fully understand and to be able to prove the infringement, the Commission should be in a position to ask for explanations and clarifications to the individuals who were directly involved in the cartel.

During the process of the revision of the 2002 Notice, some respondents to the public consultation expressed their concern that an applicant may not always be in a position to meet this requirement if its employees refused to answer questions.2340

One of the most important questions that a leniency applicant should firstly assess is whether it is fully desirable to take some type of disciplinary action against the employees(s) for having participated in the cartel, bearing in mind the scope of duty to provide full and continuous cooperation. Arguably, employees may not be willing to assist the company in the context of its leniency application if disciplinary action is taken against them. In this context it has been observed that, in order to prevent such situation, employees should be given individual assurances that cooperation will not lead to disciplinary action being taken against them. It is, however,

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2340 In this context A. KAYHKO feared that ‘[d]espite managements’ intention to cooperate with the Commission, it may prove very difficult to persuade the relevant employee(s) to reveal the identity of the other cartel participants, let alone the identity of their representatives. This task is not eased by the time pressure which most immunity applicants face, or the fact that all discussions with these key employees (and other preliminary investigations) will have to be conducted by external counsel. These key individuals are likely to have been in the same business with their co-conspirators for several years and may even have strong personal ties. For most of them admitting their own participation to their employer is already a challenge (sometimes eased by ‘corporate amnesty’ policies, under which an employer will promise to refrain from any disciplinary actions in exchange for candid disclosure of all details regarding the cartel), but ‘ratting’ on their friends and colleagues is sometimes a near impossibility’. A. KAYHKO “The European” 43-44.
2341 See S. MOBLEY AND R. DENTON, Global Cartel Handbook – Leniency: Policy and Procedure, Oxford, Oxford University Press (2011), 800 p., under heading “European Commission” (hereafter: See ‘S. MOBLEY AND R. DENTON, Global Cartel’). As these authors comment ‘[d]etailed employment law advice will need to be taken in affected jurisdictions. However, in broad terms, a company may wish to consider the following as options. Giving the employees a formal oral or written warning; keeping the employees within the company, but in another business division; suspending or demoting the employees; taking action such as freezing salary, recovery bonuses, removal or adjustment of pension rights, and contributing to any costs incurred by the company as a result of the illegal activity (wherever possible); or as a final resort, dismissing the employees’.
2342 See stressing this aspect e.g. S. MOBLEY AND R. DENTON, Global Cartel (under heading “European Commission”). According to these authors the employee may alert other cartel members that the firm has discovered the violation and increase those companies’ chances of being faster in the leniency race. Furthermore, if employees do not cooperate and, as a result, the competition authority cannot obtain evidence to prove the cartel fully, the company may regret its decision to take disciplinary action. See also B. FISSE, “Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity” in C. BEATON-WELLS AND C. TRAN (eds) Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion, Oxford, Hart publishing 2015, 360 p., at 197-199 (hereafter: ‘B. FISSE, “Reconditioning Corporate”’).
2343 A. NIKFAY AND P. FIGUEROA, “Immunity, Sanctions & Settlements – European Union”, 2016 Global Competition Review, available at http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/10/european-union/. On the other side of the picture it has also been pointed out that, keeping in mind the need to keep employees available for the purposes of the external antitrust investigation, “[d]ismissal (however much your company may wish to discipline the
doubtful that such approach is fully appropriate from an enforcement perspective. Taking disciplinary actions sends a clear and strong message to employees (and entities in general) that the undertaking will not tolerate competition law violations. A more appropriate solution could consist in delaying internal disciplinary action against employees until the undertaking’s obligation to cooperate with an investigation has ended.\textsuperscript{2344}

The concerns of undertakings about the difficulties to satisfy this obligation were reinforced by the fact that natural persons can be subject to different types of (criminal) sanctions in several Member States.\textsuperscript{2345} While criminal cartel offences offer immunity to the employees of the first firm to come forward, they do not necessarily provide any \textit{ex-ante} reward for culpable individuals to come forward once immunity has been granted. This means, in particular, that if the second firm to submit an application receives a 50\% reduction in fines, its employees will not receive a corresponding reduction of a possible prison sentence.\textsuperscript{2346} Although the fears deriving from criminal enforcement are understandable, they should also be put into perspective. Regulation 1/2003 offers a number of safeguards regarding the transmission of information to Member States that apply criminal sanctions. First, on the basis of Article 12 of Regulation 1/2003, information exchanged in the ECN can only be used by the receiving authority if the documentation in question had been collected in a way that respects the same level of protection of the rights of defence of natural persons as in the receiving authority.\textsuperscript{2347} Second, exchanged information can only be used by the receiving authority to impose custodial sanctions if the law of the transmitting authority foresees such sanctions for antitrust infringements.\textsuperscript{2348} This is in any event not the case for the Commission, which can only impose sanctions on undertakings. As a result, the risk of facing criminal sanctions is not increased in the context of the ECN. In addition, the fact that directors and employees should be available for possible interviews with the Commission does not imply that they have to provide incriminating information.\textsuperscript{2349}

c. Not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel

The 2006 Notice makes clear that the duty of continuous cooperation encompasses the obligation not to destroy, falsify or conceal information. This obligation is applicable from the moment when the applicant is “contemplating making its application” – \textit{i.e.} when the applicant is deciding on and preparing its application.

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\textsuperscript{2344} B. FISSE, “Reconditioning Corporate” 197-199.

\textsuperscript{2345} B. FISSE, “Reconditioning Corporate” 197-199. B. FISSE explains that “[a] decision to postpone the application of a sanction must not generate false expectations on the part of the employee: for instance, where your company must satisfy cooperation obligations towards investigating antitrust agencies (which is usually a precondition for immunity from antitrust fines or leniency), your company may need to retain the employee on paid leave/absence (in some countries now known euphemistically as ‘gardening leave’) until a final resolution of the antitrust case against the company.”


\textsuperscript{2347} Still, as is examined in Chapter 12 cooperation is often taken into account as a mitigation factor in the assessment of the criminal penalty.

\textsuperscript{2348} See further \textit{supra} Chapter 5, section 2.3.1.2(a).

\textsuperscript{2349} Regulation 1/2003, Article 12(3).

\textsuperscript{2349} S. SUURNÄKKI AND M. L. TIERNOWENTELLA, “Commission adopts” 14.
This condition is meant to prevent that actions of destruction, falsification and concealment jeopardise the investigation. Such actions are, in effect, not only blatantly against the spirit of cooperation demanded from undertakings under the leniency policy.\textsuperscript{2350} From the enforcement perspective, the destruction of information can seriously undermine the investigation of the case and, thereby, make it more difficult for competition authorities to prove the infringement. In this scenario, there is no possible justification to grant any lenient treatment.

Furthermore, it is important that this condition is complied with from the moment an undertaking starts considering to come forward with a leniency application.\textsuperscript{2351} This added reference to the timing makes clear that under the 2006 Notice, the Commission will simply not tolerate deliberate actions of destruction or manipulation of evidence.\textsuperscript{2352} This strict approach contrasts with the approach adopted under the previous Leniency Notices. As the analysis of the application of the 1996 and 2002 systems illustrated, companies had in certain occasions destroyed valuable evidence and were still entitled to obtain leniency discounts.\textsuperscript{2353} In this sense, the adoption of the 2006 system puts an end to this inadequate approach.

In has, however, been noted that individuals are experienced in destroying evidence and generally refusing to cooperate with their employer.\textsuperscript{2354} Bearing in mind the obligation not to ‘falsify, destroy or conceal evidence’, it is not unthinkable that the actions of a rogue employee jeopardise the whole purpose of the firm’s leniency application.\textsuperscript{2355} The fact that undertakings application can be put at risk by individual stresses the tension inherent in the design of the Commission’s leniency programme which does not makes a difference between individuals and leniency applicants. Since the Commission’s Leniency Notice is only applicable to undertakings, (only) the undertaking-applicant can be responsible for acts of destruction. Still, it is uncertain to which extent a firm is in a position to prevent acts of destruction, falsification or concealment of evidence.

**d. Not disclosing the fact or any of the content of the leniency application**

The application by the Commission of the 2002 Notice, as confirmed by the European Courts, clearly indicated that the duty to provide genuine, full and continuous cooperation also includes an obligation for the applicant not to disclose the fact or any of the content of its application before the Commission issues a statement of objections in the case, unless otherwise agreed. Like the obligation to prevent acts of destruction, falsification and concealment, the obligation to preserve the confidence of the leniency application is also applicable from the moment the undertaking contemplates to make its submission to the Commission.

\textsuperscript{2350} See also \textit{e.g.} S. SUURNÄKKI AND M. L. TIerno CENTELLA, “Commission adopts” 14.
\textsuperscript{2351} It should be noted that the general rule is that the cooperation obligation starts at the time of the application.
\textsuperscript{2352} S. SUURNÄKKI AND M. L. TIerno CENTELLA, “Commission adopts” 14.
\textsuperscript{2353} See \textit{supra} sections 4.1.2.4 and 4.2.4.3 of this Chapter.

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The confidentiality obligation is designed to preserve the purpose and the surprise effect of unannounced inspections. If other cartel participants are aware of the fact that one of the cartel members has blown the whistle, they may take different initiatives, such as hiding or destroying evidence, which could undermine the inspection. However, the Commission recognizes that satisfying this obligation may prove quite difficult in practice. In fact, respondents to the public consultation on the draft 2006 Notice also expressed their concern that the obligation to preserve the confidentiality of the leniency application could go counter to other legal obligations of the company applicant, which may oblige it to make such a disclosure. This aspect was considered by the Commission in the 2006 Notice, which provides that the restriction on disclosure to third parties applies “unless otherwise agreed” with the Commission. This specification emphasises that while it is absolutely necessary to preserve the effectiveness of inspections, and thus to maintain the existence of a leniency application confidential, leniency applicants have certain margin to discuss with the Commission the obstacles they encounter when fulfilling this condition. If such obstacle(s) cannot be surmounted, the Commission may exceptionally agree to disclose the existence of the application. The possibility to openly discuss with the Commission the pressure or need to disclose the leniency application increases the flexibility of the (interpretation of the) conditions of the Notice while protecting the effective working of the Notice.

e. The obligation to end the participation in the infringement

The 2006 Notice confirms the view that an undertaking must have ended its involvement in the alleged cartel immediately following its application. However, the last version of Commission’s programme further specifies that undertakings only need to satisfy this obligation to the extent that - in the Commission’s view - the integrity of the inspections remains preserved.

The analysis of (the application of) the 2002 Notice showed that when undertakings put a sudden end to their participation in the infringement, they could alert other cartel members about the existence of a leniency application. This situation could undermine the Commission’s inspections. Therefore, although as a general rule leniency candidates should terminate all cartel activities as soon as possible, the Commission explained that this should not necessarily entail an

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2356 See supra section 4.2.4 of this Chapter.
2357 See supra section 4.2.4 of this Chapter. This could be the case of listed companies. For example, the New York Stock Exchange requires listed companies to disclose to the public any material information that may reasonably be expected to affect the market in their securities. Typically, such information involves events of an unusual or non-recurring nature. Companies are also generally required to dispel unfounded rumours which result in unusual market activity or price variations. As a result of registration of ordinary shares under the US securities laws and the listing of ordinary shares on the New York Stock Exchange, (also) non-US companies are subject the requirements imposed by the NYSE.
2358 This point of the Notice also applies to the practice of the Commission of discussing with the applicants how to address discovery requests in third country jurisdictions, while safeguarding the effectiveness of the leniency system. See further infra section 4.3.2.5 of this Chapter. Logically, leniency applicants may wish to contact other competition authorities in the context of their application. In this case, the Commission may ask for a waiver to discuss the application and exchange information with such authorities. S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 13-14.
2359 Leniency Notice 2006, point 12(b).
2360 See supra section 4.2.4 of this Chapter. See also stressing this aspect e.g. S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 13-14.
abrupt interruption of their involvement in the activities where their participation is expected by other cartel members, such as planned meetings.\textsuperscript{2361}

The approach contained in the 2006 Notice minimises the tension between the obligation to terminate the infringement and the need to keep the application confidential. As the 2006 programme states, companies should approach the Commission in order to discuss its precise point of view, when they are concerned about the possibility of alerting other cartel members by ending the infringement. This rule increases the flexibility of the procedure for leniency applicants while preserving the purpose and effectiveness of the inspections.

f. The disqualification for immunity of coercers

Point 13 of the 2006 Notice contains the classic – but still absolutely necessary – exclusion of coercers. The only difference with the 2002 system, which (only) excluded firms which coerced other undertakings to participate in the infringement from immunity,\textsuperscript{2362} is that the 2006 programme also excludes undertakings which coerced participants to remain in the cartel.\textsuperscript{2363}

The new formulation of the coercer provision severs the connection between the role of coercer and the creation of the cartel agreement.\textsuperscript{2364} Under the 2006 Notice, companies which adopt some type of coercive behavior with respect to other undertakings in the context of a cartel are simply disqualified to obtain immunity. This partly new exclusion has a positive effect on the working of the leniency system. By excluding this type of coercers from obtaining immunity, companies are discouraged from forcing other companies to join or remain in the agreement. In absence of coercion or pressure to remain in the agreement, cartel participants may be more inclined to stop their collusive behavior which, in turn, may destabilize the cartel. In addition, the wording of the Notice is absolutely clear as regards the type of behaviour which leads to the exclusion from the benefit of immunity.\textsuperscript{2365} The 2006 exclusion is thus fully in line with the objective of the system to increase transparency and certainty.

4.3.2.4. Introduction of the marker system

Under the 2006 system, an undertaking may decide to make a formal application for immunity straight away or it may apply for a marker.\textsuperscript{2366} According to point 15 of the 2006 Notice, where justified, an immunity application can be accepted on the basis of only limited information, which is further specified in the Notice. When the Commission grants a marker, the place of an immunity applicant in the leniency queue is protected for a specific period, which is determined on a case-by-case basis. This system gives the applicant some extra time to gather all the information required to

\textsuperscript{2362} Leniency Notice 2002, point 11(c).
\textsuperscript{2363} Still, undertakings which adopt this behaviour may qualify for a reduction of fines if they fulfil the relevant requirements.
\textsuperscript{2364} Compare supra section 4.1.2.2(e) of this Chapter. In effect the 1996 referred to cartel instigators.
\textsuperscript{2365} This objective wording contrasts with that of the 1996 system, which generally excluded companies which played a determining role in the cartel. See further supra section 4.1.2.2(e) of this Chapter.
\textsuperscript{2366} See Leniency Notice 2006, point 14. See also commenting on the marker system e.g. V. ROSE AND D. BAILEY, “The Leniency” 1156; R. INCARDONA, “The Fight” 40.
meet the relevant immunity threshold. The Commission decides on a fully discretionary basis whether an immunity applicant may obtain a marker or not.

The introduction of the marker system is one of the most important novelties of the 2006 Notice.\textsuperscript{2367} The fact that only one company can benefit from immunity creates a race among cartel participants and puts high pressure on them to be the first to approach the Commission.\textsuperscript{2368} As a result, immunity candidates not only needed to be as fast as possible to come forward, they also had to be first to collect the necessary quality evidence to enable the Commission to launch an inspection or to prove the violation. As the analysis of the Commission’s decisions applying the previous Notices showed, being the fastest firm to come forward while, at the same time, collecting extensive evidence often represented a burden for leniency applicants. As long as undertakings had not submitted evidence which met the immunity threshold, there was always a danger that – even if the applicant was first to contact the Commission – another member of the cartel could be faster in finishing a qualifying leniency application and finally obtain immunity.\textsuperscript{2369} The idea behind the marker system is thus that, when justified, first applicants have some additional time to collect the required evidence to meet the threshold.\textsuperscript{2370} On the one hand, this new possibility enables the Commission to find a balance between the importance of early applications and the need to collect information which allows it at a later stage to prove and punish cartels.\textsuperscript{2371} The market system is as such in line with the principle that fast and early cooperation is greatly valuable for the Commission and should be rewarded.\textsuperscript{2372} From the undertakings’ point of view, the introduction of the marker system adds certain flexibility to the procedure and increases transparency and certainty of outcome.\textsuperscript{2373} As a result, the marker encourages quick reporting of cartels, which in turn should lead to an increase in the number of leniency applications and, thereby, enhance the working of the Commission’s policy.\textsuperscript{2374}

\textsuperscript{2367} See welcoming this mechanisms R. INCARDONA, “The Fight” 40; J. S. SANDHU, “The European” 149-150. According to this author, ‘the efficacy of the Commission's leniency policy in the past has been significantly weakened by the absence of a marker system and, therefore, the introduction by the Commission of a marker system to its leniency programme is welcomed’.

\textsuperscript{2368} See further supra section 1 of this Chapter. See also e.g. V. ROSE AND D. BAILEY, “The Leniency” 1156.


\textsuperscript{2370} See R. INCARDONA, “The Fight” 40. In the words of this commentator ‘the marker system does offer firms the possibility to win the race even if they do not have all the information required at the time when they decide to run for the immunity’. See also stressing the advantages of the system for undertakings J. S. SANDHU, “The European” 149-150. This author observes that ‘[u]sing a marker system introduces elements of transparency and predictability to the leniency process. This is because in a marker system a leniency applicant is aware of where it stands with respect to other applicants; the Commission will inform the applicant whether it is the first to seek leniency or otherwise. As a result, the leniency applicant can assess its chances of ultimately receiving leniency. Previously, in the absence of a marker system, the prospect of receiving leniency would have been more uncertain and potential leniency applicants, therefore, would have shied away from reporting a cartel’.

\textsuperscript{2371} It should be noted that the information provided on the basis of the marker system will normally not be enough.

\textsuperscript{2372} See also e.g. T. KLOSE, “Commission Notice” 1871).

\textsuperscript{2373} See concerning the importance of these aspects supra section 2 of this Chapter.

\textsuperscript{2374} See also J. S. SANDHU, “The European” 149-150, commenting that ‘a marker system places the Commission in a win-win position. A company involved in a cartel is more likely to report the illegal conduct if the entity knows that it is the first cartel member to approach the Commission (and, therefore, is guaranteed immunity). Similarly, if a company learns that it is not the first entity to approach the Commission, but the second or third, then there will also be a strong incentive to try and secure the next available benefit under the leniency policy. That is because when there are multiple immunity applicants, an adverse decision against the cartel participants is likely, given the information flowing to the Commission by the first company to obtain leniency’.

An adverse decision against a cartel participant could include
The 2006 marker system is only available for immunity applicants. Applicants applying for reductions of fines cannot benefit from the system. This choice is consistent with the rationale of the marker. As this system seeks to increase firms’ incentives to come forward quickly and allow for the detection and investigation of a cartel, the potential of the marker to result in such benefits is considerably more limited in the context of reductions. This is also illustrated by the Commission’s practice, which in effect suggests that after a first company blows the whistle, several subsequent applications are often made in a very short time interval.\textsuperscript{2375} It is, therefore, difficult to see how a marker for reduction could contribute to effective enforcement.\textsuperscript{2376}

Pursuant to point 15 of the Notice, an applicant who wishes to obtain a marker must provide the Commission with information concerning ‘its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct’. The applicant should also inform the Commission about other past or possible future leniency applications to other authorities in relation to the alleged cartel. When the company does not provide the Commission with enough information, its application will be rejected and it will need to reapply. Logically, in the mean time, another applicant may submit a successful application and qualify for immunity.\textsuperscript{2377}

Some commentators have argued that requiring such detailed information to “only” obtain a marker is excessive.\textsuperscript{2378} However, without this information the Commission cannot be completely sure that there are no prior applications relating to the same infringement. Moreover, this information is also used by the Commission to ascertain whether the infringement concerns one or more Member States. Since Article 101 TFEU is applied in parallel by all European competition authorities, the Commission should be able to assess at the very beginning of a case whether a NCA or the Commission itself is well placed to deal with the case. This will also enable the applicant to submit

large fines and, where applicable, imprisonment for individuals. Thus, in both cases, the would-be leniency applicant is provided with clarity of process, and firm expectations as to the outcome of its leniency application (subject to the applicant fulfilling its part of the leniency bargain).

\textsuperscript{2375} As explained above this “rolling-up effect” results from the fact that the significant added value concept, which is used to grant reductions, diminishes with every application. See also stressing this aspect S. S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 10.

\textsuperscript{2376} See also S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 10. In addition, as these authors also point out ‘the critical factor for the detection of cartels under the Leniency Notice is the submission of an immunity application. Therefore, it may be justified to grant an immunity applicant, which reports on a previously unknown cartel, a delay to complete its application. However, this does not apply when the Commission has already engaged in an investigation of the cartel. Third, since applications for reductions of fines are assessed on the basis of their relative significant added value at the point of time when such an application is made, it would also not be feasible for the Commission to effectively process and assess several simultaneous markers’.

\textsuperscript{2377} See OECD, “Use of Markers” 2. Still, if a company does not perfect a marker within the time-limit set (and an extension is not granted), the company in question can submit a formal application for immunity. If this firm is the first to meet the threshold and fulfil the relevant conditions, it will obtain immunity. For that purpose, all the information provided by that company (under the marker and under the full application) is taken into account. Since the marker is no longer applicable, the date at which the company qualifies for immunity is the date when it meets the threshold. In contrast, if the undertaking had perfected the marker, the date in which the marker was granted would have been deemed as the date of qualifying for immunity, Commission, MEMO/06/469.

\textsuperscript{2378} See e.g. A. RILEY, “The modernization” 7 (of the online version of this article); T. KLOSE, “Commission Notice” 1871); J. S. SANDHU, “The European” 152. This last author commented that since the information required by the Commission is clearly extensive ‘leniency applicants, which have been granted markers, will face significant hurdles in gathering the required information to perfect the marker and meet the threshold for immunity. From a practical perspective, an applicant's internal investigations covering the review of all paper and electronic documents and, also, the interviewing of current (and former) employees will take time and could take many weeks’.
its application to the relevant authority.\textsuperscript{2379} Finally, by requiring this information the Commission can assess whether a marker applicant has a genuine spirit of cooperation and wishes to submit a serious immunity application.

The marker system as embedded in the 2006 Notice is only granted at the discretion of the Commission.\textsuperscript{2380} This choice is based on reasons of public interest and is in line with effectiveness considerations. From the point of view of the Commission, a discretionary system is needed to maintain the race between firms to submit the information required to qualify for immunity. By encouraging this race the detection and termination of infringements is facilitated. Accordingly, the Commission will be inclined to grant a marker only in cases where it appears that the applicant is in a position to perfect it, which in turn will enable the Commission to conduct an inspection within a short time period.\textsuperscript{2381} Put differently, the marker is only used in cases which will (with almost full certainty) lead to the detection and punishment of the infringement.\textsuperscript{2382} In order to ascertain whether the applicant will be able to perfect the marker, the Commission asks the candidate to describe what kind of internal investigatory initiatives it has already undertaken, the results of such initiatives and what additional measures it intends to take during the marker period. The applicant must also provide detailed documentation and explanations as regards the time needed to conduct such measures. Based on this information, the Commission will make an informed decision on the time granted to perfect a marker.\textsuperscript{2383} If, based on a preliminary assessment of the case, the Commission believes that the applicant will not be able to perfect the marker and fulfil the immunity requirements, there is no objective (enforcement) justification to grant a marker. In the words of the Commission ‘\[t\]he interest is not in the race to simply get a place in the queue. One should keep in mind that the overall purpose of the Leniency Notice is to enhance actual cartel reporting and destabilising’.\textsuperscript{2384}

While the position of an undertaking to perfect the marker is decisive in the assessment of the question whether to grant a marker or not, a marker will only be granted to a leniency applicant under the 2006 Notice when this appears justified. According to the Commission, ‘\[t\]he EU marker

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\textsuperscript{2379} See also S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 10-11. This is also in line with the ECN Model Leniency Programme which aims at reducing the burden on applicants created by multiple leniency systems in the EU.
\textsuperscript{2380} Leniency Notice 2006, point 15. See criticising this aspect e.g. R. INCARDONA, “The Fight” 40. According to this author ‘this uncertainty on the final choice might reduce the attractiveness which the marker system is supposed to bring to firms intending to disclose their cartels’. A. RILEY, “The modernization” 195.
\textsuperscript{2381} By limiting this time lapse, the Commission seeks to ensure that evidence is not manipulated. OECD, “Use of Markers” 4.
\textsuperscript{2382} It appears, however, that the reasons why the Commission retains discretion in granting a marker are not fully clear to everybody. See e.g. J. S. SANDHU, “The European” 150. ‘It is not clear why the Commission is reserving a discretion rather than guaranteeing the grant of a marker where immunity is still available and the immunity applicant provides the minimum information required by the Commission’.
\textsuperscript{2383} OECD, “Use of Markers” 4. Furthermore, it should be kept in mind that according to point 12 of the 2006 Leniency Notice the marker applicant is expected to cooperate fully, genuinely and continuously throughout the procedure. This means that, when the marker applicant submits the application, it should submit immediately information and evidence it has already on the alleged cartel, if requested by the Commission. Also, if the Commission asks, it should provide supplementary information and evidence as soon as available to it. In addition, following from the spirit of genuine leniency cooperation, the applicant must take all the necessary steps to protect confidentiality and to avoid that, even inadvertently, evidence is destroyed.
\textsuperscript{2384} S. SUURNÄKKI AND M. L. TIERNO CENTELLA, “Commission adopts” 9-10. On the other hand, this reasoning is logically a small consolation for the companies which run the risk that eventually the marker is not granted. See commenting this aspect M. REYNOLDS AND D. ANDERSON, “Immunity and EU leniency in cartel cases: current issues”, (27-2) 2006 ECLR, 82-90, at 85 (hereafter: ‘M. REYNOLDS AND D. ANDERSON, “Immunity’’); J. S. SANDHU, “The European” 150-151).
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system caters for the needs of those immunity applicants who, for *legitimate reasons* are not in the position to submit all necessary evidence and information at a given time, but are able to perfect their application within a certain specific time span’. This is, for example, the case when a new management finds out after its appointment that the firm was involved in a cartel agreement or an employee reports on cartel activity when monitoring internal compliance.

This suggests that a marker is only granted when the delay in collecting the evidence is justified by rightful reasons beyond the control of the applicant. Conversely, wishing to reserve a place in the immunity line does not in itself appear to be sufficient to justify a marker. The *legitimate reasons* consideration seems to add an element of fairness to the marker system. The justification requirement gives the Commission the discretion to not reward undertakings with a marker, when they were aware of the existence of the cartel and, instead of coming forward immediately, they decided to wait. It indeed appears fairer to grant a marker when the applicant suddenly learns about the unexpected (and unwanted) existence of the cartel, than to grant it to an applicant which was already aware of and involved in the infringement.

The discretion in the granting of a marker may have a positive and a negative effect on the working of the Leniency Notice. Arguably, the *legitimate reasons* approach causes uncertainty as to whether an applicant’s explanation will be accepted by the Commission which may have the effect of discouraging prospective applicants from making an application at all, or to delay their application until a legitimate reason arises (e.g., change of management). On the other hand, granting a marker only when this is legitimately justified may encourage companies to behave conform the European competition rules (for instance by introducing compliance programmes) and, thereby, enhance *ex-ante* deterrence. When a leniency applicant is aware of the existence of the cartel and has no justification to obtain a marker, it is exposed to a risk of suddenly being involved in a quick leniency race which it may lose. If, on the contrary, the applicant was not aware of the infringement, giving it an advantage in the leniency race by granting some extra time to collect the evidence may appear justified. While this approach is understandable and potentially acceptable from an enforcement perspective, it can also be criticised on the ground that, in assessing whether a marker is justified or not, the Commission seems to make a distinction between the different (categories of) individuals involved in the cartel, whereas the leniency system only applies to undertakings. One may accordingly wonder whether it is enough that the manager is not aware of the cartel in order to have legitimate reasons to obtain a marker. At the same time this question underlines the issue that leniency programmes are based on economic theory, which assumes that undertakings are decision-

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2385 OECD, “Use of Markers” 2.
2386 OECD, “Use of Markers” (submission of the Commission) 2.
2387 J. S. SANDHU, “The European” 150-151. This commentator observes that it is difficult to understand the Commission’s requirement that the leniency applicant should justify its request for a marker. The disclosure of the cartel (or, where it is clear that the Commission is aware of the cartel, detailed information enabling the Commission to find an infringement should be reason enough to justify the request for a marker. The Commission is urged to recall that the predominant goal of a leniency programme is the uncovering of cartels. It seems counter-productive to require an applicant to justify its request for a marker in the light of this goal: the requirement appears to place a leniency applicant in a defensive position, which is counter-intuitive to the goal of rooting out cartels.
2388 OECD, “Use of Markers” (note by the Secretariat) 18; J. S. SANDHU, “The European” 150-151. This author notes that by reserving discretion to grant a marker, and not guaranteeing a marker to as a wide field of potential immunity applicants as possible, the Commission is introducing uncertainty into the leniency process and reducing the predictability of its outcome. This will deter some leniency applicants from approaching the Commission, and others will be delayed in their approach to the Commission to report a secret cartel. See also P. VERMA AND P. BILLIE, “Why would” 3.
makers behaving rationally while reality is more complex. As is well known, infringements are also materially committed by individuals whose incentives may not be consistent with those of the companies. The fact that the Commission wants to enhance compliance with EU competition law by natural persons suggests that the possibility of punishing those individuals who were effectively involved in the cartel must be reconsidered.

The time to perfect the marker is determined by the Commission on a case-by-case basis. This period varies depending on the circumstances of the case. Nevertheless, it seems logical that, due to the need to conduct inspections in a timely manner, the time period is kept short. Generally, it is not longer than three weeks, but when justified, this time period may be extended. A long period to complete a marker would place other candidates at disadvantage and would also delay the investigation of the case. In addition, this would increase the risk of leaks of the leniency application and could also put at risk the purpose of the investigation. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

4.3.2.5. Interaction with private enforcement

Under the 2006 Notice the Commission made official its 2002 practice of accepting oral leniency applications. The 2006 Leniency Notice contains a separate section IV regarding the submission of (and subsequent access to) oral corporate statements. By adopting these explicit rules, the Commission sought to address the (justified) criticism concerning the lack of coordination between the submission of leniency applications and private damage claims. The Commission had acknowledged in this regard that if the content of corporate statements could be unconditionally used as evidence in private law proceedings, companies would no longer be inclined to reveal their involvement in cartels.

Under the 2006 Leniency Notice, the Commission may thus accept the submission of oral corporate statements. This oral procedure is applicable to the corporate statements made with a view to obtain

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2390 See further Chapter 12.
2391 F. ARBAULT and B. SAKKERS, “Cartels” 817; J. S. SANDHU, “The European” 149-150. This author urged the Commission “to ensure that the period of time afforded to a leniency applicant to perfect a marker is adequate to allow it to complete fully its internal investigations, and that the Commission does not pre-set an upper limit which does not take into account all relevant circumstances concerning an alleged cartel”.
2392 See OECD, “Use of Markers” (contribution of the European Union) 4.
2393 It should be noted that, according to point 15 of the Notice, companies which have been granted a marker cannot perfect it by submitting an application in hypothetical terms. It should be recalled that hypothetical applications are meant to allow companies to ascertain whether the evidence in their possession would meet the immunity threshold, before disclosing their identity and the infringement. In a hypothetical application, the undertaking should therefore submit a list of evidential documents that are to be revealed at a later moment. Given the special nature of hypothetical applications, companies can only perfect it by submitting a formal application.
2395 It should be kept in mind that at this moment a number of initiatives were being taken to enhance private enforcement of competition law. See e.g. Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final; Commission, White Paper on Damages Actions for Breach of the EC antitrust rules COM (2008) 165. See also e.g. E. CAMILLERI, "A Decade of EU Antitrust Private Enforcement Chronicle of a Failure Foretold?", (10-11) 2013 ECLR, 531-537.
immunity or a fine reduction. This protection is granted, regardless of whether the applicant ultimately acquires immunity or reduction of fines.\textsuperscript{2397} To avoid a potential abuse of the system, oral statements will not be accepted when the applicant has already disclosed the content of the corporate statement to third parties.\textsuperscript{2398} The possibility to make oral corporate statements constitutes an important advantage for leniency applicants. Oral corporate statements will be recorded and transcribed by the Commission.\textsuperscript{2399} This copy is subsequently considered as a document of the Commission and, in contrast to written statements, is protected from discovery actions.\textsuperscript{2400} 2401

The oral submission of corporate statements under the 2006 Leniency Notice also required a new type of access to the file. In this regard, the Commission must ensure that the addressees of the statement of objections\textsuperscript{2402} obtain effective access to the file while minimizing the risk of discovery actions for leniency applicants.\textsuperscript{2403} To this end, access to corporate statements is initially only granted to the addressees of the SO. An important condition is that the parties commit not to make any (electronic) copies of the contents of the SO.\textsuperscript{2404} In addition, third parties such as the customers of the cartel firms or complainants are not granted access to the corporate statements. At their request, the Commission may provide them with a non-confidential version of the SO and they may participate in (certain parts of)\textsuperscript{2405} the hearing.\textsuperscript{2406} 2407

Initially, the Commission took the view that these (new) rules of the 2006 Notice could generally ensure the confidentiality of leniency applications. As the Commission’s approach indicates, a minimum level of protection for corporate statements is crucial to ensure the integrity and effectiveness of the leniency program.\textsuperscript{2408} However, this point of view was questioned, especially following the Pfleiderer judgment. In essence, in this case the ECJ held that – in the absence of binding EU rules on the topic – it is up to the national courts, on the basis of national law and on a

\begin{itemize}
\item \textsuperscript{2397} Commission, Press Release 06/469, (“Competition: revised leniency notice - frequently asked questions”).
\item \textsuperscript{2398} Leniency 2006, point 32.
\item \textsuperscript{2399} Ibid
\item \textsuperscript{2400} Leniency Notice 2006, point 32. See also T. KLOSE, “Commission Notice” 1884; J. YSEWYN AND E. JORDAN, “Cashing in on Cartels”, 2003 (6) ECLR, 235-237, at 236.
\item \textsuperscript{2402} Leniency Notice 2006, point 32. In accordance with Article 19 of Council Regulation 1/2003 and Articles 3 and 17 of Commission Regulation 773/2004, undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission’s premises and to correct the substance of their oral statements within a given time limit. Following the (explicit or implicit) approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission’s premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.
\item \textsuperscript{2403} Hereafter: the ‘SO’.
\item \textsuperscript{2404} T. KLOSE, “Commission Notice” 1885.
\item \textsuperscript{2405} Leniency Notice 2006, point 33. The addressees of the SO are allowed to read the transcripts of corporate statements or listen to the tapes. They can take handwritten notes. The copy of the transcripts is logically not be allowed. If copying were possible, this could lead to proceedings for discovery.
\item \textsuperscript{2406} Third parties may not participate in those moments of the hearing in which corporate statements are discussed. T. KLOSE, “Commission Notice” 1885.
\item \textsuperscript{2407} Hereafter, if not otherwise specified.
\item \textsuperscript{2408} The Commission will commonly remove all references and citations of corporate statements in the non-confidential versions that are sent to third parties (see A. CARUSO, “Leniency” 464; C. CAUFFMAN, “The interaction of leniency programmes and actions for damages”, 2011(7-2) The Competition Law Review, 181-220, at 190.
\item \textsuperscript{2409} Leniency corporate statements will only be transmitted to the NCAs pursuant to Article 12 of Regulation 1/2003, if the conditions set out in the Network Notice are met and if that the level of protection against disclosure awarded by the receiving NCA is equivalent to the one conferred by the Commission.
\item \textsuperscript{2400} See e.g. J. ALMUNIA, Speech 11/581 “New challenges in mergers and antitrust”, delivered at the IBA annual competition conference, 16 September 2011. The NCAs also adopted a resolution within the ECN framework to express their common view that protecting the confidentiality of leniency documentation is necessary to safeguard the leniency system. This resolution is available at \url{http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf}
\end{itemize}

In order to avoid that this uncertainty has a negative impact on the operation of the leniency system and on the detection and punishment of cartel infringements, Directive 2014/104/EU on actions for damages fully protects leniency statements (and settlement submissions)\footnote{With respect to settlement submissions, this system allows for faster and more efficient enforcement. \textit{Infra} Chapter 9.} from being disclosed or used in damages actions. Third parties seeking access to corporate statements submitted in the context of a leniency application cannot obtain access to such information.\footnote{Directive 2014/104, Article 6(6).} Furthermore, the Directive also introduces rules to protect competition authorities’ ongoing investigations. Documents specifically created for the purpose of an investigation by the parties, or by the competition authorities and sent to the parties, can only be disclosed in damages actions after the proceedings are terminated.\footnote{Directive 2014/104, Article 6(5).}

Fully protecting leniency statements and settlement submissions, and temporarily protecting documents prepared for public enforcement, ensures that infringers are willing to cooperate with the competition authorities. On the one hand, the absolute protection of the corporate statements is fully necessary as corporate statements contain the most comprehensive information about the cartel infringement. There is a genuine and real concern that making such statements available would undermine the effectiveness of leniency applications. At the same time, the victims of a cartel still have access to the evidence they need to prove their claim. While documents created for the purpose of an investigation will be disclosed after the proceedings are terminated, the Directive also stipulates that all preexisting information – i.e. information existing independently of competition authorities’ investigations – can be disclosed at any time.\footnote{Directive 2014/104, Article 6(9).} Taking into account the key contribution of private enforcement to generally enhancing deterrence, it can be affirmed that Directive 2014/104 has found an appropriate balance between the need to protect the working of the leniency programme and the right of victims to obtain compensation.

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4.3.3. The 2006 Leniency Notice in practice

4.3.3.1. Overview of cases and leniency discounts

On the basis of the 2006 system, the Commission granted some type of lenient treatment in a total of 26 cartel decisions. These Commission’s decisions are listed in the table below. The table indicates how much leniency discount was granted in each case.

<table>
<thead>
<tr>
<th>Date</th>
<th>Decision</th>
<th>Discount granted under</th>
<th>Marker</th>
</tr>
</thead>
<tbody>
<tr>
<td>28.01.2009</td>
<td><em>Marine hoses</em></td>
<td>100% (conditional immunity respected)(^{2415})</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>30%(^{2416})</td>
<td></td>
</tr>
<tr>
<td>13.04.2011</td>
<td><em>Consumer detergents</em></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>50%, 25%</td>
<td></td>
</tr>
<tr>
<td>19.10.2011</td>
<td><em>CRT glass bulbs</em></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>50%</td>
<td>Yes</td>
</tr>
<tr>
<td>07.12.2011</td>
<td><em>Refrigeration compressors</em></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>40%, 25%, 20%, 15%</td>
<td></td>
</tr>
<tr>
<td>28.03.2012</td>
<td><em>Freight Forwarding AMS infringement</em></td>
<td>100% (Deutsche Post AG)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>25 %, 30 %,</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Freight Forwarding CAF infringement</em></td>
<td>100% (Deutsche Post AG)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>20 %, 50 % (+partial immunity), 5 %</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Freight Forwarding PSS infringement</em></td>
<td>100% (Deutsche Post AG)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>50 % (+partial immunity), 25 %,</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Freight Forwarding NES infringement</em></td>
<td>100% (Deutsche Post AG)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>35 %</td>
<td></td>
</tr>
<tr>
<td>28.03.2012</td>
<td><em>Mountings for windows and window-doors</em></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>45 %, 25%</td>
<td></td>
</tr>
<tr>
<td>27.06.2012</td>
<td><em>Water management products</em></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>05.12.2012</td>
<td><em>TV and computer monitor tubes</em></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>40%, 30%</td>
<td>Yes</td>
</tr>
</tbody>
</table>

\(^{2414}\) The dates in the table correspond to those for the adoption of the decision, which will normally be a few years after the leniency application(s).

\(^{2415}\) Unless otherwise stated, conditional immunity was granted and respected in the final decision.

\(^{2416}\) Unless otherwise stated, these reductions corresponded to the percentage band that was indicated by the Commission before the adoption of the Statement of Objections.
<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Percentage</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.07.2013</td>
<td><strong>Automotive Wire Harnesses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Toyota</td>
<td>100%</td>
<td>(Sumitomo)</td>
</tr>
<tr>
<td></td>
<td>Honda</td>
<td>100%</td>
<td>(Sumitomo)</td>
</tr>
<tr>
<td></td>
<td>Nissan</td>
<td>100%</td>
<td>(Sumitomo)</td>
</tr>
<tr>
<td></td>
<td>Renault (W95 Platform)</td>
<td>100%</td>
<td>(Sumitomo)</td>
</tr>
<tr>
<td></td>
<td>Renault (W52/98 Platform)</td>
<td>100%</td>
<td>(Sumitomo)</td>
</tr>
<tr>
<td>27.11.2013</td>
<td><strong>Shrimps</strong></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>04.12.2013</td>
<td><strong>Euro Interest Rate Derivatives</strong></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>04.12.2013</td>
<td><strong>Yen Interest Rate Derivatives (YIRD)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(i) UBS/JPMorgan 2007 infringement</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td>(ii) UBS/Royal Bank of Scotland 2007 infringement</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td>(iii) UBS/Royal Bank of Scotland 2008 infringement</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td>(iv) UBS/Deutsche Bank 2008-09 infringement</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td>(v) Citigroup/Royal Bank of Scotland 2010 infringement</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td>(vi) Citigroup/Deutsche Bank 2010 infringement</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td>(vii) Citigroup/UBS 2010 infringement.</td>
<td>100%</td>
<td>(UBS)</td>
</tr>
<tr>
<td></td>
<td><strong>CDT cartel</strong></td>
<td>40%, 30%, 10%</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>CPT cartel</strong></td>
<td>30%, 40%</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Yes</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Category</td>
<td>EU Market Share</td>
<td>Leniency Discount</td>
</tr>
<tr>
<td>-------------</td>
<td>-----------------------------------------------</td>
<td>-----------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>29.01.2014</td>
<td>Polyurethane Foam</td>
<td>100%</td>
<td>50%</td>
</tr>
<tr>
<td>19.03.2014</td>
<td>Automotive bearings</td>
<td>100%</td>
<td>40%, 30%, 20%</td>
</tr>
<tr>
<td>02.04.2014</td>
<td>Steel abrasives</td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>02.04.2014</td>
<td>Power cables</td>
<td>100%</td>
<td>45% (+partial immunity)</td>
</tr>
<tr>
<td>25.06.2014</td>
<td>Mushrooms</td>
<td>100%</td>
<td>50%, 2417, 30%</td>
</tr>
<tr>
<td>03.09.2014</td>
<td>Smart card chips</td>
<td>100%</td>
<td>30%</td>
</tr>
<tr>
<td>21.10.2014</td>
<td>Swiss Franc interest rate derivatives CHF LIBOR</td>
<td>100%</td>
<td>40%</td>
</tr>
<tr>
<td>21.10.2014</td>
<td>Swiss Franc interest rate derivatives Bid Ask Spread Infringement</td>
<td>100%</td>
<td>30%, 25%, Yes</td>
</tr>
<tr>
<td>10.12.2014</td>
<td>Envelopes</td>
<td>100%</td>
<td>50%, 25%, 10%</td>
</tr>
<tr>
<td>17.06.2015</td>
<td>Parking Heaters</td>
<td>100%</td>
<td>45%</td>
</tr>
<tr>
<td>24.06.2015</td>
<td>Retail Food Packaging CEE (Linpac)</td>
<td>100%</td>
<td>50%, 30%</td>
</tr>
<tr>
<td></td>
<td>Retail Food Packaging France (Linpac)</td>
<td>100%</td>
<td>50%, 30%, 10%</td>
</tr>
<tr>
<td></td>
<td>Retail Food Packaging Italy (Linpac)</td>
<td>100%</td>
<td>45%, 30%, 20%, 10%</td>
</tr>
<tr>
<td></td>
<td>Retail Food Packaging NWE (Linpac)</td>
<td>100%</td>
<td>50%</td>
</tr>
<tr>
<td></td>
<td>Retail Food Packaging SWE (Linpac)</td>
<td>100%</td>
<td>45%, 30%, 20%</td>
</tr>
<tr>
<td>15.07.2015</td>
<td>Blocktrains</td>
<td>100%</td>
<td>45%, 30%</td>
</tr>
<tr>
<td>21.10.2015</td>
<td>Optical Disc Drives</td>
<td>100%</td>
<td>50%</td>
</tr>
</tbody>
</table>

2417 This leniency discount was granted in a separate decision issued for Riberebro, which decided not to follow the settlement procedure.
As the table illustrates, the Commission rewarded companies with immunity under the 2006 Leniency Notice almost in all the cartel decisions.\textsuperscript{2418} In particular, immunity pursuant to point 8(a) was granted in all decisions except for the Envelopes case. Immunity on the basis of point 8(b) was granted only with respect to one of the seven infringements that were established in the Yen Interest Rate Derivatives decision.\textsuperscript{2419} In addition, all the undertakings that obtained conditional immunity, were rewarded with final immunity by the Commission at the end of the proceedings. Individual reductions were also applied very frequently. These reductions also corresponded to the percentage band that was indicated by the Commission before the adoption of the Statement of Objections.

### 4.3.3.2. The application of the 2006 Leniency Notice

To a large extent, the basic principles and the functioning of the 2002 and 2006 Notices are the same or very similar. Still, the modifications included in the 2006 Leniency Notice increased the transparency of the system and provided additional certainty for applicants. While this added clarity should in principle create greater incentives for companies to blow the whistle, the application and interpretation of the Notice in practice remains decisive for undertakings considering to come forward. This (sub)section examines the most interesting cases in which the Commission applied the 2006 Leniency Notice.

#### a. Granting immunity under point 8(a) of the 2006 Notice

Under the 2006 system immunity pursuant to point 8(a) was granted in 25 cases including Marine Hoses (2009),\textsuperscript{2420} Consumer Detergents (2011),\textsuperscript{2421} CRT Glass (2011),\textsuperscript{2422} Refrigeration compressors (2011),\textsuperscript{2423} Mountings for windows and window doors (2012),\textsuperscript{2424} Freight forwarding (2012),\textsuperscript{2425} Automotive wire harnesses (2013),\textsuperscript{2426} Shrimps (2013),\textsuperscript{2427} Euro

\textsuperscript{2418} See further infra section 4.3.3.3 of this Chapter.

\textsuperscript{2419} Since this decision concerned seven separate infringements, immunity could be granted to different undertakings for each specific infringement. Accordingly, this case involved both types of immunity.


\textsuperscript{2426} Commission Decision of 10 July 2013 (Case AT.39748 — Automotive wire harnesses) [2013] OJ C 283/5, paras 22 and 155.

The decision in Euro interest rate derivatives (EIRD), has not been published yet. The press release available at


2430 Commission Decision of 2 April 2014 (Case AT.39610 — Power Cables) [2014] OJ C 319/10. The non-confidential version of this decision is not available.


2433 The decision in Smart card chips has not been published yet. The press release (IP/14/960) available at


2440 Ibid, para 1117.

2441 Ibid, para 1119.

2442 Ibid, paras 1120-1121.

2443 It should be noted that this journal article was based on a declaration of the defendant's criminal counsel in that case.

2444 Ibid, paras 1120-1122.

2445 This documentation (which was a matter of public record) related to the trial in the LCD cartel case. Case COMP/39.437 — TV and computer monitor tubes [2013] OJ C 303/13, para 1123.
not receive any indecent payments or benefits.\textsuperscript{2446} To conclude, the Commission stated that Chunghwa proved its value as an immunity applicant through information and documentary evidence – independently of evidence and explanations provided by any individual employees – and should thus be granted immunity on the basis of point 8(a) of the 2006 Leniency Notice for its involvement in both CDT and CPT cartels.\textsuperscript{2447}

This decision reflects an unprecedented change in the application of the leniency system by the Commission. First of all, this decision shows that the Commission is willing to apply the obligation to terminate the cartel more flexibly, when the undertaking has given precise instructions to terminate an agreement even if such instructions were not followed. In particular, the Commission considered that all the conditions to obtain immunity were satisfied, including the condition to terminate the cartel, even though an individual employee was still taking part in pricing agreements.

By granting immunity to an undertaking which did not ensure the termination of the illegal cartel by its employees, the Commission in fact opened the (complex) black box of a cartel and recognised that the different individuals involved in such agreements have different interest that are not necessarily aligned with the undertaking’s objectives.\textsuperscript{2448} Arguably, a more flexible approach, as adopted in \textit{TV and computer monitor tubes}, may (only) be understandable when undertakings demonstrate that they have invested extensive and genuine efforts to comply with the European competition rules and satisfy the leniency requirements. Nevertheless, the mere willingness of an applicant to respect and fulfil the conditions to obtain immunity has never been sufficient for the Commission to grant a lenient treatment.\textsuperscript{2449} In addition, rewarding such efforts seems to be at odds with the key principle that, under EU competition, law undertakings are fully responsible and liable for their employees’ behaviour. Taking into account this basic principle, it is difficult to justify the Commission’s approach. This subjective interpretation and application of the leniency conditions is not consistent with the (clear wording of the) 2006 Leniency Notice and creates uncertainty as to the scope of the immunity obligations. This situation undermines the transparency of the system and should thus be avoided in order to preserve the effectiveness of the Notice.

The responsibility of undertakings for the actions of their employees is also clearly reflected in the scope of the full cooperation obligation as contained in the 2006 system. While in the context of the Commission’s Leniency Notice this obligation is applicable to undertakings, it is a fact that this obligation cannot be satisfied if the individuals who were involved in the infringement are not willing to cooperate.\textsuperscript{2450} Accordingly, if employees reject to assist an undertaking in the context of a leniency submission, the outcome of the application can truly be endangered. This complex scenario once more underlines the frequent lack of alignment of the interests of individual cartel participants and businesses. The decision in \textit{TV and computer monitor tubes} – in which the Commission even qualified the US practice involving payments to individuals who agree to provide full cooperation and serve a prison sentence in the US as “standard” – shows that the Commission is well aware of this tension.


\textsuperscript{2447} Ibid, para 1125.


\textsuperscript{2449} See further supra sections 4.2.4.1 and 4.2.4.2 of this Chapter.

\textsuperscript{2450} Leniency Notice 2006, point 12(a).
b. Granting immunity under point 8(b) of the 2006 Notice

Under the 2002 system, the Commission only granted immunity to one company on the basis of point 8(b) of the Notice.

In *Yen Interest Rate Derivatives* (2015), Citigroup submitted a leniency submission which contained information that Citigroup had previously provided to various financial regulators following an internal investigation. This investigation had been triggered because a Citigroup employee – who was responsible for Citigroup’s JPY LIBOR submissions – reported an attempt by a Citigroup trader to influence Citigroup’s JPY LIBOR submissions in June 2010 and, as a result of which, the trader was dismissed. The Commission granted Citigroup conditional immunity pursuant to point 8(b) of the Notice for the Citi/DB 2010 infringement.2451

This case, once again, stresses the different incentives that individuals may have within the context of a same undertaking to commit or not to commit a competition law violation. While some individuals may have a great interest in colluding with the firm’s competitors, other will not hesitate to report potential violations. At the same time, this emphasises the importance for undertakings of having appropriate training and compliance programmes in place and to monitor their implementation by, for instance, conducting internal investigations. If in *Yen Interest Rate Derivatives*, the employee in question would not have reported the suspected violation by a trader, Citigroup could not have been rewarded with immunity for its conduct. Having responsible and trained employees who carefully follow compliance programmes appears, in other words, essential to avoid potential competition law sanctions.

c. Granting reductions in fines under points 24-25 of the 2006 Notice

Numerous reductions have been granted on the basis of the 2006 Leniency Notice.

In *Marine Hoses* (2009),2452 the Commission found that Manuli provided evidence which represented significant added value and was therefore the first undertaking to meet the reduction conditions.2453 In particular, Manuli provided information concerning its presence in cartel meetings and the identity of the meeting participants. Manuli also submitted an internal document showing that cartel members exchanged detailed sales statistics for the period 1986-1989. That document strengthened the Commission's ability to prove that already in the 1980s cartel members used such statistics to implement and supervise the market sharing agreements.2454 The information provided by Manuli also helped the Commission to prove that the cartel included geographic market sharing, by attributing 'home markets’ to cartel members.2455 Finally, Manuli provided the Commission with internal contemporaneuous documents concerning the existence of cartel arrangements, and Manuli’s own role in the cartel. This information facilitated the Commission's ability to prove the cartel.2456 Nevertheless, at the time, of Manuli’s application, the Commission already had a significant amount of information to prove the main elements of the cartel.2457 Taking into account the value of this contribution, the early stage at which the information was provided

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2454 *Ibid*, para 482.
2456 *Ibid*, para 484.
and the extent of its cooperation, Manuli was granted a 30% reduction.\textsuperscript{2458} Parker ITR also submitted a reduction application.\textsuperscript{2459} The Commission admitted that although Parker ITR’s statement was consistent with the rest of the information, it contained little ‘substantial added value’ as regards the period 1986-2007.\textsuperscript{2460} The Commission also found that the evidence submitted by Parker ITR’s for the period after April 1981 – that is five years before the start of the infringement described in the decision – was so inconsequential that any proof would necessarily be subject to the limitation period for the imposition of fines. Based on Point 36 of the Notice,\textsuperscript{2461} the Commission held that the part of the submission concerning that period should not be taken into account to assess whether Parker ITR’s application had significant added value. Parker ITR was consequently not granted any reduction in fines.\textsuperscript{2462} \textsuperscript{2463}

In \textit{Consumer Detergents} (2011),\textsuperscript{2464} every submission significantly strengthened the Commission’s ability to prove the existence of the infringement as well as its specific nature and scope.\textsuperscript{2465} Considering both the quality of its leniency application and its timely cooperation from the beginning of the investigation, P&G was granted a 50% reduction in fines.\textsuperscript{2466}

In \textit{Refrigeration compressors} (2011),\textsuperscript{2467} Panasonic provided several pieces of contemporaneous evidence which strengthened the Commission’s ability to prove the infringement, in particular as regards the first six months of its participation. This company obtained 40% reduction. Next, ACC fulfilled the reduction requirements and submitted contemporaneous evidence of compelling nature, but due to the limited extent of the information this firm only obtained a 25% reduction. The third qualifying firm for reductions was Embraco. This company submitted new contemporaneous evidence and corroborating evidence of a detailed nature as well as oral statements and records which significantly enlightened the cartel. This company obtained the maximum 20% reduction within the applicable band. Finally, Danfoss provided evidence that contributed to the establishment of the cartel activities, clarified the functioning of the cartel and corroborated other evidence. This cooperation was rewarded with a 15% discount.\textsuperscript{2468}

In \textit{Bearings} (2014),\textsuperscript{2469} NSK was the first undertaking to meet the requirements of points 24 and 25 of the Notice. This company provided evidence confirming meetings as well as new information

\textsuperscript{2458} \textit{Ibid.}, para 486-488. In this case, Manuli also claimed that it should obtain partial immunity for the period of 1996/1997. However, the Commission rejected this claim and noted that although the evidence provided by Manuli was used by to prove its participation in the infringement, this evidence was not used to increase the duration of the infringement as a whole.

\textsuperscript{2459} \textit{Ibid.}, para 489. In particular, this application consisted of ‘a corporate statement indicating cartel contacts between 1972 and 2006, and Parker ITR’s attempt to leave the cartel ‘softly’ in 2006/2007, meeting minutes and correspondence for 1972 to 1981, and correspondence among cartel members (tender allocation and circulation of market information) for 1989 and 1999 to 2003’.

\textsuperscript{2460} \textit{Ibid.}, para 490. The Commission’s decision added that ‘the infringement during that period is fully proven by the extensive evidence submitted by the immunity applicant and the first leniency applicant, and by the documents collected during the inspections’.

\textsuperscript{2461} Point 36 of the Leniency Notice states that ‘[t]he Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose’.

\textsuperscript{2462} \textit{Ibid.}, paras 492-493.

\textsuperscript{2463} In this case Bridgestone also submitted an application under the Leniency Notice. However, in the Commission’s view it contained little that could be qualified as providing ‘added value’. When Bridgestone applied for leniency, the infringement had already been fully proven. Bridgestone was not granted any reduction in the fine. The fact that Bridgestone submitted information in good faith is not relevant. \textit{Ibid.}, paras 494-497.

\textsuperscript{2464} \textit{Case COMP/39.579 — Consumer detergents} [2011] OJ C 193/14

\textsuperscript{2465} \textit{Ibid.}, para 93

\textsuperscript{2466} \textit{Ibid.}, paras 95-96. In this case Unilever was also granted a 25% reduction based on the quality and the timing of its application. More precisely, the Commission considered that Unilever could not obtain the maximum reduction given the important delay in its cooperation. In particular, the Unilever made its first submission only in 2009, which is more than one year after the start of the investigation.


\textsuperscript{2468} \textit{Ibid.}, paras 89-93.

on a number of bilateral and trilateral contacts. However, some of that information remained rather vague and NSK, as a result, was granted a 40% reduction of the fine.\textsuperscript{2470} NFC, the second undertaking to meet the requirements, provided detailed new information evidencing its own participation in the single and continuous infringement but also concerning the overall framework of the cartel. NFC obtained the maximum reduction of 30%.\textsuperscript{2471} Finally, SKF was the last undertaking qualifying for a reduction. SKF applied for leniency immediately after the inspections and submitted additional information that enabled the Commission to conclusively interpret several documents in an incriminating manner. Moreover, this company submitted new evidence which enabled the Commission to better demonstrate the single and continuous nature of the infringement and significantly strengthened the case against other cartel members. SKF was therefore granted the maximum reduction of 20%.\textsuperscript{2472}

In \textit{Automotive wire harnesses} (2013),\textsuperscript{2473} Furukawa was the first undertaking to submit evidence of the Toyota and Honda infringements which represented significant added value. While Furukawa’s documentation proved and corroborated the main elements of the infringements, this firm only cooperated more than a year later and after having received a request for information. As a result, Furukawa obtained a 40% reduction.\textsuperscript{2474} Yazaki was second to satisfy the relevant requirements in relation to the same infringements. The evidence provided by Yazaki corroborated other evidence and allowed the Commission both to accelerate its investigation and to improve its understanding of the operation of the cartel. Yazaki was thus granted the maximum reduction of 30%.\textsuperscript{2475}

In \textit{Blocktrains} (2015),\textsuperscript{2476} \textit{EXIF} was the first undertaking to meet the reduction requirements. According to the decision ‘\textit{EXIF} provided contemporaneous, documentary evidence of multi- and bi-lateral cartel meetings and contacts and detailed information on the subject matter of those meetings and contacts. More particularly, \textit{EXIF} provided detailed, corroborating information on the pricing coordination, on the customer protection arrangements through "wish lists", on the functioning of the notification system and on exchanges of commercially sensitive information between the cartel members’.\textsuperscript{2477} Given the value of this information, \textit{EXIF} was rewarded with a 45% reduction.\textsuperscript{2478} The second undertaking to meet the relevant conditions was \textit{Schenker}. In essence, this firm provided detailed information on the subject matter of several meetings which clarified the organisation of the cartel. \textit{Schenker} obtained 30% reduction.\textsuperscript{2479}

In \textit{Mountings for windows and window doors} (2012),\textsuperscript{2480} GU was the first company that met the requirements to obtain a reduction. GU’s submission was useful to demonstrate certain aspects of the cartel. In particular, GU was the first to confirm the information provided by the immunity applicant on the cartel members, the product definition, the period and the EEA-wide scope of the infringement. GU also submitted evidence from the relevant period, which helped prove the beginning of the cartel. Moreover, this company provided the Commission with extremely valuable information on the extension of the agreed price increases in markets outside of Germany and the organization and design of cartel meetings. Given the significant added value of GU’s contribution, the early stage and the extent of the cooperation GU’s fine was reduced by 45%. The second company applying for a reduction, Maco, confirmed and supplemented the information that the Commission already had and also provided evidence of various meetings in connection with markets outside of Germany. This information helped to prove that the cartel covered the whole

\textsuperscript{2470} Ibid, para 104.
\textsuperscript{2471} Ibid, para 105.
\textsuperscript{2472} Ibid, para 106.
\textsuperscript{2473} Case AT.39748 — \textit{Automotive wire harnesses} [2013] OJ C 283/5.
\textsuperscript{2474} Ibid, paras 157-159.
\textsuperscript{2475} Ibid, paras 160-161.
\textsuperscript{2476} Case AT.40098 — \textit{Blocktrains} [2015] OJ C 351/5.
\textsuperscript{2477} Ibid, para 98.
\textsuperscript{2478} Ibid.
\textsuperscript{2479} Ibid, para 99.
EEA area. However, since Maco did not submit any evidence from the relevant period on these meetings, Maco obtained a 25% reduction.\textsuperscript{2481}

In \textit{TV and computer monitor tubes} (2012),\textsuperscript{2482} five companies applied for a reduction. Samsung submitted an application for reduction on the CDT and CPT cartels right after the inspections.\textsuperscript{2483} This firm submitted evidence concerning the cartel contacts, which corroborated and gave further details on the findings made during the Commission’s inspections. The Commission attached special importance to a chronological list of the cartel meetings which contained information about the date and place of the meetings, the meeting type, names of the participants and a brief description of the contents of the meetings. Furthermore, Samsung also explained the development of various contacts regarding the CDT and CPT cartels, the participants, the subjects discussed and — in reply to a request for information — the relationship between the meetings in Europe and Asia. Finally, Samsung was the first firm that corroborated information which confirmed the existence, nature and the duration of both the CDT and CPT cartels.\textsuperscript{2484} The Commission, therefore, acknowledged that Samsung’s cooperation brought evidence with a significant added value. However, in the Commission’s view Samsung failed to explain how and why the arrangements would affect the Community, as required under point 23 of the 2006 Notice.\textsuperscript{2486} In fact, in the Commission’s view, Samsung tried to minimise the extent and meaning of the information exchange. While this company stated that parties exchanged information on a world wide level,\textsuperscript{2487} it omitted the fact that the information exchanged concerned future behaviour regarding important competition parameters.\textsuperscript{2488} Furthermore, Samsung also omitted that one of the core features of the CDT cartel was also market sharing.\textsuperscript{2489} As a result, the Commission found that Samsung hindered the Commission’s task of proving the infringement, by providing arguments that go against the documentary evidence. Due to this behaviour, Samsung finally obtained a reduction of 40% instead of the maximum 50% reduction.\textsuperscript{2490} Technicolor was the third undertaking to satisfy the reduction requirements.\textsuperscript{2491,2492} Although this company cooperated extensively, at the time of this submission

\textsuperscript{2481} \textit{Ibid}, paras 531-540.
\textsuperscript{2483} \textit{Ibid}, para 1126.
\textsuperscript{2484} The decision added that ‘Samsung further explained various abbreviations relating to company names and meeting types. The list of abbreviations […] helped the Commission not only to interpret the information […] in the meeting lists but also in the documents discovered during the inspections and received in replies to requests for information’. \textit{Ibid}, para 1126.
\textsuperscript{2485} \textit{Ibid}, para 1127.
\textsuperscript{2486} \textit{Ibid}, para 1129.
\textsuperscript{2487} According to Samsung this information concerned manufacturing, inventory levels, export and sales, pricing, customer developments, market trends and developments as well as product developments (which covers therefore all main aspects of the business).
\textsuperscript{2488} It is interesting to note that, according to the decision, this task was entrusted to the lower level employees and served to prepare for or monitor anticompetitive arrangements. The Commission also point out in this regard that the work division of the cartel does not minimise the anticompetitive nature of the information exchange. Case COMP/39.437 — \textit{TV and computer monitor tubes} [2013] OJ C 303/13, paras 1129-1130.
\textsuperscript{2489} \textit{Ibid}, para 1130.
\textsuperscript{2490} \textit{Ibid}, para 1132.
\textsuperscript{2491} \textit{Ibid}, para 1154. More precisely, ‘Technicolor corroborated the […] documentary evidence submitted by Chunghwa, Samsung and Philips […] in particular for the period of 1999-2005 of the CPT cartel. Technicolor voluntarily […] went beyond the scope of the request for information. More specifically, Technicolor’s submissions helped to establish the information exchange practices between the cartelists, thereby helping the Commission to form a clearer picture of the nature of the CPT cartel. Technicolor was the first company to provide a substantial amount of explanations — in particular regarding e-mail exchanges and other contacts — concerning the information exchange practices of the participants in the CPT cartel. In providing new and substantial explanations regarding the information exchange practices, Technicolor added further clarity to the relationship between the Asian and the European cartel contacts. Technicolor also […] clarified the functioning of the CPT cartel in the EU and its links to Asian cartel contacts. Moreover, Technicolor provided […] a number of meetings that were previously unknown to the Commission in particular for the period 2003-2005’.
\textsuperscript{2492} In this case Philips, the second reduction applicant, was granted a 30% reduction of the fines regarding the CDT and the CPT cartel. As regards this reduction, the decision simply states that Philips submitted an application soon after the Commission’s inspections. The decision also commented that LGE – a 50/50 joint venture established in 2001 with Philips – argued that it should benefit from any leniency granted as a result of Philips’ leniency application. Philips
the Commission disposed already of an extensive amount of documents, which reduced the added value of the Technicolor’s evidence. But most importantly, the Commission underlined that Technicolor made a number of observations that rendered the Commission’s task more difficult. According to the decision, Technicolor’s claims other cartel member argued during the oral hearing that Technicolor’s information exchanges with other competitors were not part of the cartel. Due to Technicolor’s hindering behaviour and the limited significant added value of this firm’s evidence, the Commission only granted a 10% reduction, within the available range of up to 20%. Finally, Panasonic submitted a leniency application, right after Commission inspections but also after having received a request for information. After an examination of the evidence, the Commission came to the preliminary conclusion that the evidence submitted by Panasonic did not represent significant added value. Moreover, Panasonic contested any involvement in a cartel covering Europe, although its participation was well documented and supported by contemporaneous documents. The Commission found, consequently, that Panasonic did not disclose its participation in the alleged cartel as was required by point 23 of the Notice. In light of this, Panasonic did not qualify for a reduction.

In Shrimps (2013), Stührk was the only firm that provided the Commission with a leniency application. However, Stührk did not provide more information than it had already submitted in the context of a request for information. The Commission explained Stührk that an expression of interest to cooperate is not enough to meet the leniency conditions but this firm made no further applied for leniency concerning both its own direct participation in the cartel and the participation via the 50/50 joint venture. Nevertheless, LGE had not cooperated in Philips’ leniency application or applied for leniency itself. Therefore, the Commission concluded that there were no grounds to grant a reduction. Ibid, paras 1147-1153. Technicolor also admitted to having on several occasions exchanged price information with competitors, covering both past and projected prices for the coming year. In any event, in addition to pricing discussions, there is ample evidence of Technicolor exchanging information on future production plans and, future plans or targets on costs and sales with other cartel participants, which equally demonstrates that the information exchange formed part of the overall cartel. Technicolor has also confirmed that the employee who engaged in the information exchange was instructed by superiors (who were responsible for sales as well as production and sales planning) to gather information on “production capacities” as well as “present and future total tubes market volumes”. It is clear from documents submitted by Technicolor that the information exchange was very detailed, future oriented, company or factory specific and that the contacts were often as frequent as a couple of times per week.

In addition, the Commission rejected Technicolor’s claim regarding partial immunity. In this regard the Commission found that ‘the evidence Technicolor has submitted on information exchange does not increase the gravity or duration of the infringement. That evidence is also an integral part of the CPT cartel evidence, as explained above. There is therefore no reason to disregard those facts when setting a fine for Technicolor’. Ibid, para 1161.

It should be noted that Panasonic/MTPD’s application for immunity was rejected because conditional immunity had already been granted to Chungwa.

Case COMP/39.437 — TV and computer monitor tubes [2013] OJ C 303/13, para 1133. Pursuant to Article 18(2) of Regulation 1/2003, this company was requested to provide, amongst other things, documents regarding all contacts concerning CRTs (including CPTs and CDTs) that executives of the undertaking have had since 1 January 1995 to the date of the request for information with representatives of its competitors listed in the request.

Ibid, para 1134. The Commission further elucidated this aspect in its decision. First, Panasonic provided its cooperation following a request for information and this cooperation did not go beyond the company’s cooperation obligations in an investigation. See in this regard Judgment of the General Court of 13 July 2011Case T-151/07, Kone Oyj and Others v Commission, ECR [2011] II-5313, para 222.

Ibid, paras 1138-1140. In the words of the Commission, Panasonic’ arguments, ‘do not amount to purely denying legal assessment of the facts, but go to the very core of the leniency reduction in fines, which requires that the company discloses its own participation in cartel behaviour affecting the Community’. It must be recalled that the requirement for the undertaking to disclose its participation in an alleged cartel affecting the Community is a new condition which was included in the 2006 Leniency Notice. The 2002 Leniency Notice did not contain this requirement, nor did the 1996 Leniency Notice.


Case AT.39633 — Shrimps [2014] OJ C 453/16

In addition, the Commission also pointed out that in a subsequent meeting dating of 18 February 2010, Stührk did not provide information with a significant added value. Case AT.39633 — Shrimps [2014] OJ C 453/16, para 550.
In Envelopes (2014), three companies applied for a leniency reduction. Tompla was the first undertaking to meet the requirements. This applicant provided detailed information on the set-up and the functioning of the cartel, including details of the meetings. This information corroborated and supplemented the evidence available to the Commission and had also an important clarifying value as regards the scheme of the violation. Tompla was therefore granted a 50% reduction of the fine. Hamelin was the second undertaking qualifying for a reduction. Hamelin submitted detailed information on several cartel meetings which elucidated the organisation of the cartel. Still, Hamelin was only granted a 25% reduction – instead of the maximum reduction – because its leniency application came at an advanced stage of the Commission’s investigation. Mayer-Kuvert – the third undertaking to meet the requirements – submitted detailed information on its own involvement in the cartel. Since its leniency application was also made at a late stage of the investigation, this firm was granted a 10% reduction of the fines. Other reductions were granted in CRT Glass (2011), Freight forwarding (2012), Polyurethane foam, (2014), Power Cables (2014), Mushrooms (2014), and Swiss Franc Interest Rate Derivatives (CHF LIBOR) (2014).

The decisions granting reductions in fines under the 2006 Notice clearly illustrate that the Commission has not changed its approach as regards the criteria used to assess the granting of discounts. While the wording of the 2006 Notice is indeed more specific than that of the 2002 Notice, the additional clarity simply codifies the previous practice.

The application of the 2006 Notice confirms the (already established) concept of significant added value. As the decisions cited above illustrate, contemporaneous and documentary and incriminating evidence concerning the cartel contacts which corroborate and/or give further details on the agreement is greatly valued by the Commission. In particular, notes or documents from the cartel

2503 Ibid, para 550.
2504 In its judgment in SKW, the General Court confirmed that, when an undertaking does not cooperate with the Commission, it is irrelevant whether this happened due to its choice not to cooperate or due to objective reasons that prevented it from cooperating. According to the General Court, an undertaking that wishes to co-operate with the Commission, but that is not in a position for objective reasons to provide certain evidence, is not prevented from filing a leniency application in which it explains these reasons. Case T-384/09, SKW Stahl-Metallurgie Holding AG e.a. v Commission, paras 243–244.
2505 Such acknowledgements were dine in its reply to the Statement of Objections and the subsequent Oral Hearing Case AT.39633 — Shrimps [2014] OJ C 453/16, para 551.
2507 On 22 October 2010, 24 July 2013 and 7 November 2013, Tompla, Hamelin and Mayer-Kuvert (also on behalf of GPV France SAS and Heritage Envelopes), respectively, applied under the Leniency Notice for a reduction of any fine that would be imposed on them. Ibid, para 98.
2508 Ibid, para 99.
2509 Ibid, para 100.
2510 Ibid, para 101.
2511 Ibid, para 101.
2512 Case COMP/39.605 — CRT Glass [2012] OJ C 48/18. In this case NED provided important new evidence and corroborating information thereby substantially strengthening the Commissions ability to prove the case and adding significant value. This company consequently obtained 50% reduction. The Commission also found in this case that Schott did not provide evidence representing significant added value and thus did not merit any reduction.
2517 Case AT.39924 — Swiss Franc Interest Rate Derivatives (CHF LIBOR) [2015] OJ C 72/9, paras 79–81.
meetings, containing information about the dates and places of the meetings, the meeting type, the names of the participants (including the applicant) and descriptions of the contents of the meetings normally help to strengthen the Commission’s ability to prove or corroborate facts. As a general rule, such information consequently has significant added value.\textsuperscript{2518} The Commission also found that other evidence from the relevant period\textsuperscript{2519} – such as information on the product definition, the period and the EEA-wide scope of the infringement – which helped to prove the full period and scope of the infringement had significant value.\textsuperscript{2520}

Next, the Commission also attached importance to information that could be used to corroborate the existing evidence,\textsuperscript{2521} evidence providing further details on the anticompetitive contacts, documents explaining the context of documents collected during the inspections and, in general, information which assisted the Commission in proving the infringement.\textsuperscript{2522}

This practice is fully consistent with the more specific and clarified wording of the 2006 Notice, according to which (i) written evidence originating from the period of time to which the facts pertain, (ii) incriminating evidence directly relevant to the facts in question and (iii) compelling evidence with a high corroborative value is more valuable than (i) evidence subsequently established, (ii) indirect relevance and (iii) evidence with a low corroborative value respectively.\textsuperscript{2523}

In assessing the concrete level of reduction within the applicable band, the Commission did not depart from the approach established under the previous system. Under both the 2002 and the 2006 Notices, factors regarding (i) the time at which the evidence fulfilling the reduction conditions was submitted and (ii) the extent to which the evidence represents added value, were essential to determine the exact level of reduction. It should also be kept in mind that the extent to which the evidence represents added value logically depends on the timing of the submission. The later a company decides to apply for leniency, the smaller the chances for its contribution to have much added value.\textsuperscript{2524} Conversely, if the leniency application is submitted early, it is more likely that evidence contained therein has some added value for the Commission’s case. The Commission’s practice illustrates that when the undertaking submitted its application at a late stage in the proceedings, the Commission never granted the maximum reduction.\textsuperscript{2525} This approach makes sense


\textsuperscript{2519} See as regards the importance of submitting evidence from the relevant period e.g. Refrigeration compressors (Case COMP/39.600 — Refrigeration compressors [2012] OJ C 122/6), paras 89-93; Case COMP/39.452 — Mountings for windows and window doors [2012] OJ C 292/6, paras 531-540. In this case the second company applying for a reduction, Maco, confirmed and supplemented the information that the Commission already had and also provided evidence of various meetings in connection with markets outside of Germany. This information helped to prove that the cartel covered the whole of the EEA. However, since Maco did not submit any evidence from the relevant period on these meetings, Maco obtained a 25\% reduction.

\textsuperscript{2520} See e.g. COMP/39.406 — Marine Hoses [2009] OJ C 168/6, paras 482-483. In Marine Hoses the Commission stated that the information provided by Manuli ‘also helped it to prove that the cartel included geographic market sharing, by attributing ‘home markets’ to cartel members’.

\textsuperscript{2521} Case COMP/39.600 — Refrigeration compressors [2012] OJ C 122/6, paras 89-93.

\textsuperscript{2522} Case AT.40098 — Blocktrains [2015] OJ C 351/5, para 98.

\textsuperscript{2523} See 2006 Leniency Notice, point 25.

\textsuperscript{2524} See illustrating this aspect COMP/39.406 — Marine Hoses [2009] OJ C 168/6, paras 485-486. In this case although Manuli’s application contained important information, the Commission stressed that, nevertheless, at the time of Manuli’s application, it already had a significant amount of information to prove the main elements of the cartel.

\textsuperscript{2525} In Envelopes, Hamelin submitted detailed information on several cartel meetings which elucidated the organisation of the cartel. Still, Hamelin was granted a 25\% reduction – instead of the maximum reduction – because its leniency
as companies should cooperate as soon and as fast as possible in order to show a true spirit of cooperation. If an applicant does not show a real and genuine cooperative attitude, there is no objective reason to justify the granting of the maximum fine. On the other hand, early and prompt cooperation was positively valued. Despite the value of the timing factor, the decisions also suggest that providing significant added value at an early stage is not a guarantee to obtain the maximum reduction within a range.\textsuperscript{2526}

To determine whether to grant the maximum reduction or not, the Commission also took other relevant factors into account, such as the level of detail and the clarity of the information. While detailed new information concerning the (functioning of the) agreement was commonly useful for the Commission,\textsuperscript{2527} when the evidence remained vague and unclear, the Commission frequently lowered the reduction.\textsuperscript{2528}

Furthermore, when companies made observations or statements that in the Commission’s view rendered its task of proving the infringement more difficult, the maximum reduction was logically never granted. Such observations generally consisted in denying certain (non-essential) facts\textsuperscript{2529} or minimising a part of the applicants’ behaviour in relation to the cartel agreement.\textsuperscript{2530} Taking into account the importance and possible impact of such statements on the Commission’s ability to prove the infringement, the Commission was quite benevolent and only lowered the reductions by 10%.\textsuperscript{2531} In contrast, other cases demonstrate that the Commission is also prepared to adopt a stricter approach if necessary. This is more precisely the case when the applicant contests a fundamental part of its application came late and at an advanced stage of the Commission’s investigation. Mayer-Kuvert – the third undertaking to meet the requirements – submitted detailed information on its own involvement in the cartel. Since its leniency application was made at a late stage of the investigation, this firm was granted a 10% reduction of the fines. Case AT.39780 – Envelopes [2015] OJ C 74/5, paras 100-101. In Automotive wire harnesses, Furukawa was the first undertaking to submit evidence the Toyota and Honda infringements which represented significant added. While Furukawa’s documentation proved or corroborated the main elements of the infringements, this firm only cooperated more than one year later and after having received a request for information. As a result, Furukawa obtained a 40% reduction. Case AT.39748 – Automotive wire harnesses [2013] OJ C 283/5, paras 157-159. In Consumer detergents Unilever was granted a 25% reduction based on the quality and the timing of its application. More precisely, the Commission considered that Unilever could not obtain the maximum reduction given the important delay in its cooperation. In particular, the Unilever made its first submission only in 2009, which is more than one year after the start of the investigation. Case COMP/39.579 – Consumer detergents [2011] OJ C 193/14, paras 95-96. See further supra section 4.2.4.3 of this Chapter. In order to obtain the maximum reduction within the applicable band, other relevant factors are taken into account by the Commission. See further supra section 4.3.3.2(c) of this Chapter.

\textsuperscript{2526} See further supra section 4.2.4.3 of this Chapter. In order to obtain the maximum reduction within the applicable band, other relevant factors are taken into account by the Commission. See further supra section 4.3.3.2(c) of this Chapter.

\textsuperscript{2527} NFC, the second undertaking to meet the requirements, provided detailed new information evidencing its own participation in the single and continuous infringement but also concerning the overall framework of the cartel. Consequently, NFC obtained the maximum reduction of 30%. Case AT.39922 – Bearings [2014] OJ C 238/10, para 105.

\textsuperscript{2528} In Bearings NSK provided evidence confirming meetings as well as new information on a number of bilateral and trilateral contacts. However, some of that information remained rather vague and NSK was granted a 40% reduction of the fine. Case AT.39922 – Bearings [2014] OJ C 238/10, para 104.


\textsuperscript{2530} Ibid, paras 1129-1132.

\textsuperscript{2531} It should, however, be noted that lowering the level of reduction by 10% has a different impact on applicants depending on the reduction band applicable. It is thus not the same to lower the reduction by 10% when the applicable band is 50%-30%, than when the applicable band is 0%-20%. See illustrating this aspect Case COMP/39.437 – TV and computer monitor tubes [2013] OJ C 303/13, paras 1129-1132. In this case, the fine of Samsung was one the one hand, lowered from 50% to 40% because this firm ‘tried to minimise the extent and meaning of the information exchange’. On the other hand, in the same case ‘Technicolor's reduction as also lowered from 20% to 10% since this firm ‘claimed that the information exchange that was implemented by other cartel member did not include information regarding prices’.
involvement in the cartel, even if its participation is supported and well documented by contemporaneous documents. In these circumstances, the Commission takes the reasonable view that the applicant is not disclosing its participation in the alleged cartel – as is required by point 23 of the Notice – and therefore does not qualify for a reduction.\textsuperscript{2532}

Finally, the decisions applying the 2006 Notice showed that when the information provided by firms can only be used to establish an infringement in a period that would be subject to the limitation period for the imposition of fines, the Commission may chose not to take this cooperation into account. This approach is in line with the well-established practice according to which cooperation must be useful and help the Commission to establish and punish an infringement, in order to obtain a reduction.\textsuperscript{2533}

\section*{d. Granting a marker under the 2006 Notice}

According to the information published by the Commission in its decisions, a marker was granted in – at least – 8 cases.

In \textit{TV and computer monitor tubes} (2012), Chunghwa applied for a marker on 9 March 2007. On 23 March 2007, Chunghwa submitted an immunity application which was subsequently further complemented. On 24 September 2007, Chunghwa was granted conditional immunity for both CDT and CPT cartels.\textsuperscript{2534}

In \textit{Shrimps} (2013), Klaas Puul first approached the Commission on 13 January 2009 to express its intention to submit an application for immunity from fines in connection with a cartel in the North Sea shrimps industry. The Commission granted Klaas Puul a marker until 26 January 2009 ‘in order to allow it to gather the necessary information and evidence’.\textsuperscript{2535}

In \textit{Mushrooms} (2014), Lutèce applied for a marker for immunity on 22 December 2011. Nearly one month later, more precisely on 25 January 2012, Lutèce submitted an application for immunity from fines pursuant to point 8 of the Leniency Notice aiming at perfecting the marker. On 17 February 2012, the Commission granted conditional immunity pursuant to point 8(a) of the Leniency Notice to Lutèce.\textsuperscript{2536}

On 28 March 2013, \textit{K+N} applied for a marker under the Leniency Notice in the context of the \textit{Blocktrains} cartel (2015). On 30 April 2013, \textit{K+N} submitted an application for immunity from fines pursuant to point 8(a) of the Leniency Notice which aimed at perfecting the marker. On 7 June 2013, the Commission granted \textit{K+N} conditional immunity from fines.\textsuperscript{2537} Other cases where a marker was granted include \textit{Freight Forwarding} (2012),\textsuperscript{2538} \textit{Mountings for windows and window-
It is unfortunate that the Commission decisions contain so little information about both the initiative of companies to apply for markers and the Commission’s assessment of whether to grant it or not. In particular, the lack of information regarding the justification of the marker increases the ambiguity of the marker system from the perspective of leniency applicants. This lack of clarity may lead companies to directly submit a standard immunity application, instead of losing time preparing the necessary information to request a marker. Although it is true that the conditions to grant a marker could be further enlightened, on the other hand, this relative uncertainty does not necessarily undermine the effectiveness of the leniency programme. It should be kept in mind that companies that have participated in a cartel have a very strong incentive to apply for leniency as soon as possible and to try to obtain immunity. From the enforcement point of view, the attractiveness of this reward combined with the (enhanced) clarity of the conditions to obtain immunity under the 2006 system,

2540 Case AT.39748 — Automotive wire harnesses [2013] OJ C 283/5, para 22. This decision briefly notes that ‘[o]n […] Sumitomo applied for a marker under points 14 and 15 of the Notice on immunity from fines and reduction of fines in cartel cases (”the Leniency Notice”). The application was followed by a number of submissions consisting of oral statements and documentary evidence. The Commission, by decision of 5 February 2010, granted Sumitomo conditional immunity pursuant to point 8(a) of the Leniency Notice. On […], Furukawa applied for marker and/or immunity from fines. On 12 February 2010, it was informed by the Commission that a marker was no longer available. On […], Furukawa applied for leniency’.  
2541 In Steel abrasives the Commission does not even mention that an application for a marker was made. However, it appears from the decision that the immunity applicant applied for a marker. In particular, the decision states that ‘[b]ased on the available evidence, the contacts between Winoa, MTS and Würth continued until the date of the inspection. Therefore, the Commission considers the date of the inspection, namely 15 June 2010, as the end date of the involvement of Winoa, MTS and Würth. For Ervin, the immunity applicant, the date of the application for a marker, namely 30 March 2010, is the end date of its involvement in the cartel’. Case AT.39792 — Steel Abrasives [2014] OJ C 362/8, para 40.  
2542 Non-confidential version of the Commission decision in Case AT.39924 — Swiss Franc Interest Rate Derivatives (CHF LIBOR) [2015] OJ C 72/9, para 14. In this case, RBS applied for a marker on 9 August 2011. On 20 February 2012, the Commission granted RBS conditional immunity pursuant to point 8(a) of the Notice.  
2543 Ibid, para 15. The Commission’s decision indicates that RBS made one marker application as regards both the Bid Ask Spread Infringement and the CHF LIBOR infringement.  
2544 Case AT.39801 — Polyurethane foam [2014] OJ C 354/6, paras 29, 63 and 101. In this case Vita submitted a marker application on 30 April 2010. For this firm the end date is considered to be 30 April 2010 when it applied for a marker. As such, the Commission clearly stated that ‘[d]ue to the marker application of 30 April 2010, the duration of the infringement is limited with regard to Vita’.  
2545 Case AT.39748 — Automotive wire harnesses [2013] OJ C 283/5, para 37. In this decision the only reference made to the marker is the following: ‘Based on the available evidence, it is considered that the cartel continued until 25 July 2011, the date of the inspections by the Japanese Fair Trade Commission. On the same day, or within a few days thereafter, several participants submitted leniency applications, or applications for a marker, to the Commission. In the absence of evidence of on-going collusion after 25 July 2011, it is considered that the infringement ended for all parties on that date’ (emphasis added).  
2546 Case AT.40055 — Parking heaters [2015] OJ C 425/14, para 13. According to this decision ‘[o]n 15 November 2012, Webasto applied for a marker under the Leniency Notice in the context of the Parking Heaters cartel. According to the Commission’s decision the application was followed by a number of submissions consisting of oral statements and documentary evidence. On 11 July 2013, the Commission granted Webasto conditional immunity from fines pursuant to point 8(a) of the Leniency Notice’.  
2547 Case AT.39861 — Yen Interest Rate Derivatives [2016] OJ C 348/14, para 24. This decision states that ‘[o]n 17 December 2010, UBS applied for a marker under points 14 and 15 of the Notice on immunity from fines and reduction of fines in cartel cases (hereinafter “the Leniency Notice”). The application […]. By decision of 29 June 2011, the Commission granted UBS conditional immunity pursuant to point 8(a) of the Leniency Notice’.
suffices to trigger leniency applications and thus to discover illegal cartels. In addition, even if not much information is available, the decisions cited above show the willingness of the Commission to give companies the opportunity to use a marker and, thereby, to obtain some additional time to collect the necessary evidence to qualify for immunity. In turn, this demonstrates that companies are often capable of finding legitimate reasons that in the Commission’s view justifies granting a marker. This relatively frequent use of the marker should be seen as a positive development since, as commented above, the legitimate reasons requirement takes into account whether a company was directly involved in a cartel and thus, benefiting from the infringement. The fact that a marker is only granted when the undertaking was not directly involved in or aware of the violation may further encourage compliance.2548

With respect to the additional time obtained by firms in the context of a marker, the decisions suggest that qualifying companies have an extra period of time ranging from two weeks to approximately one month to perfect their application. Presumably, the exact amount of time will vary depending on the complexity of the case and the legitimate reasons set out by the parties that wish to obtain a marker. The information published is, however, insufficient to get a more thorough insight into this aspect.

4.3.3.3. Measuring the effectiveness of the 2006 Leniency Notice

a. The number of cartels across time

The chart below shows the number of cartel decisions2549 adopted before and after the adoption of the first Leniency Notice, in the period from 1990 to (November) 2016.

\[\text{Chart showing number of cartel decisions before and after adoption of Leniency Notice} \]

2548 See for a more detailed assessment of this aspect supra section 4.3.2.4 of this Chapter.
2549 It should be recalled that the concept of cartel should be understood as a hardcore restriction in the sense of Article 101 TFEU. See further supra Chapter 4.
As the chart illustrates, from 1990 to 1996 – id est before to the introduction of the programme – the Commission adopted a total of 18 cartel decisions. This corresponds to almost three cartel decisions per year on average. In contrast, from 1996 to 2002, the Commission was able to adopt a total of 30 cartel decisions, i.e. approximately four decisions per year, on average. In the next five years, from 2003 to 2007, the Commission adopted 28 cartel decisions, i.e. approximately five cartel decisions on average. Finally, 45 decisions were adopted between 2008 and November 2016, which makes 3 decisions per year on average.

These numbers illustrate a steady increasing trend since the adoption of the 1996 leniency system in the average number of decisions, which started slowing down after 2009. From 2008 until (November) 2016, the average number of decisions adopted by Commission diminished by nearly two decisions per annum, compared to the 2003-2007 period. This decrease in the number of detected cartels can be due to both worsened detection as well as diminished cartel birth. Given the high detection rate of the Commission’s Leniency Notice, it is certainly not excluded that the lower number of cartel decisions is the result of a general decrease in the number of cartels operating in the market. To make a more accurate assessment of the functioning of the 2006 leniency policy, one should take a closer look at cartel detection and examine the method that led the Commission to detect the existence of collusive agreements.
b. The method of detection

Since the beginning of 2008 until the end of 2016, a total of 45 cartel decisions were adopted. In these decisions, three main methods of detection were identified. These are: (i) the (2002 or 2006) Leniency Notice; (ii) investigations of the Commission, including informants and (iii) parallel procedures.


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2550 The examination of the detection method from 2003 until the end of 2007 has been conducted in the previous section (the effectiveness of the (2002) Notice).
2551 It should be taken into account that the 2002 Leniency Notice was also applied in 2009, 2010 and 2011 even if in this period the 2006 Notice was already applicable. Given the simultaneous application of both Notices, it is difficult to measure impact of the 2006 system separately by looking at the total number of cartel decisions adopted after the 2006 Leniency Notice was published.
2552 Case COMP/39.482 — Exotic Fruit (Bananas) [2012] OJ C 64/10, para 43.
2556 Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6, para 54.
2564 Case COMP/39.482 — Exotic Fruit (Bananas) [2012] OJ C 64/10, para 79. According to this decision '[o]n 8 April 2005, Chiquita applied for immunity from fines and, alternatively, a reduction of the fine under the Commission Notice on immunity from fines and reduction of fines in cartel cases, in relation to the business of distribution and marketing of imported bananas as well as pineapples and other fresh fruit in Europe. That application was registered as Case 39188 — Bananas. Chiquita was granted conditional immunity from fines on 3 May 2005 in respect of an alleged secret cartel – as described in Chiquita's submissionsices of [...] - affecting the sale of bananas and pineapples in the EEA'.

2573 Case AT.39633 — Shrimps [2014] OJ C 453/16, paras 31-32. In this case the Commission notes that ‘[o]n 14 January 2003 the National Competition Authority in the Netherlands adopted a decision based on national competition law and on Article 101 TFEU, against several firms active in the North Sea shrimps industry, […] Fines were imposed, inter alia, on Heiploeg BV, Goldfish BV, Klaas Puul & Zoon BV and L. Kok International Seafood BV. […] On 13 January 2009, Klaas Puul approached the Commission stating its intention to submit an application for immunity from fines in connection with a cartel in the North Sea shrimps industry’.

2574 The Commission's investigation started with unannounced inspections in October 2011 (see Commission, MEMO/11/711 “Commission confirms inspections in suspected cartel in the sector of Euro interest rate derivatives”). The Commission opened proceedings in March 2013. Barclays was not fined as it benefited from immunity under the Commission's 2006 Leniency Notice for revealing the existence of the cartel to the Commission. (See Commission, MEMO/11/711 “Commission confirms inspections in suspected cartel in the sector of Euro interest rate derivatives”).


2576 See Commission, Press Release IP/13/1208, “Commission fines banks € 1.49 billion for participating in cartels in the interest rate derivatives industry”.


2578 Case AT.39924 — Swiss Franc Interest Rate Derivatives (CHF LIBOR) [2015] OJ C 72/9, paras 15-16.


2580 The companies colluded through bilateral contacts that took place in the period between September 2003 and September 2005. Renesas benefitted from full immunity under the Commission’s 2006 Leniency Notice for revealing the existence of the cartel to the Commission. See Commission’s, Press Release IP14/960, “Commission fines smart card chips producers € 138 million for cartel”. This decision has not been published yet.


2583 Case AT.39922 — Bearings [2014] OJ C 238/10, para 18. Although the Automotive bearings cartel was officially revealed on the basis on the Commission’s Leniency Notice, this decision states that in July 2011 the Japanese Fair Trade Commission carried out inspections in Japan. Only after such inspections had been conducted JTEKT submitted an immunity application to the European Commission.


2588 Case AT.40028 — Alternators and Starters [2016] OJ C 137/77

2589 Commission, Press Release IP/16/2582 (“Commission fines truck producers € 2.93 billion for participating in a cartel”).
The Commission conducted inspections and discovered the existence of a cartel in 6 cases: International Removal Services (2008), Carglass (2008), E.On - GdF collusion (2009), Power Transformers (2009), Envelopes (2014) and Power exchanges (2014). Finally, the opening of the Commission’s procedures which led to a decision in Pre-stressing steel (2010) was possible due to parallel or previous procedures in other jurisdictions.

The following figure illustrates the proportion of cases detected by each of these methods, from 2008 until the end of 2016.

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2590 Some of these cartel decisions simply mention that the proceedings were opened as a result of a Commission’s inspection. It can, however, be inferred that such “spontaneous inspections” probably resulted from other sources such as (anonymous) complaints, referrals or informants. This assumption is also based on the fact that the Commission is obliged to define the subject of its inspection. See further supra Chapter 7.

2591 Case COMP/38.543 — International removal services [2009] OJ C 188/16, para 95. According to this decision ‘[t]he Commission had information that certain Belgian companies in the international removals business were party to agreements that might be caught by the prohibition in Article 81 of the Treaty’.

2592 Case COMP/39.125 — Car glass OJ [2009] C 173/13, paras 38-39. In this case, ‘[b]y letter of 7 October 2003, the Commission received information from a German lawyer, acting on behalf of an unidentified client, that carglass manufacturers had put in place certain agreements and concerted practices with a view to exchanging price and other sensitive information and allocating carglass supplies between each other for certain vehicle manufacturers and other car models. Following contacts with the Commission, the informant provided additional information by letter of 10 March 2004. On 22 and 23 February 2005, the Commission carried out inspections in Belgium, Germany, France, the United Kingdom and Italy at the premises of Saint-Gobain, Pilkington, AGC and Soliver’.


2594 Case COMP/39.129 - Power Transformers [2009] OJ C 296/21, para 39. This case arose following the Commission’s inspections in Gas Insulated Switchgear. In Power Transformers, Siemens obtained immunity on the basis of point 8(b) of the 2002 Notice.

2595 Case AT.39780 — Envelopes [2015] OJ C 74/5, para 16. In this case the Commission was able to carry out inspections under Article 20(4) of Regulation (EC) No 1/2003 thanks to the information provided by an informant regarding specific possibly anticompetitive conduct in the envelopes sector.

2596 Commission Decision of 5 March 2014 (Case AT.39952 — Power Exchanges) [2014] OJ C 334/5, para 16. This decision simply states that ‘[f]rom 7 to 9 February 2012, inspections were carried out at the premises of EPEX (France) and NPS (Finland, Norway, and Sweden). In November 2012, inspections were carried out at the premises of the power exchange […]. After the inspections at their premises, the Commission sent several requests for information to EPEX and NPS as well as to third parties, pursuant to Article 18 of Council Regulation (EC) No 1/2003. On 22 March 2013, the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against the addressees of this Decision’.

2597 Case COMP/38.344 — Pre-stressing Steel [2011] OJ C 339/7, paras 105-106. According to this decision ‘[o]n 09.01.2002, the German national competition handed over documents to the Commission concerning a court case at the German local labour court on the dismissal of Mr. (…), a former WDI employee. Mr. (…) asserted that during his employment with WDI, he had been involved in an infringement of Article 101 of the TFEU on PS. In this context, he gave an account of the undertakings involved and first information on the infringement’.
As this table illustrates, 85% of the cases were detected on the basis of the Commission’s (2002 and 2006) leniency system between 2008 and 2016. Investigations conducted on the initiative of the Commission and investigations following parallel cases in other jurisdictions, led to a decision fining a cartel in 15% of the cases. Compared to other methods of cartel detection, the Leniency Notice has a much greater detection potential.

c. The method of detection across the years

The evolution of the effectiveness of the programme, compared to other detection methods, can also be examined across time.

The detection of cartels in Europe across the years shows the (evolution of the) success of the Leniency Notice. From 2008 to 2016, the (2002 or 2006) Leniency Notice was used to detect an overwhelming majority of the cartels fined by the Commission. Furthermore, the Commission relied exclusively on the leniency system to detect cartels during five years. As for the individual impact of the 2006 Notice, the graphic illustrates that the proper functioning of the system only became apparent as from 2011. While in 2009 only 20% of the proceedings were triggered by a 2006 leniency application, in 2011, 75% of the cases were opened on the basis of a 2006 immunity
submission. After 2011, the Commission’s reliance on the 2006 Notice to discover collusive agreements has simply become undeniable.

d. The type of lenient treatment granted

Finally, (i) the granting of immunity when an undertaking enabled the Commission to carry out an inspection,2598 (ii) the granting of immunity when an undertaking enabled the Commission to find an infringement2599 and (iii) the granting of reductions to companies which provided added value to the case,2600 can be assessed individually in order to evaluate the specific type of contribution of the 2006 leniency system made to anti-cartel enforcement.

Under the 2006 programme, the Commission granted some type of lenient treatment in all 27 cases. Remarkably, immunity under point 8(a) has been granted in 26 cases to undertakings which enabled the Commission to conduct an inspection.2601 In terms of percentage, this type of immunity has been granted in 96% of the cases. In contrast, immunity on the grounds of point 8(b) has been granted only in one case when an undertaking enabled the Commission to prove the infringement.2602 This means that point 8(b) of the Notice was applied in 4% of the cases. Finally, reductions under points 25 and 26 of the 2006 Leniency Notice have been granted in 24 decisions, corresponding to almost 90% of the cases.2603

2598 2006 Leniency Notice, point 8(a).
2599 2006 Leniency Notice, point 8(b).
2600 2006 Leniency Notice, point 21.
2601 In 22 of these decisions one or more reductions were also granted under the 2006 Notice.
2602 It should be noted that this decision concerned seven separate infringements. Therefore, both types of immunity, i.e. immunity pursuant to point 8(a) and point 8(b), could be granted to different undertakings for each specific infringement. In particular, the revelation of four infringements was rewarded with immunity pursuant to point 8(a) while immunity pursuant to point 8(b) was granted for one infringement. In addition, in this case a reduction of 30% was also granted.
2603 For a concrete overview of the leniency discounts see supra Table 3.
Pursuant to point 8(a) of the Notice, the Commission only grants immunity when a company enabled it to discover a cartel and undertake a targeted inspection. The substantial application of this provision indicates that the 2006 Leniency has an outstanding detection potential. Furthermore, the detection capacity of the Commission leniency system appears to have increased following the 2006 reforms. While the Commission granted immunity under point 8(a) in 72% of the cases where the 2002 Notice was applied, under the 2006 regime this percentage has increased by 24% to 96%. This considerable increase suggests that reforms have successfully enhanced the certainty of the system, thereby encouraging undertakings to break the wall of silence (even more) often. In contrast to the 1996 system – and, to a more limited extent, the 2002 system – companies no longer wait to file an application until they discovered that the Commission is already aware of the existence of a cartel and of the main details of a case. Under the 2006 Notice, companies fully seized the opportunity of obtaining full immunity by providing the Commission with the necessary evidence to launch a targeted inspection as fast as possible. This motivation to win the immunity race cannot but enhance the effective working of the leniency system.

With respect to the application of point 8(b) of the 2006 Notice, the granting of immunity under this provision in only 4% of the cases contrasts with the overwhelming application of point 8(a). The fact that the Commission granted immunity under this provision in a much lower number of cases than under point 8(a) of the 2002 Notice is simply due to the alternative nature of both provisions. Once a company had obtained immunity under point 8(a) for an infringement, immunity under point 8(b) was no longer available. It must be observed that the number of cases in which point 8(b) has been applied under the 2006 Notice, has decreased considerably compared to the application of this provision under the previous Notice. In particular, the Commission applied point 8(b) in 14% of the cases under the 2002 system, while point 8(b) of the 2006 Notice has only been applied in 4% of the cases. Since this decrease is simply due to the unavailability of point 8(b) immunity, it should be seen as a positive development. Arguably, the reforms contained in the revised 2006 Notice encouraged early detection.

Finally, the fact that the Commission granted a reduction in 89% of the cases in which the 2006 Leniency Notice was applied indicates that, once an inspection had been conducted, companies felt major pressure to cooperate with the Commission in the investigation of the case. In addition, such cooperation was regarded by the Commission as having significant added value and was thus helpful for its investigation. This was in effect also the case under the 2002 Notice, according to which one or more companies applied for reduction in 90% of the cases, i.e. the same percentage as under the 2006 system.

4.3.4. Conclusion on the 2006 Notice

The analysis of the design of the 2006 Notice has shown that the remaining shortcomings of the 2002 Notice have been addressed. Although the essential principles of both notices remain the same, in several respects the 2006 Leniency Notice increases the general certainty and transparency of the

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2604 See supra section 4.2.5 of this Chapter.
2605 See supra section 4.1.4 of this Chapter.
2606 For an overview of all the individual discounts granted under this section, see supra Table 3. For a more detailed discussion of the advantages of a Leniency system rewarding subsequent applicant see supra section 4.1.2.2(g)(i) of this Chapter.
system. Measures such as the clarification of the conditions that must be satisfied to enable the Commission to conduct a (targeted) inspection and the additional conditions to obtain immunity, the scope of the obligation to cooperate, the clarified threshold to qualify for reductions in fines, the introduction of a marker system and the new mechanism to protect corporate statements are some important modifications that improve the functioning of the system.

The 2006 revision of the leniency programme did not only enhance the certainty of the Commission’s leniency system. As the analysis of the decisions indicates, the Commission generally applied the Notice in a straightforward and consistent manner. For example, provisional immunity has not been withdrawn and the range of applicable reductions as communicated to applicants was always respected. As a result, undertakings were clearly encouraged to come forward as soon as possible and reveal the existence of illegal cartels to the Commission.

Furthermore, the analysis of the effectiveness of the 2006 Notice indicates that the leniency system constitutes an appropriate means to detect and facilitate the task of proving complex cartel infringements. This is well illustrated by the massive detection of cartels on the basis of the leniency policy. Cartelists spontaneously came forward and blew the whistle even before the Commission had conducted inspections. The granting of immunity under point 8(a) of the 2006 Notice clearly contrasts with the application of the 1996 Notice. Firms cooperating with the Commission in the context of the 1996 system frequently cooperated once the Commission was already aware of the existence of the cartel and had launched investigations. In addition, the number of undertakings that qualified for a reduction in fines under the 2006 regime also demonstrates that subsequent applicants can bring significant added value to the Commission’s case, thereby confirming that the 2006 Leniency Notice achieved its objectives.

Despite the generally effective working of the 2006 leniency system, the analysis of the 2006 Notice (in practice) shows some inconsistencies in the interpretation of the leniency requirements. For instance, in TV and computer monitor tubes (2012), the Commission considered the fact that an individual employee disobeyed instructions or violated company policy in the assessment of the immunity conditions. By taking this aspect into account, the Commission brings some obscurity to the – until now – consistent and clear application of the leniency regime. If an individual agent is acting within the scope of his employment, the fact that the agent’s behaviour was contrary to his employer’s instructions or against the corporation’s policies does not relieve the undertaking of responsibility for it. In the same line, the undertaking remains responsible for the fulfilment of all the relevant conditions to obtain immunity. Mere efforts to satisfy the leniency conditions on the side of the firm have never been sufficient for the Commission to grant a lenient treatment. Bringing a subjective element, such as the mere willingness of a firm to cooperate, into the assessment of the leniency requirements may as such undermine the certainty and transparency of the system.

On the other hand, special attention should be given to the fact that the Commission acknowledges and even takes into account the different incentives/disincentives for individuals within a business to comply with competition law rules. This recognition only accentuates the issues and complexities inherent to the architecture of cartels. Cartel activity should be seen as a form of collusive organisation involving various individual actors whose interests are not always aligned with the interests of the undertaking. This consideration is not only essential to understand the working of cartels but should also be taken into account in the overall functioning of the enforcement system.
This reasoning applies in particular in the leniency context. Leniency programmes are intended to undermine cartel stability by modifying the incentives of cartel members and amending the interactions of the system they participate in. If the lack of alignment of the interests of an undertaking with those of individuals is disregarded in the design of the system, the foundations of the programme are intrinsically vulnerable.

**Concluding remarks**

This Chapter has analysed the evolution of the design and application of the Commission’s leniency programme.

This examination has demonstrated that the Commission has consciously sought to take economic considerations into account in the design of its leniency system. This is well illustrated by the fact that the key shortcomings (from an economic point of view) of the 1996 Notice were mainly addressed in the (revised) 2002 Notice. The Commission’s flexible and open response to the comments made by practitioners and fellow competition authorities clearly reflected its determination to make the Notice work optimally. The 2002 Leniency Notice modified and improved the approach of its predecessor with regard to a number of key aspects. The abolition of the decisive evidence test, the extension of leniency to undertakings already under investigation, the availability of upfront conditional immunity, and the clear coercer exclusion are some of the improvements that most likely encouraged more applicants to come forward. Taken as a whole, it could be stated that the 2002 revision generally succeeded in reducing the subjectivity of the 1996 system and increasing predictability and transparency for cartel participants.

Nevertheless, the (revised) 2002 Notice had some room for improvement. In particular, a number of clarifications could be made in order to enable applicants to better assess their chances to obtain immunity or a reduction in fines. Such improvements were made in the content of the 2006 revision which indeed succeeded in enhancing the transparency and certainty of the leniency system. Some of the most significant reforms concern, inter alia, the clarification of the information required to satisfy the immunity threshold, the clarification of the scope of the obligation to cooperate and of the conditions to qualify for reductions in fines. Taking a closer look to these revisions, it can be stated that the 2006 reforms could thus be seen as a codification of the Commission’s practice as well as the relevant EU case-law. In addition, by introducing a marker system, the Commission also created some room for applicant which do not possess all the evidence to meet the immunity threshold, but still wished to come forward. The fact that a marker is relatively frequently granted suggests that this system is encouraging cartel members to blow the whistle.

The analysis of the application of the conditions of the Notice by the Commission also appears to have evolved. This evolution can mainly be seen by comparing the interpretation of (the conditions to obtain) leniency under the 1996 Notice and the 2002 Notice.

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2608 See also A. RILEY, “Cartel Whistleblowing” 95. This author, however, comments that although the 2002 Notice ‘marks a radical break with the 1996 Notice […] whether it will bring about an American style uplift in the number of applicants is more questionable’. In the words of A. SWAAK AND D. J. ARP ‘[i]n the global effort to identify, punish, and deter hardcore collusion among competitors, the 2002 Leniency Notice is a welcome notable strengthening of EU enforcement policy’. C. R. A. SWAAK AND D. J. ARP, “A tempting” 17.
While the Commission interpreted some of the conditions contained in the 1996 Notice rather widely formulated and applied by the Commission. As a result, as examined above, the granting of immunity to undertakings that cooperated in the Commission’s proceedings was not the general rule. This approach changed under the revised 2002 Notice, which was far clearer as regards the conditions to obtain immunity and/or a reduction. After the 2002 revision, the Commission was able to adopt a more coherent approach concerning the implementation of the Notice. The enhanced legal certainty resulting from the revised Notice in combination with the Commission’s coherent application is clearly reflected in the number of successful immunity application submitted under the 2002 regime. The last nuances incorporated in the 2006 Notice increased even more the predictability of the system while reducing the Commission’s discretion in the interpretation of the 2006 conditions. This obviously maximizes the potential of the Commission’s leniency programme.

In the light of these considerations, it can be concluded that the Commission’s leniency regime is extremely attractive for cartel members. Furthermore, from an enforcement perspective the leniency programme fulfils a crucial role in the detection of concealed agreements and also in the collection of the information needed to establish the existence of the infringement. As the analysis above has demonstrated, without the leniency programme the current cartel detection rate would be almost unconceivable.

Although the general balance of the Commission’s leniency system is very positive, the analysis conducted in this Chapter has also shown that two specific aspects may undermine (at least to some extent) the effective working of the Notice and merit therefore further reflection.

The first aspect concerns the marker system. As examined above, the granting of a marker under the Commission’s Notice is conditional upon the fact that the marker is justified. According to the Commission’s view, this is for instance the case when the “undertaking” was not directly involved in or aware of the violation. Although the interpretation of the justification condition seemed to be rather flexible in practice, one may question the purpose and the rationale of this condition. In fact, the legitimate reasons consideration seems to add an element of fairness to the marker system. One may indeed believe that it is fairer to grant a marker when the applicant suddenly learns about the unexpected (and unwanted) existence of the cartel, than to grant it to an applicant which was already aware of and involved in the infringement. In the assessment of whether a marker is justified or not, the Commission seems to distinguish between the different (categories of) persons involved in the cartel, even if the leniency system only applies to undertakings. One may accordingly wonder who must not be aware of the existence of the cartel to obtain a marker. At the same time, this issue underlines that leniency programmes are based on economic theory, which assumes that undertakings are decision-makers behaving rationally while reality is more complex.

The second aspect concerns a different but related subject, namely the scope of the obligation to cooperate (which is applicable to individuals) while only undertaking can submit leniency applications. As commented above, undertakings bear in principle full responsibility for the actions of their employees in the context of the full cooperation obligation as contained in the 2006 leniency system. This obligation cannot be satisfied if the individuals who were involved in the infringement

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2609 See for a more detailed assessment of this aspect supra section 4.3.2.4 of this Chapter.
are not willing to cooperate. In other words, individuals have the capacity to undermine an undertaking’s leniency application.

This scenario once more underlines the (at times frequent) lack of alignment of the interests of individual cartel participants and businesses. The Commission’s practice illustrates that it is aware of this tension. By granting immunity to an undertaking when its employees do not respect the cooperation obligation, the Commission is in fact acknowledging that individuals involved in cartel have different interest that are not necessarily aligned with the undertaking’s objectives and that the undertakings cannot always be responsible for its employees’ conduct.\textsuperscript{2610} The increasing attention placed on the discrepancies or tension between undertakings’ and individuals’ interests suggests that this issue is more relevant in the European context than one may think at first sight. This conclusion is also supported by economic principles which constitute the foundation of the design of the leniency system.\textsuperscript{2611} Leniency programmes are meant to influence the incentives that rational individuals have to deviate from the cartel agreement. The assumption made in the Commission’s regime that undertakings have the same motivation as individuals may have negative far-reaching consequences and even constitute an intrinsic weakness in the design of the European system.


\textsuperscript{2611} See further supra section 1 of this Chapter.
CHAPTER 9. The European Commission’s cartel settlement procedure

The overall success of the leniency policy in Europe during the last years has resulted in a previously unforeseeable number of cartels being cracked. While the application of the leniency system simplifies the collection of information and evidence, the programme did not accommodate an expediting procedure to deal with the growing number of cartel cases. Taking into account that competition authorities have only limited resources compared to the high amount of leniency applications that they receive, it is not completely unexpected that the Commission started facing an important procedural backlog. To deal with this administrative overload and to enhance the overall effectiveness of the anti-cartel enforcement system, the Commission introduced its final cartel “settlement package” in June 2008. Basically, the settlement concept consists in a simplified and accelerated procedural scheme for cartel cases. Under the procedure, undertakings must admit their involvement in a cartel and their liability, and waive certain procedural rights. In turn, they have the advantage of an expeditious procedure and receive a fine discount.

The settlement procedure has rapidly become a valuable enforcement instrument for both undertakings and the Commission. On 20 May 2010, two years after the adoption of the Settlement

2612 See supra Chapter 8.

2613 This aspect was admitted by former Commissioner for competition N. KROES (SPEECH/05/205). See also commenting on this aspect e.g. A. RILEY, “The Modernisation”; Comments of J. JOSHUA, “Session C” 387; J. JOSHUA, “That Uncertain Feeling: The Commission's 2002 Leniency Notice” in C.-D. EHLMANN AND I. ATANASIU (eds.) European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Hart Publishing, Oxford 2007, 736 p., at 526 and 533 (hereafter: ‘J. JOSHUA, “That Uncertain Feeling”’). This author commented that ‘[w]ith no measures yet to streamline the Commission's lengthy procedures in order to ensure timely dispatch of cases, a huge backlog has built up, and even if the Commission manages by focusing resources in the new Directorate to double to ten or so the cartel decisions that emerge annually, if immunity applications continue to come in at the rate of two or so per month, by the year 2012 the stockpile of unresolved cases could have reached the hundreds’.


2615 It is interesting to comment that N. KROES initially proposed a ‘structural change within the Directorate General’ promoting a ‘simplified handling of cases’ and referred to a ‘direct settlement’ procedure. She specifically observed that if, ‘despite the efforts to improve anti-cartel enforcement, the Commission is not able to deliver swift enforcement with timely punishment, we may need to look at how some form of plea bargaining procedure could bring advantages in the context of European competition law’. N. KROES, SPEECH/05/205. In October 2006, the Commissioner stated that the first thoughts’ on the possibility of using direct settlements had been elaborated. (N. KROES, SPEECH/06/595, “Delivering on the crackdown: recent developments in the European Commission’s campaign against cartels”, speech delivered at the 10th Annual Competition Conference at the European Institute, October 2006, Fiesole (Italy)). One year later, the Commission presented a draft for public consultation (see Commission, Press Release IP/07/1608 “Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels”, October 2007, Brussels) a legislative package to introduce the new settlement procedure. It included a Draft Notice on Settlements and of a Draft Commission Regulation proposing amendments to Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 EC. Interested parties were invited to provide their comments on the proposals. A total of 48 replies to the consultation were submitted. In these contributions the settlement proposal was generally seen as a positive initiative. Moreover, suggestions were made to “improve” the system (from the contributors’ perspective). One of the specific concerns of contributors concerned the Commission’s discretion during the whole procedure. The replies are available at http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/#content

2616 See further infra section 3 of this Chapter.
Notice, the procedure was successfully tested for the first time in the DRAMs investigation.\textsuperscript{2617} Around six years after its introduction, the settlement route has been followed in an important number of cartel cases.\textsuperscript{2618} Furthermore, in some of these decisions, the Commission decided to test the limits of the system by settling “hybrid” cases, \textit{i.e.} cases in which not all parties agree to settle.

The settlement procedure has an important impact on the enforcement of the European cartel prohibition. However, the design of the system as well as its effective working in practice, have also been questioned.\textsuperscript{2619} This Chapter explores the use of settlements in anti-cartel enforcement with a special focus on the Commission’s settlement procedure. To this end, after a discussion of the reasons that led the Commission to adopt the Settlement Notice, the theoretical benefits and the (pre)conditions for an effective settlement system are discussed from the enforcement perspective. The next part explores the concept and the structure of the settlement procedure and discusses whether its design is appropriate to contribute to effective enforcement. Further, the application of the settlement procedure by the Commission and the practical lessons that can be learned from the settled cartel cases are examined. Finally, it is assessed whether the system is achieving the desired efficiency objectives.

\section*{1. Understanding the adoption of the settlement system}

The introduction of the settlement procedure was motivated by a number of reasons. From a procedural point of view cartels can (also)\textsuperscript{2620} be distinguished from other types of antitrust infringements. Cartel cases are typically long and complex from a procedural point of view. The introduction of the leniency system and the resulting increased number of detected cartels, combined with the excessive length of cartel proceedings were decisive reasons for the enactment of the procedure. Furthermore, the length of cartel proceedings does not only concern the period of investigation leading to a Commission decision, but also covers the post-decision period given the frequent appeals brought by parties before the European Courts. The adoption of a new set of rules was also necessary as the settlement system did not fit within the existing legal framework.\textsuperscript{2621 2622}


\textsuperscript{2618} See further infra section 4 of this Chapter.


\textsuperscript{2620} Chapter 4 showed that from a substantial point of view, cartels are different from other types of illegal agreement. This differentiation is related to the fact that on the one hand, they are considered restrictions by object as a rule and, on the other, they (practically) never satisfy the conditions stipulated under Article 101(3) TFEU.

\textsuperscript{2621} Commitment decisions under Article 9 of Regulation 1/2003 cannot be adopted in cartel cases. See further infra section 3.1 of this Chapter.

1.1. The “boom” of leniency applications

The introduction of a simplified procedure in cartel cases should be explained taking into account the circumstances of the period preceding the adoption of the system in 2008, and specially the impact of the popularity of the leniency system.

The attractiveness of the leniency system among undertakings is reflected in the great flow of immunity applications.²⁶²³ In its Competition Policy Newsletter of Autumn 2005, the Commission explained that since the entry into force of the Notice in February 2002 until the end of 2005, it had received 167 applications under the 2002 leniency programme. Of these applications, 87 were requests for immunity and 80 were requests for reduction in fines.²⁶²⁴ Under the 1996 Leniency Notice, which was in place for six and a half years, the Commission received over 80 leniency applications in total.²⁶²⁵

While the number of leniency applications is not, per se, indicative of the success or effectiveness of the programme in uncovering cartels or gathering evidence,²⁶²⁶ it is a fact that each application received had to be handled by the Commission. Therefore, even if applications turned out to be of no value for the Commission’s case – and the granting of some form of lenient treatment was finally rejected – the Commission still had to invest time and resources in processing the applications received.²⁶²⁷ This situation arguably had (and still has) a direct impact on the Commission’s administrative capacity, as well as on the number of inspections that the Commission is capable of undertaking each year.²⁶²⁸ ²⁶²⁹

²⁶²³ For a deep analysis of the success of the Commission’s Leniency Notice see supra Chapter 8.
²⁶²⁴ See Commission, MEMO/06/357, “Commission proposes changes to the Leniency Notice—frequently asked questions”.
²⁶²⁶ See supra Chapter 8.
²⁶²⁷ See J. JOSHUA, “Session C” 387. J. Joshua stated that ‘Olivier Guersent actually said the Commission would like to get rid of ”8(a)” applications. That is indeed what is happening in practice now. How did this change come about? We all know about the huge caseload, and for an administrative mindset, one way to address caseloads is to find administrative solutions to clear what you have already and heavy obstacles to new cases coming in, so you keep your backlog down’. While the wording of this author looks a bit exaggerated, it could indeed be argued that the revision of the immunity threshold in the 2006 leniency system was due to the fact that the Commission received too many immunity applications under point 8(a) of the 2002 system which turned out to be of limited value for the Commission’s case. The revision of the point 8(a) threshold in the 2006 system made clear that immunity applications which did not contain the information specified in the Notice, would be rejected.
²⁶²⁸ A. STEPHAN, “The Direct Settlement” 5 of the online version of this contribution. This author correctly observes that ‘the reorientation towards the ‘cartel-busting’ goal has brought many more cases to the attention of the authority than it is easily able to accommodate. The increasing burden of cartel cases is clear’.
²⁶²⁹ In fact, former Competition Commissioner Kroes acknowledged that ‘the burden of immunity applications falls heavily on the European competition authority. […] the Commission therefore risks becoming the victim of its own cartel-busting success’. N. KROES, SPEECH/05/205. N. Kroes also noted that ‘[u]nlike some other systems – that of our American colleagues, for example – there is no arrangement for simplified handling of cases in which the parties to the cartel and enforcer concur as to the nature and scope of the illegal activity undertaken and the appropriate penalty to be imposed’. See also J. RATLIFF, “Plea Bargaining in EC Anti-Cartel Enforcement- A System Change?” in C.-D. EHLMANN AND I. ATANASIU (eds.) European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Oxford, Hart Publishing, 2007, 736 p., at 598 (hereafter: J. RATLIFF, “Plea Bargaining””).
Furthermore, it was understood that in 2006, the Commission had at least 35-40 cartel investigations pending.2630 The elevated number of on-going investigations can explain inter alia that, even if the number of detected cartels had grown considerably, there was no significant increase in the number of cartel decisions concluded.2631 Only 5 final decisions were issued in 2005. The same amount of decisions were adopted in 2006. Although it could be argued that, before the application of the 1996 leniency system, 4 or 5 decisions is a normal (or even a good) average,2632 these ciphers can be disappointing taking into account the expectations created by the high detection rate and the massive application of the Leniency Notice.2633 As regards the application of the 2002 Leniency Notice, the first decision in which the 2002 system was applied dates from 20 October 2005.2634 In 2005, the 2002 Notice had only been applied in 2 decisions. By the end of 2006, the Commission had adopted infringement decisions in 6 cartel cases in which undertakings had cooperated under the 2002 Notice.2635 It is not out of order to suggest that this “lower than expected” decisional productivity is related to the diversion of resources resulting from the boom of leniency applications.2636

2630 See pointing this out J. RATLIFF, “Plea Bargaining” 598; A. STEPHAN, “The Direct Settlement” 5 of the online version of this contribution; A. SCORDAMGLA, “The new Commission settlement”.
2631 For an overview of the cartel decisions adopted since 1990 see Table 1 in section 4.1.3 of Chapter 8. J. RATLIFF, “Plea Bargaining” 598. This author points out that “Commission cartel proceedings usually take years and considerable resources, even with amnesty/leniency. The number of decisions per year is only some seven or eight. That may be no mean achievement in the circumstances (and already faster than fully contested cartels without amnesty/leniency), but clearly it is not a good result, if cases are coming in faster, creating an ever greater backlog”.
2632 See for an overview of the Commission cartel decisions adopted between 1990 and 2015 supra Tables 1, 2 and 3 in Chapter 8.
2633 As Chapter 8 showed, the three versions of the Leniency Notice have been applied in a great majority of cases.
2634 See predicting this point M. REYNOLDS AND D. ANDERSON, “Immunity” 85. These authors commented that ‘[t]he first cases investigated following Leniency Notice immunity applications in mid-2002 are only expected to reach decision stage at the end of 2005’.
2635 See further supra, Table (“Leniency 2002”). See also commenting on the number of cases in which the 2002 Leniency system was applied, Commission, MEMO/06/357; B. VAN BARLINGEN AND M. BARENNES, “The European” 6: A. STEPHAN, “The Direct Settlement” 5 of the online version of this contribution.
2636 See commenting on the effects of the unsatisfactory decisional productivity on deterrence A. STEPHAN, “The Direct Settlement” 5 of the online version of this contribution. A. STEPHAN comments that ‘any stagnation of the move to expedite the throughput of cartel cases sends out the wrong message as to enforcement and hence deterrence. See also M. REYNOLDS AND D. ANDERSON, “Immunity” 85-86. According to M. J. Reynolds and D. G. Anderson: “[t]he increased caseload under the new Leniency Notice has meant that significantly fewer cases are brought to decision stage each year, and thus the overall fine levels have decreased each year since the heights in 2001 of nearly 2 billion in total cartel fines, to only 390 million in 2004. […] fewer overall fines each year sends the wrong message, from the Commission’s point of view, on commitment to enforcement and deterrence’. Although the level of fines is not necessarily linked to the level of deterrence, it should be admitted that high amount of fines may send a clear message to undertakings and, in this sense, deter them from committing an infringement. On the other hand, A. Scordamaglia stresses the negative impact of long or delayed procedures for businesses. He observes that ‘what is at stake here is not the decisional productivity, but the per-firm length of cartel investigation, […] unless the procedure is accelerated the backlog of cases will increase exponentially, stagnating the procedural mechanism. Such a scenario would possibly infringe the general principle of ‘reasonable time’ requirement in the conduct of administrative procedures, which is of constitutional value’. In addition, he recalls that ‘exceeding the ‘reasonable time’ in issuing a decision can constitute ground for its annulment, where it has been proved that breach of that principle has adversely affected the rights of defence of the undertakings concerned. Yet, as such it does not affect the validity of the administrative procedure’. A. SCORDAMGLA, “The new Commission settlement” 65. In this same context M. J. Reynolds and D. G. Anderson note that although ‘even if [s]ometimes such delays may work to a company’s advantage, […] in other cases companies may be more willing to admit the wrongdoing, pay and move on, rather than dragging the case out over many years, including a potentially lengthy and expensive period of investigation and cooperation’ (at 85-86). This is one of the aspects that were taken into account in the design of the settlement procedure.
1.2. The procedural complexity of cartel cases

Experience shows that in a great majority of cartel cases parties often go to Court in an attempt to reduce the level of the fine imposed by the Commission. Litigation often relates to circumstances having a bearing on the amount of the fine and accountability of parent companies for their subsidiaries’ behaviour. \(^{2637}\) Undertakings do not normally deny that the anticompetitive activity took place. \(^{2638}\) Once the Commission has gathered quality evidence to prove the anti-competitive conduct, adopting cartel decisions establishing the infringement is, thus, a quite straightforward task. \(^{2639}\)

That being said, cartel cases are not only quite frequent; they are also typically longer and more complex from a procedural point of view. \(^{2640}\) The intensification of the procedural issues in the handling of cartel cases is related to the multiplicity of parties involved in the procedure and the confidentiality issues the cartel parties raise. \(^{2641}\)

In addition, it should be kept in mind that final decisions must be fully reasoned on the basis of the Commission’s analysis of the facts. \(^{2642}\) This means in practice that when the Commission intends to adopt a decision establishing a material infringement, it is obliged to investigate all the relevant substantive detail of each case. \(^{2643}\) As a result, the average cartel file numbers tens of thousand pages, \(^{2644}\) while only a few hundreds of those pages on average are actually used in evidence. \(^{2645}\)

The extreme size of cartel files complicates even more the intense screening of these files for confidentiality issues. \(^{2646}\) K. MEHTA and M. L. TIERNO CENTELLA, director for cartels and Deputy-

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\(^{2638}\) The fact that undertakings normally accept their participation in an illegal cartel is also related to the frequent application of the Leniency Notice, which indeed requires companies to acknowledge and describe their involvement in the infringement. See supra Chapter 8.

\(^{2639}\) N. KROES, SPEECH/07/722, “Assessment of and perspectives for competition policy in Europe”, delivered at Celebration of the 50 anniversary of the Treaty of Rome, November 2007, Barcelona. In contrast, in other anti-trust cases companies tend to discuss relevant substantive issues such as market definition or the balance of anti- and pro-competitive effects of the restriction of competition. Therefore, it appears easier and more probable to reach convergent views in cartel cases. This is another aspect which was considered in order to define the scope of application of the settlement procedure. See further infra section 3 of this Chapter. See for a deeper analysis F. CASTILLO DE LA TORRE, “Evidence, Proof and Judicial Review in Cartel Cases”, (32 – 4) 2009 World Competition, 505–578.


\(^{2642}\) This obligation derives from Article 296 TFEU. Unless a decision is well motivated, it runs the risk of being annulled by the Court for lack of motivation.

\(^{2643}\) N. KROES, SPEECH/05/205.

\(^{2644}\) More precisely, between around ten thousand to two hundred thousand pages.

\(^{2645}\) K. MEHTA and M. L. TIERNO CENTELLA, “EU settlement” 10 – of the online version of this contribution; see also emphasising this point N. KROES, SPEECH/05/205.

\(^{2646}\) Preparing the file for access is an intensive task that implies especially a substantive assessment of confidentiality claims. See further on this complex issue Commission, Antitrust Manual of Procedures - Internal DG Competition
Head of Unit G-2 in the Directorate General for Competition of the Commission respectively, further enlightened this aspect:

‘Preparing a whole cartel file for access to files requires screening, deciding upon the scope and justification of confidentiality claims and clearing contradicting requests by other parties for access to the documents, pages, paragraphs or data that have been claimed confidential. This exercise is done irrespective of whether those data or texts have been used at all to establish the facts, because the Commission can only select what it uses to inculpate a company, but cannot choose which evidence or information may be useful to exculpate it. Moreover, disagreements on confidentiality claims and access requests can be brought before the hearing Officer and, ultimately, be appealed separately to the General Court (Akzo procedure), irrespective of whether they are simple pieces of information which will not be used for or against a party. However, experience shows that only a few hundreds of pages in the file – at most around two thousand – are actually used in evidence in our cases (by the Commission and by the parties, in their defence). This has been established on the basis of our files of the last years, which systematically illustrate this point’. 2647

Last but not least, the fact that multiple companies are involved in a case often implies that they will request the use of multiple different languages for the procedure. 2648 The amount of time spent on translations inevitably leads to additional procedural delays. 2649

The procedural complexity of cartel cases combined with the risk of overload stressed the need for a structural change within the Directorate General. 2650 To (at least partially) solve this problem, a dedicated Cartels Directorate was created in the Competition DG in 2005. 2651 Notwithstanding this

working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012, at 128. This text is available at http://ec.europa.eu/competition/antitrust/information_en.html. See also stressing the intensive nature of confidentiality issues in the area of cartels N. KROES SPEECH/07/722; see also OECD, “Experience with Direct Settlements” 79; A. SCORDAMAGLIA, “The new Commission settlement” 63.

2647 K. MEHTA AND M. L. TIERNON CENTELLA, “EU settlement” 10 – of the online version of this contribution. These authors add that ‘[t]his tremendous effort is subject to constraints particularly exacerbated when parallel proceedings are conducted in third country jurisdictions where parties face discovery issues, when there is a great number of companies and/or languages and when the parties make unmotivated claims’.

2648 It should, however, be noted this is an essential aspect of the rights of defence of undertakings. Pursuant to Article 3(1) of Regulation 1/1958 (Regulation No 1 determining the languages to be used by the European Economic Community, [1958] OJ 17/385), the addressees of correspondence from the Commission are entitled to receive such correspondence in one of the languages of the Member State in which they are located. See further Commission, DG Competition “Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU” (2010), paras 24-29.

2649 N. KROES SPEECH/07/722; see also OECD, “Experience with Direct Settlements” 79; J. RUIZ CALZADO et al., “Rights of Defence” 434. These authors comment that translation requirements should do not justify the important delays in the procedure and argue that binding deadlines should be implemented.


2651 In April 2005 N. KROES commented that ‘[t]he risks of overload’ were the subject of one of my first discussions with Philip Lowe. After a detailed review, we reached the conclusion that structural change within the Directorate General had to be part of the solution. A dedicated cartel directorate, with three units and an experienced management team, will bring economies of scale and pool the Commission’s best anti-cartel knowledge. And I expect to see further cuts in lead times for cartel procedures. This step is necessary. We are putting our house in order to implement and manage a lasting deterrence strategy. But alone it is probably not enough to guarantee that the Commission remains in the driving seat for cracking down on cartels’. N. KROES, SPEECH/05/205. More recently, in 2008, it has been estimated that approximately 35-40% of the Commission’s resources for the field of competition is dedicated to the fight against cartels. D. WAELBROECK, “Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?” GCLC Working Paper 01/08 2008, at 33; A. SCORDAMAGLIA, “The new Commission settlement” 64.
reform, the room for considerable improvement in terms of procedural savings in cartel cases confirmed that further initiatives were necessary.2652

1.3. Frequency of cartel appeals

The methodology employed by the Commission to calculate fines has never been an exact science. Although the Commission is limited by the objective criteria set out in Regulation 1/2003 – as developed in the 2006 Fining Guidelines – and must justify any departure from this methodology,2653 the Commission’s margin of appreciation in setting fines remains considerable.2654 The existence of this margin of discretion, as such, inevitably motivates the companies that have been fined in a competition law procedure to appeal the Commission’s decision and, by doing so, try to reduce their fine.2655 In addition, the continuous rise in the number of cartel cases resulting, among others, from the effectiveness of the leniency programme, logically implies that the number of appeals also grows. On average, it is estimated one cartel decision triggers 3 to 4 appeal cases.2656 2657

The high inclination of firms to challenge Commission decisions seems to be partly due to the fairly rewarding nature of appeal procedures. Based on an study of 42 fully reported decisions imposing fines on 56 price-fixing cartels involving 306 companies, over the period 1998 to January 2009, C. Veljanovski, reports that: (i) Commission decisions fining cartels were appealed in 93% of the cases (that is in 52 out of 56 cartels) by one or more undertakings, (ii) the fining decisions that were challenged in the European courts represented 99% of all fines, totalling €7.9 billion; (iii) in 63% –

2652 As regards procedural overload A. Scordamaglia notes that two different alternatives may alleviate this problem. One possible solution consists in encouraging decentralisation. In his view: ‘[d]ecentralisation of cartel enforcement would produce procedural efficiencies gained through delegation of cases to NCAs’. […] It is, however, rather confusing that this author also comments that ‘in an ideal world, the Commission would deal with every [leniency] application… Otherwise we might leave applicants in a situation of uncertainty, trying to second guess whether, and when, to rush to file separate applications with those national competition authorities which offer national immunity programmes’ (A. SCORDAMAGLIA, “The New Commission settlement” 64). The concept of decentralisation implies as such that the Commission does not deal with all the leniency applications that it receives. Arguably, in a more ideal decentralised word, binding rules would exist for case allocation. Since the ECN work sharing system is based on the principle of flexibility, it is accepted that cartel members considering to apply for leniency will necessarily need to identify the authority or authorities to which its application should be made. To this end, in the EU context, the applicant should, in principle: (i) identify the authorities which have competence to impose sanctions within the territory affected by the infringement, and (ii) decide which of the authorities with jurisdiction over the case is most likely to deal with it. This second step should be done considering the principles of case allocation as set out in the ECN notice. Based on these principles, a firm may need to consider applying for leniency to a maximum of four NCAs within the ECN, including the Commission.


2654 Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 Tokai Carbon and Others v Commission [2004] ECR II-1181, para 216. See more recently, Judgment of the General Court of 12 December 2012, Case T-392/09, I garantovaná a.s. v Commission, para 112. This case was recently confirmed by the ECJ in Judgment of the Court of 15 May 2014, Case C-90/13 P I garantovaná a.s. v Commission.

2655 See A. Stephan, “The Direct Settlement” 5-6 of the online version of this contribution.

2656 N. Kroes, Speech/05/205. The precise number of appeals triggered by a cartel case depends, however, on the number of cartel participants. See also F. Smuda, P. G. Bougette and K. Hüscherth, “Determinants of the Duration of European Appellate Court Proceedings in Cartel Cases”, ZEW - Centre for European Economic Research Discussion Paper No. 14-062, (September 1, 2014), available at http://ssrn.com/abstract=2492942. According to these authors in the period from 2000 to 2004, 86 of the undertakings that participated in the cartel appealed the Commission decision. In the period from 2005 to 2009, this percentage increased considerably to 86% of appeals.

2657 This aspect is analysed in more detail in Chapter. It should be noted that since this discussion is meant to enlighten the reasons underlying the introduction of the European settlement procedure in 2008, the sources and literature analysed mainly date from the period preceding the publication of the system.
Given the fruitful results that can be achieved by challenging infringement decisions, appeals have remained a common path for cartel participants. Frequent appeals consume a substantial amount of the Commission’s valuable but, at the same time, limited resources. Considering the frequency, on the one hand, and the resources required for legal defense, on the other, it is understandable that the Commission sees the need to defend its fining decisions in appeal cases as ‘an ongoing and implicit part of the process and needs to be planned for in terms of resources’. This established and costly propensity to appeal has no positive value for anti-cartel enforcement.

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2658 The fruitful appeals concerned fines of nearly €2.5 billion which were lowered to €2.0 billion. That is 8.9% in aggregate.
2660 It should be noted that 20 appeals were still pending.
2662 In this version of this study C. VELJANOVSKI does not refer to the average fine discount. In a previous version of this paper he calculates that during the period 1996-2005 fines were reduced by an average of 18% on appeal to the European Courts. See C. VELJANOVSKI, “Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission”, 2006 (27) ECLR, 510-513, at 512. A. STEPHAN also provides his own estimation of cartel fines reductions. He comments that during the period 1996-2005, the reductions are close to 20 per cent on average. However, according to him, since the adoption of the leniency system by the Commission, fine reductions are lower. In contrast, in period previous to leniency (1975-1995), he quantified the average reduction at 49.3%. A. STEPHAN, “The Direct Settlement” 5-6.

2664 In this context it is also noted that the frequent appeals, have led to considerable delays. Of 50 rulings of the General Court delivered between 2003 and 2006 the average length of appeal was 3.5 years. Hence, rulings average three years. Undertakings normally have a 3 month period upon the delivery of a Commission decision, to either pay the fine or submit a bank guarantee, if they decide to challenge the decision, until the appeal is complete). A. Stephan highlights the negative effects that frequent appeals and the consequent delays may have for companies. More specifically, he states that for the firms involved, the cumbersome, costly and time-consuming process – that of waiting years for the Commission to reach a decision before learning the exact level of fine incurred, appealing to the CFI and waiting years for a ruling, and then possibly applying to the ECJ if unsuccessful and waiting even longer for a second ruling – is surely detrimental to cartel enforcement in Europe’. A. STEPHAN, “The Direct Settlement” 7 of the online version of this contribution; see also A. SCORDAMAGLIA, “The new Commission settlement” 66.
2665 N. KROES, SPEECH/05/205.
2666 In particular, it has been argued that the lack of positive impact is related to the fact that while fines are regularly reduced in appeal, they have never been increased to a higher level than the one adopted by the Commission. A. STEPHAN, “The Direct Settlement” 8 of the online version of this contribution. It is true that the Courts usually do not go beyond the Commission fine, even where the undertaking loses the appeal. However, a couple of cases have demonstrated that this risk exists. For instance, in BASF, the General Court increased the appellant’s fine because it applied essentially the same methodology as the Commission, but disagreed with the Commission finding that the European and the global cartel agreements were part of the same infringement (See CFI 12 December 2007, Joined cases T-101/05 and T-111/05, BASF AG and UCB SA v Commission [2007] ECR II-4949). In SGL Carbon, the ECJ also imposed a higher fine on SGL Carbon for its participation in the Graphite Electrodes cartel by annulling part of the leniency reduction granted by the General Court (in this case both the Commission and SGL Carbon appealed the judgment of the General Court. More precisely, while the original fine imposed by the Commission of €80 million was reduced by the General Court to €69 million, the Court re-increased the fine imposed on SGL Carbon to €75.7 million. (Case C-301/04 P, Commission v SGL Carbon AG [2006] ECR I-5915); see also Commission, MEMO/06/258, “Competition: Commission welcomes judgments of the Court of Justice in SGL Carbon and Showa. Denko Cases”. See commenting on the risk of losing an appeal P. D. CAMESASCA, J. YSEWYN, T. WECK, AND B. BOWMAN, “Cartel Appeals...
2. Theoretical benefits of the settlement procedure and (pre)conditions for the success of the system

The discussion above suggests that reaching an understanding with cartel participants, on both the extent of the illegal behaviour and appropriate sanctions, can be considerably beneficial for competition authorities.2665 In particular, the introduction of settlements2666 into the European enforcement system can contribute to effective enforcement in two different ways. Firstly, by enabling the Commission to speed up the handling of cases and, secondly, by making it possible to avoid the cost and resource commitment linked to allowing full access to the file, translation work, conducting hearings, preparing formal decisions and defending them before the European Courts.2667 Beyond the enforcement gains related to speedy procedures and lower costs, settlements can deliver other additional less obvious benefits. When competition authorities are capable of deciding cartel cases more swiftly, the infringement is brought to an end more rapidly, which curbs enduring overcharges. A shorter time distance between the infringement and the punishment also appears to enhance the deterrent effects of the punishment.2668 Furthermore, if less resources are needed – and expenses are reduced in the context of a shorter streamlined procedure – more illegal agreements can be detected and handled.2669 In turn, additional cartel detection may also stimulate follow-on cases, and hereby, private enforcement.2670 The fact that companies have to compensate the cartel victims in the context of private damage actions enhances at the same time overall deterrence. Last

to the Court of Justice: The Song of the Sirens?, 2013 (4-3) *Journal of European Competition Law & Practice*, 215-223, at 222.
2665 See also A. STEPHAN, “The Direct Settlement” 8 of the online version of this contribution.
2666 At this stage of the discussion, the concept of settlement should be understood as a simplified and accelerated procedural scheme for cartel cases. Under the procedure, undertakings must admit their involvement in a cartel and their liability, and waive certain procedural rights. In turn, they have the advantage of an expeditious procedure and receive a fine discount. See supra section 1 of this Chapter.
See A. STEPHAN, “The Direct Settlement” 8 of the online version of this contribution; J. JOSHUA AND P. CAMESASCAL, “Where Angels Fear” 14; A. SCORDAMAGLIA, “The new Commission settlement” 62. This author comments that ‘[t]he rationale behind the introduction of an expedited settlement procedure lays on the premise that, handling more cases with the same resources leads to higher productivity in terms of decision delivery’. M. MARQUIS, “Settling cartel investigations in the EU and its Member States”, March 2012, at 3, available at http://ssrn.com/abstract=2070190, (hereafter: ‘M. MARQUIS, “Settling cartel”’) M. Marquis stresses that ‘the benefits of a cartel settlement may include the mutual savings enjoyed by the Commission and by the undertakings concerned (money, time, managerial distraction, costly advice, etc.)’.
2668 W. WILS, “The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles”, 2008 (31-3) *World Competition*, 335–352, also available at https://ssrn.com/abstract=1135627, at page 12 of the online version of this article (hereafter: ‘W. WILS, “The Use of Settlements”’). On the difficulties for deterrence resulting from the passage of time between the infringement and the punishment, see W. WILS, *The Optimal*, section 8.4.2.3. See also A. STEPHAN, “The Direct Settlement” 8 of the online version of this contribution. In this regard A. STEPHAN comments that ‘settlements would in principle allow taxpayers money to be used a lot more effectively in dealing with cartel infringements; enhancing deterrence as timely punishment is delivered to more cartels. The costs of lengthy trials are a welfare loss to society and their avoidance should be favoured if that does not compromise the effectiveness of cartel enforcement and deterrence’. The negative impact of settlements on cartel enforcement is discussed below.
2669 This aspect is stressed in the Settlement Notice. Particularly Recital 1 provides that ‘the settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence’. See also W. WILS, “The Use of Settlements” 12 of the online version of this article; M. MARQUIS, “Settling cartel” 5.
2670 M. MARQUIS, “Settling cartel” 5.
but not least, an increased risk of detection and, thus, greater punishment chances may promote self-reporting and motivate compliance.\textsuperscript{2671}

From an enforcement perspective it can thus be concluded that cartel settlements are generally desirable. Nevertheless, having a settlement system in place does not imply as such that cartel participants will use it.\textsuperscript{2672} The theoretical enforcement benefits deriving from settlements can only be achieved in practice if companies are (frequently) willing to settle. Reasonably, undertakings will only be prepared to do so if the benefits of entering into a settlement outweigh the benefits of fully contesting the case.\textsuperscript{2673}

Two different types of benefits can be distinguished for companies which correspond either to enforcement efficiencies or enforcement losses for the competition authority.\textsuperscript{2674} First, just like competition authorities, settling cartel participants can also avoid some of the high legal costs related to a full procedure and a potential appeal (\textit{i.e.} legal costs, management time, etc…).\textsuperscript{2675} In addition, they may also benefit from an expedited resolution of the case.\textsuperscript{2676} Companies will be able to move on and focus on their business (instead of expensive litigation) sooner when their case is definitely decided.\textsuperscript{2677} Settlements entered into by companies only to obtain this type of benefits unmistakably contribute to effective enforcement as such benefits correspond to enforcement efficiencies for the competition authorities.\textsuperscript{2678} Taking into account that firms will only settle when it is in their best interest, it is possible that such advantages do not motivate companies sufficiently to agree to settle. Therefore, additional incentives or benefits may thus be needed in order to induce companies to follow the settlement path.\textsuperscript{2679} However, this second type of benefits for companies such as lower penalties, lesser or no findings of infringement correspond directly to enforcement losses for the competition authority and have, therefore, a negative impact on effective enforcement and

\textsuperscript{2671} ICN, Cartel Working Group, “Cartel Settlements”, Kyoto Report, April 2008, at p. 10, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf (hereafter: ‘ICN, “Cartel Settlements”’). This report explains that ‘the benefits do not end with the investigation that is resolved through a settlement – not only are resources freed to investigate other cartels, but the swift prosecution of more cases leads to an increased fear of detection, resulting in future self-reporting and ultimately increased deterrence.’ This aspect is further elucidated by M. MARQUIS, who states that ‘to the extent that actual or prospective cartelists act rationally (not so all the time), the knowledge of an increased risk of detection and sanctions may promote incrementally higher rates of self-reporting and additional compliance. Thus, beyond the efficiencies to be gained from less resource-intensive investigations and fewer appeals, cartel settlements can also ideally produce (net) positive spillover effects, some of which may feed back into further opportunities for settlements (potentially creating a self-reinforcing dynamic’). M. MARQUIS, “Settling cartel” 5.
\textsuperscript{2672} ICN, “Cartel Settlements” 8.
\textsuperscript{2673} See also ICN, “Cartel Settlements” 9; W. WILS, “The Use of Settlements” 12 of the online version of this article.
\textsuperscript{2674} W. WILS, “The Use of Settlements” 12 of the online version of this article.
\textsuperscript{2675} See also M. MARQUIS, “Settling cartel” 3; W. WILS, “The Use of Settlements” 12 of the online version of this article.
\textsuperscript{2676} The interest of companies in an early outcome is related to the length of the proceedings. The ICN Kyoto Report points out that ‘[c]orporations and their executivies who participate in cartels can rapidly resolve their liability through settlements. The swift imposition of justice allows corporations and their executives to put cartel conduct behind them and attempt to move the company forward as a competitive participant in an industry free of collusion. Enforcers in jurisdictions where charges cannot be resolved through settlements may face substantially prolonged investigations and prosecutions, resulting in inevitable backlog. Similarly, without the opportunity for settlements, cartel participants wishing to resolve potential charges could face years of waiting, as could potential victims awaiting damages, while the government completes its investigation and prepares its case’. ICN, “Cartel Settlements” 9-10. See also W. WILS, “The Use of Settlements” 12 of the online version of this article.
\textsuperscript{2678} W. WILS, “The Use of Settlements” 12-13 of the online version of this article.
\textsuperscript{2679} Ibid, 12-13 of the online version of this article.
deterrence. This complex situation stresses the need for competition authorities to strike the key balance between offering sufficient incentives to induce firms to settle, while imposing sanctions that send a deterrent message.  

In enforcement terms, settlements will only be appropriate when the negative impact resulting from penalty discounts is offset by the benefits related to cost, time and resource savings. The larger the reduction of the fine, the more difficult it will be to compensate the enforcement losses. As regards the Commission’s settlement procedure in cartel cases, a fix fine discount of 10% is systematically granted to companies which follow this procedural route. This means the settlement procedure will be an appropriate enforcement mechanism if the costs and resources saved thanks to system surpass the negative impact on deterrence resulting from the 10% reduction in fines. In this regard, W. WILS has identified a number of (pre)conditions that ensure that the enforcement gains from settlements surpass the enforcement losses.

First, companies should not be provided with a “right to settle”. Some discretion should be given to competition authorities to screen cases and, consequently, decide whether a certain case qualifies to be settled in the light of the specific circumstances. By retaining this margin of appreciation competition authorities can restrict settlements to cases where the enforcement gains compensate losses.

Second, the competition authority must have a strong reputation when it comes to handling cases successfully under the normal procedure. The settlement procedure will work properly – even when the settlement discount is modest – if companies are certain that the Commission is capable of winning contested cases.

Next, prior to any considerations as regards the settlement of a case, the competition authority should have conducted a full investigation of the case and establish all the relevant facts. If a case is settled at a too early stage of the investigation, there is a risk that competition authorities are not completely...
aware of the full extent and seriousness of the infringement. In this scenario, the settlement reward may be unjustified.2687

Finally, W. WILS observes that it may be useful to assess the working of settlement systems in order to confirm that the necessary enforcement gains that justify their use are obtained. The analysis of the Commission’s settlement procedure in the next part will also clarify whether the requirements for an effective settlement regime are present in the Commission’s system.

3. Key concept of the Commission’s settlement system

The settlement procedure provides a streamlined version of the existing procedure for cartel cases. The system is suitable for companies who are convinced of the strength of the Commission’s case in view of the evidence gathered during the investigation and are, as a consequence, willing to acknowledge their involvement in an infringement and accept their liability. As such, they do wave the rights to full access to file and a hearing but, in exchange, they have the advantage of an expeditious procedure and receive a 10% fine reduction.2688

The settlement procedure is exclusively reserved for cartel cases. This specific scope of application is related to two different factors. First, the frequency, length and procedural complexity of cartel cases suggests that there is a substantial scope for procedural savings. Secondly, as a general rule cartel participants do not tend to dispute highly complex issues such as proof of intent, market definition or the pro- or anti-competitive effects of the conduct. It is, thus, more likely to reach quickly a common understanding in these cases.2689

In the light of these circumstances, the settlement procedure was designed to alleviate some of the Commission’s administrative burdens and speed up the cartel decision making process.2690 The shortening of the final part of the regular procedure for cartels made this possible. More specifically, the settlement system bypasses the full access to file, written response and oral hearing stages that usually follow the issue of a Statement of Objections, and – even – allows for the use of a shortened version of the Statement of Objections.2691 Given this particular structure, the procedure gives the Commission the opportunity to handle more cases with the same resources.2692 In addition, the system is likely to reduce the number of appeals to the European Courts in cartel cases.2693

Settlements are based on Articles 7 and 23 of Regulation 1/2003, which constitute the legal basis for all Commission decisions fining a cartel. This means that the Commission will in any event

2687 While W. WILS indeed observes the need for the competition authority concerned to have conducted a previous investigation, he has a slightly different view as regards the granting of a discount. According to him, if a previous full investigation would not be conducted, the settlement reward might be too large. This view appears correct when settlements rewards are not a fix percentage. However, in the case of the Commission’s settlement procedure, the 10% reduction is in any instance proportional to the fine to be imposed by the Commission. If the whole scope of the actual infringement has not been established, the fine will be lower and, accordingly, the settlement reward too.

2688 See in this line Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 61. See further infra section 3.1 of this Chapter.

2689 See supra section 1 of this Chapter.

2690 N. KROES, SPEECH/05/205.

2691 See further infra section 3.1 of this Chapter.

2692 See Recital 4, Commission Regulation 322/2008.

2693 Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 60. This aspect is discussed in more detail below.
establish the infringement and impose a fine. The difference is that the new Article 10a of Commission Regulation 773/2004 and Notice on the conduct of settlement procedures in cartel cases provide for a specific procedure. As the ECJ judgment in Alrosa confirms, settlements are thus different from commitment decisions adopted under Article 9 of Regulation 1/2003. Commitment decisions do not formally establish the existence of an infringement; they bring a suspect behaviour to an end by imposing on companies the commitments offered to meet the Commission concerns. Given the important need in cartel cases to establish the infringement and impose dissuasive sanctions, commitments decisions are not appropriate for cartels.

3.1. Structure of the procedure

The logic behind the settlement system differs considerably from the one behind the standard procedure. The whole point of the procedure is to reach a ‘common understanding’ between the settling parties and the Commission on the facts and qualification of a case. Still, the Commission will only start the settlement procedure after a meticulous investigation of the case, i.e. once it has collected sufficient intelligence and evidence to pursue the case under the standard procedure with the adoption of a full Statement of Objections. This approach is adequate from an enforcement perspective as it allows to establish all the elements of the infringement before offering a (potentially unjustified) settlements reward.

When the Commission considers the case suitable for settlement, it invites all cartel participants to indicate whether they envisage engaging in settlement discussions. Companies may then confirm their interest in exploring the possibility of a settlement. There is no obligation on the Commission, however, to offer settlement discussions. It decides on a fully discretionary basis whether a particular

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2694 In this case the Court held that ‘[u]nlike Article 7 of Regulation No 1/2003, which allows the Commission to establish the existence of an infringement, to order the parties concerned to bring it to an end and to impose on them any structural or behavioural remedy, including the cessation of trading relations which are contrary to the Community competition rules, Article 9 of that regulation provides that the Commission, without making a finding of infringement, may establish that there is no need for further action since the undertakings concerned have voluntarily offered commitments which meet its competition concerns’. Case C-441/07 P, Commission v Alrosa Company Ltd [2010] ECR I-5949, para 77.

2695 According to Recital 13 of Regulation 1/2003, commitments are to be adopted ‘without concluding whether or not there has been or still is an infringement’.

2698 See also F. Laina and E. Laurinen, “The Use of Settlements” page 8 of the online version of this article.

2697 Article 10a(1) of Regulation 773/2004 (as amended by Regulation 622/2008); paras 8–13 of the Settlement Notice; Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 63. In this context M. Schinkel comments that “[T]ypically, the Commission makes the first move in deciding whether or not to start talks. If so, it assesses whether the alleged cartel members are interested in participating. All of these assessments are informal at first”. M. P. Schinkel, “Bargaining” 470.
cartel case is suitable for settlement.\textsuperscript{2701} In taking the decision the Commission will consider the likelihood of reaching a ‘common understanding’ on the scope of the potential objections. It will further take into account the number of parties involved and the possibility of conflicting positions on liability or contestations on the facts.\textsuperscript{2702} If the case is deemed suitable for settlement, the Commission will give the parties at least two weeks to indicate their willingness to engage in settlement discussions.\textsuperscript{2703} The discretion to select cases that are possibly suitable for settlement enables the Commission to follow this route only when the features of the case indicate that procedural efficiencies will be obtained. By doing so the Commission saves time as unsuitable cases are detected and discarded at an early stage of the procedure.\textsuperscript{2704} The Commission’s margin of appreciation constitutes in this sense a key condition to ensure the appropriateness of the system to enhance effectiveness and deterrence.

Once the Commission has received an indication of the parties’ interest to engage in such discussions,\textsuperscript{2705} bilateral dialogues will start.\textsuperscript{2706} During the settlement discussions the firms can assess the most important aspects of the case including the facts, the classification of those facts, the duration and gravity of the cartel, the attribution of liability, range of likely fines and the relevant supporting evidence. Each candidate may state its views on such aspects.\textsuperscript{2707} In the course of this procedure, parties do not have the opportunity to actually “negotiate” with the Commission on the existence of an infringement, the level of the likely fine or the use of evidence.\textsuperscript{2708} Still, since they are heard, they may be able to counter the Commission’s objections through argument.\textsuperscript{2709} Throughout the discussions the Commission does not provide full access to the file, but parties are granted access to the key documentary evidence on which the Commission has based its allegations.\textsuperscript{2710} Accessible versions of documents, other than evidence, listed in the case file may

\textsuperscript{2701} See Regulation 622/2008, recital 4 and Settlement Notice, para 5. It is indeed recognized that the ‘Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties’ interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle’.

\textsuperscript{2702} Regulation 622/2008, recital 4; Settlement Notice, para 5. Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v v, para 64.

\textsuperscript{2703} Article 17 of Regulation 773/2004 (as amended by Regulation 622/2008); Settlement Notice, para 9.

\textsuperscript{2704} See also F. LAINA and E. LAURINEN, “The EU Cartel Settlement” 6 of the online version of this article.

\textsuperscript{2705} In practice, an undertaking agrees to take part in settlement discussions by issuing a written declaration. This document does not mean that it admits having participated in any infringement or that it accepts liability for such infringement (Settlements Notice, point 11; Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 66).

\textsuperscript{2706} Article 10a(1) of Regulation 773/2004 (as amended by Regulation 622/2008); Settlement Notice, paras 11-12. Where proceedings are initiated against relevant parties within the same undertaking, they must appoint a joint representation to engage in discussions with the Commission on their behalf, without prejudice as to their individual responsibility.

\textsuperscript{2707} Article 10a(2) of Regulation 773/2004 (as amended by Regulation 622/2008); Settlement Notice, para 16.

\textsuperscript{2708} Settlement Notice, para 2. See also Commission, Press Release IP/08/1056, and Commission, MEMO/08/458 (30 June 2008; F. LAINA and E. LAURINEN, “The EU Cartel Settlement” 7 of the online version of this article. In this sense the EU’s settlement procedure is not conceived as involving negotiation or US-style plea bargaining. Under the US system of ‘plea bargains’ firms can negotiate the exact fine they will face whereas in Europe they will only learn this when the Commission delivers its final decision. See further S. D. HAMMOND, SPEECH/219332 “The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for all”, delivered before the OECD Competition Committee, Working Party No. 3, (October 2006), available at http://www.usdoj.gov/atr/public/speeches/219332.pdf.

\textsuperscript{2709} N. KROES SPEECH/07/722.

\textsuperscript{2710} If these dialogues are to succeed in practice, not only the Commission but also the undertakings (including their boards and legal advisers) should be completely involved in the process. In this context it has been submitted that firms should invest sufficient resources in the process and consider it a priority. This can be done, for instance, by involving the relevant managers in the settlement meetings. Moreover, since the procedure is mainly based on oral communication and bilateral discussions between the Commission and each firm, sufficient trust and open communication is necessary for settlements to work properly. Cartel parties should also have a detailed knowledge of the case in question, to be
also be disclosed upon reasoned request, although the Commission retains discretionary power to decide on this point.\textsuperscript{2711} The most important efficiency gains are obtained in the context of these bilateral settlement discussions (instead of an oral hearing) and restricted access to the file as well as the reduction of translations.\textsuperscript{2712,2713} In practice, the bilateral discussions consist in three rounds. In the first round the Commission presents the key evidence of the illegal behaviour. Parties are also granted limited access to the case file at the Commission premises. In the second round, the Commission provides the parties with arguments and observations. In order to reach a common understanding, oral discussions normally take place. In round three, the range of likely fines is disclosed and the time limit for to submit the formal written submissions is established.\textsuperscript{2714}

If the discussions are successful the Commission will set a time-limit of 15 days for the settling companies to present a formal settlement submission either in writing or orally.\textsuperscript{2715} This submission is binding on the undertakings (but not on the Commission) and must be given in accordance with a pre-defined template. In the context of these submissions, it is of particular importance that the undertaking clearly acknowledges its liability for the infringement as described in the main facts. Firms must also accept the range of likely fines envisaged by the Commission, and agree not to challenge the Commission’s finding of infringement during the settlement procedure. Further, they waive their rights to access the file and to an oral hearing. The submission also specifies that the undertaking accepts receiving the decision in an agreed language.\textsuperscript{2716} If the settlement discussions have not led to a consensus on the allegations a full Statement of Objections will be issued and the ‘normal’ procedure will become applicable.\textsuperscript{2717}

Arguably, it may appear unfair that the settlement submissions are not binding on the Commission. The fact that an undertaking presents a settlement submission is an indication of its complete adherence to the procedure. Still, even if an oral understanding has been reached between the Commission and each firm, there is always a risk that one or more participants ultimately decide not to settle their case. Although this is in principle quite unlikely, the risk logically increases in cases involving a high number of parties. If this occurs, the Commission must be able to reassess whether the case may still be worth settling in terms of efficiency savings. The non-binding nature of the settlement submission on the Commission is, therefore, meant to ensure the effectiveness of the

\textsuperscript{2711} Article 10a(2) of Regulation 773/2004 (as amended by Regulation 622/2008); Settlement Notice, para 16.
\textsuperscript{2713} Under ordinary (non-settlement) procedure, the parties are granted access to the file and they respond in writing to the statement of objections. The parties may also request an oral hearing, presided over by a Hearing Office. (The role of the Hearing Officer is provided for in Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29). Then, after having consulted the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission issues a fully substantiated prohibition decision. This decision can be appealed (see Article 31 of Regulation 1/2003).
\textsuperscript{2714} See A.-L. HINDS, “All settled” 293.
\textsuperscript{2715} Settlement Notice, para 17.
\textsuperscript{2716} Settlement Notice, paras 20 to 22.
\textsuperscript{2717} In this context, the General Court has pointed out that the settlement procedure is a voluntary procedure and, therefore, undertakings are perfectly entitled discontinue the settlement discussions. This aspect has indeed been confirmed by the General Court. See Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 76.
system. If all the companies involved in the case confirm their submission, there is no reason for the Commission not to endorse them. Still, if this occurs, the general provisions of Regulation No 773/2004 in particular, Article 10(2) (reply to the statement of objections), Article 12(1) (oral hearing), and Article 15(1) (access to the file) will be applicable, instead of those regulating the settlement procedure.2718

When the Commission endorses the settlement submission it issues a shortened SO in line with the acknowledgements made by the settling firms in their submissions, to which the defendant replies simply by confirming that the SO reflects the content of their submission.2719 Once again, if they fail to do so, the Commission will revert to the standard procedure and issue a full SO. Similarly, if the Commission wishes to depart from the settlement submissions, it must send a new SO, following the ordinary procedure.2720 If this happens, the submissions have to be withdrawn and cannot be used in evidence.2721

To conclude, the Commission will adopt a final decision with a settlement 10% award in line with the acknowledgements made by the settling companies in their submissions.2722 These decisions are significantly shorter in length than their equivalents in a regular case.

The Settlement Notice also specifies that, as all Commission’s infringement decisions, settlement decisions are subject to the judicial review by the EU Courts.2723 However, it is reasonable to assume that appeals will be less frequent because the settling companies have voluntarily acknowledged an infringement and their liability, have accepted the key facts and the range of fines, and have confirmed that they have been satisfactorily informed of the Commission’s objections and that their rights of defence have been upheld.2724

3.2. The relationship between settlements and leniency

Settlements and leniency are separate but complementary tools in the Commission’s enforcement arsenal, intended to serve different aims.2725 While leniency is an investigative instrument that helps the Commission to detect and establish the existence of cartel infringements, the purpose of settlements is to simplify and expedite cartel proceedings while resources and enforcement costs are being saved.2726 This separation between leniency and settlements is, among other factors, illustrated

2718 See Settlement Notice, paras 19, 27 and 29.
2719 Settlement Notice, para 26.
2720 This follows from the non-binding nature of the settlement submissions on the Commission.
2721 See Settlement Notice, para 27. To date (27/10) this situation has, however, not occurred in practice.
2722 Settlement Notice, para 28.
2723 See notice on the conduct of settlement procedures in cartel cases, last paragraph.
2724 See further infra section 4 of this Chapter.
2725 See e.g. K. MEHTA AND M. L. TIENGO CENTELLA, “EU settlement” 15-16; F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 9-10 of the online version of this article.
2726 See stressing this point Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 54. The distinction between settlements and leniency in Europe contrasts with the US-system, where plea-bargains are effected in the framework of the leniency programme. Plea-bargains have been used in the US as a mean to collect evidence, as the US Leniency Programme covers immunity for first-in applicants only. This function is performed in the EU through the Leniency Notice, which covers fine reductions in exchange for evidence also for second and third applicants. This distinction explains why, in the US, plea-bargains take place during the investigation phase, whereas in the EU, they occur after the Commission has collected the necessary evidence to prosecute the case. See OECD, Plea Bargaining/Settlement of Cartel Cases, DAF/COMP(2007)38 (January 2008), p. 149-202, available at https://www.oecd.org/competition/cartels/40080239.pdf.
The most important consequence of the independent (but complementary nature) of the leniency programme and the settlement procedure is that reductions under both systems can be accumulated for undertakings if and when they are entitled to both.2729 Although the cumulative nature of leniency and settlement discounts has little influence on successful immunity applicants, the accumulation of both types of discounts can be an important benefit for subsequent applicants under the Leniency Notice.2730 In particular, the fine discounts within the ranges of 50%-30%, 30%-20% and under 20% which are granted to first, second and later subsequent applicants respectively, can be supplemented with an additional 10% reduction if the undertaking concerned decide to settle the case. This possibility undoubtedly constitutes an important incentive for undertakings to follow the settlement procedure.2731

3.3. Procedural safeguards for the settling parties

Some (defense counsel) commentators have expressed their concern about the limited access to the file and lack of oral hearing, arguing that it might lead to a disadvantageous settlement.2732

The access to file during the settlement procedure is indeed more limited than the full access to file that is granted during the regular procedure. The parties are merely given access to a selection of

2727 More precisely, in the context of leniency, the Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued (Leniency Notice 2006, para 14). On the other hand, the initiation of the settlement proceedings cannot take place later than the date on which it either issues a statement of objections (Settlement Notice para 9).
2728 Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 63.
2729 Settlement Notice, para 33.
2730 This cumulative nature implied on the other hand, that in the process of adoption of the system the amount of the settlement reward had to be carefully calculated in order to ensure and preserve the attractiveness of both leniency and settlements. While the settlement discount had to be high enough to attract non-leniency applicants, at the same time, it had to be low enough to preserve the incentives of firms planning to apply for the lower bands of the leniency system.
F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 9-10 of the online version of this article.
2731 See also ICN, “Cartel Settlements” 7-8. This report states that “[i]n jurisdictions where a reduction in fine is available pursuant to a leniency program, offering an additional reduction to a settling party beyond any leniency reduction is the primary incentive for parties to settle. In such a system, a critical issue is making a settlement discount sufficiently attractive to cartel participants such that they are willing to settle. For instance, France indicates that its settlement decisions reached in 2007 provide clear signals of fine reductions that firms may expect by applying for leniency or for settlement: firms may expect a reduction of a maximum of 50% if they meet the conditions of second-ranking leniency, and a reduction of 10% to 30%, depending on a variety of parameters, if they settle the case. France notes that the increasing total and average amount of the fines imposed by the Competition Council is key in guaranteeing that a 10% rate is attractive in absolute terms, i.e. when compared to the prospect of the fine that would be applied but for settlement”.
key documents by the Commission case team. This limitation seems to effectively serve the purpose of allowing the parties to evaluate the strength of the Commission’s case while clearing the road for the procedural efficiencies which the system seeks to accomplish. Defendants can always request access to additional documents in the Commission’s file. They can do so when such extra information is deemed necessary to enable a party to ascertain its position regarding any particular aspect of the case. The Commission will, nevertheless, only grant these requests when they are justified.2733

Furthermore, parties have in any event the opportunity to argue the case by making both written and oral representations to the Commission. If necessary, the Settlement Notice offers a settling party the possibility to call upon the hearing officer in relation to any issue bearing on due process, at any time during the settlement discussions.2734

It follows from the foregoing that the parties’ rights of defence remain fully protected under the settlement procedure. The difference with the regular procedure is that they are exercised in the framework of bilateral discussions, in anticipation of the formal notification of objections.2735

3.4. Protection in private litigation

Companies willing to settle their case need to make a settlement submission to the Commission in which they explicitly acknowledge both the participation in the illegal cartel and their liability for the infringement. As the settlement submission could potentially be discovered later on, this might result in additional exposure in private litigation.2736, 2737 It need not be said that this risk is one of the main concerns of companies about the procedure.

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2733 Settlement Notice, para 16. The older version of the Notice also included the condition that the ‘procedural efficiency is not jeopardized’. By wiping it out the Commission shows its intention to limit certain aspects of its discretion that could be perceived by undertakings as potentially abusive.

2734 Settlement Notice, para 18. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected. Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, [2011] OJ L 275/29.


2737 Even when a cartel affects the European area only, the discovery of cartel activities in Europe could have some bearing on alleged cartel activities in other countries. Particularly, in the US civil proceedings are subject to extensive document discovery requirements under the Federal Rules of Civil Procedure. Moreover, under Section 4 of the Clayton Act, 15 U.S.C. § 15, injured parties can bring suit against cartel members and collect three times the amount of damage actually inflicted by the anticompetitive conduct. Each individual cartel defendant can also be held jointly and severally liable for the damages of the entire cartel, with no right of contribution. This means that any single firm can be made to pay treble damages on behalf of all co-defendants. Successful plaintiffs can also recover their reasonable attorney’s fees. Consequently, follow-on litigation for civil damages is easy and attractive to pursue. See further e.g. K. NORDLANDER,
When evaluating the possibility to settle their case, undertakings may also consider the impact that this decision may have on follow-on damages actions. If the companies believe that the settlement increases their financial exposure in private actions in a way that exceeds the amount of the settlement reduction, the advantages of the procedure could be blurred and undertakings may hesitate to settle.\textsuperscript{2738} In order to remain successful the settlement procedure must ensure that the information submitted in the framework of the procedure remains confidential and will not be used against them at trial nor disclosed during private enforcement procedures in different jurisdictions.\textsuperscript{2739}

The Commission has acknowledged the concern that participation in the settlement procedure should not place settling parties at a disadvantage vis-à-vis possible third party damage claims.\textsuperscript{2740} For this reason, the Settlement Notice explicitly refers to oral statements, in the same way as it has done with respect to leniency applications.\textsuperscript{2741} Companies may also request the Commission to receive the statement of objections orally at the Commission’s premises. These possibilities ensure the protection of the relevant information because internal Commission documents – namely, the Commission’s own records of an oral “settlement submission” – cannot be subject to discovery.\textsuperscript{2742} In this regard, settlements submissions enjoy the same protection as corporate statements made under the leniency programme.\textsuperscript{2743} The Settlement Notice also provides that public disclosure of documents and written or recorded statements (including settlement submissions) would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of the Transparency Regulation 1049/2001.\textsuperscript{2744,2745}

The information which is made public in the Commission infringement decision, and which is protected during the course of the proceedings, is obviously useful for private parties seeking damages.\textsuperscript{2746} In fact, infringement decisions contain substantial information on the illegal conduct that serves as proof for private claimants in follow-on cases. Settlement decisions, like all infringement decisions adopted on the basis of Article 7, also have evidentiary value before national courts. However, compared to standard infringement decisions, final settlement decisions are shorter

\textsuperscript{2738} See also D. Hull and M. Clancy, “The European Commission’s new EU settlement procedures” 25.10.2004 ECLR, 646-659.
\textsuperscript{2739} See also A. Ascione and M. Motta, “Settlements” 6-7 of the online version of this contribution.
\textsuperscript{2740} See also U. Soltesz and C. Von Kockritz, “EU cartel settlements” 263.
\textsuperscript{2741} See also e.g. interview of F. Laina in D. Vascott, “EU Cartel Settlements: are they working?”, 2013 (April 8) Global Competition Review News, 1-15 at 14 (hereafter: ‘interview of F. Laina in D. Vascott’). F. Laina in effect recognises that “[u]ncertainty on the protection of settlement submissions would clearly have a negative impact on the functioning of the settlement instrument”.
\textsuperscript{2742} Settlement Notice, para 38.
\textsuperscript{2743} See also 2013 (April 8) Global Competition Review News, 1-15 at 14 (hereafter: ‘interview of F. Laina in D. Vascott’).
\textsuperscript{2744} ‘interview of F. Laina in D. Vascott’.
\textsuperscript{2745} However, the fact that Commission decided to protect the confidentiality of the settlement submission does resolve all problems in the context of (increased) private enforcement. (See also pointing this out D. Hull and M. Clancy,
\textsuperscript{2746} “The European Commission’s new EU settlement procedures” 118). The issue regarding the interaction of private damage actions and settlements/leniency, following disclosure of documents submitted under these policies is discussed in section 4.3.2.5 of Chapter 8. This inclusion also includes a discussion of the (at times deviating) views of the European Courts and the new Damages Directive.
\textsuperscript{2746} According to Article 16(1) Regulation 1/2003, private individuals can rely on a Commission decision as binding proof in civil proceedings for private damage actions before national courts.
and reveal less details. The limited publication of information in settlements makes it thus more difficult for private parties to find evidence in this type of decisions to support a claim for damages.\textsuperscript{2747} In this sense, settlements do not render private litigation easier, which is an obvious advantage for settling firms.\textsuperscript{2748}

Furthermore, companies should take into account that since settlements simplify and speed up the proceeding, the infringement is established faster and the corresponding decision is released earlier into the public domain. While this allows companies to leave the infringement behind and limit reputational harm, on the other hand, third parties seeking private damages will be able to bring follow-on litigation against a party sooner. Some firms may see this as a disadvantage. Frequently undertakings wish to delay private enforcement actions in time as long as possible.\textsuperscript{2749} Furthermore, for parties acknowledging participation in a global cartel, the release of this information may influence their positions abroad. For instance, the publication of the decision may trigger competition authorities in other jurisdictions to open a new investigation where they consider that adverse effects have occurred in their own competence territories.\textsuperscript{2750} Nevertheless, these risks are rather relative because settlements only speed up the procedure from the time of discovery of the infringement. This means that sooner or later settling companies would in any event face the consequences of their responsibility for the participation in the cartel.\textsuperscript{2751} The materialisation of these risks is thus not linked to the fact that firms have followed the settlement procedure, but to their illegal behaviour.

4. Experience with the settlement procedure: an overview of the settled cases

The table below provides an overview of all the cartel decisions that have been adopted after the publication of the Settlement Notice.

\textsuperscript{2747} See also stressing this aspect A. SCORDAMAGLIA, “The new Commission settlement” 69; U. SOLTESZ AND C. VON KOCKRITZ, “EU cartel settlements” 263; M-T. RICHTER, “The settlement procedure” 541-542.

\textsuperscript{2748} In the light of these arguments M-T. RICHTER concludes that the reduction of private actions resulting from the limited information available jeopardises the efforts of the Commission concerning private enforcement. While ‘settlements constitute a valuable tool for undertakings to limit private enforcement and therefore calculate costs more efficiently […] this happens at the costs of private enforcement which seems to be doomed never to thrive’. M-T. RICHTER, “The settlement procedure” 541-542. This view is, however, questionable. It is true that the lack of evidence on infringements constitutes one of the key issues. Still, affirming that more limited information contained in settlements (compared to regular decisions) jeopardises “all” Commission’s efforts in the field of private enforcement goes too far. As it is discussed below, not only has the Commission adopted additional initiatives to enhance private enforcement; cartel victims are increasingly creative in finding new routes to access the relevant information.

\textsuperscript{2749} M-T. RICHTER, “The settlement procedure” 541-542.

\textsuperscript{2750} The DRAM decision, for instance, triggered a separate investigation by the Brazilian antitrust ministry into the worldwide DRAM cartel. See “EU Commission's DRAM Settlement Decision Triggers New Brazilian Investigation” http://www.mondaq.com/article.asp?articleid=109592.

\textsuperscript{2751} See also M-T. RICHTER, “The settlement procedure” 541-542.
<table>
<thead>
<tr>
<th>Date decision</th>
<th>Decision</th>
<th>Settlement</th>
<th>Number of cartel participants</th>
<th>Number of settling parties</th>
<th>Number of non-settling parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.10.2008</td>
<td>Candle waxes</td>
<td>Notice not applicable(^{2752})</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
</tr>
<tr>
<td>15.10.2008</td>
<td>Bananas</td>
<td>Notice not applicable</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
</tr>
<tr>
<td>12.11.2008</td>
<td>Carglass</td>
<td>Notice not applicable</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
</tr>
<tr>
<td>28.01.2009</td>
<td>Marine hoses</td>
<td>Notice not applicable</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
</tr>
<tr>
<td>08.07.2009</td>
<td>E.On - GdF collusion</td>
<td>Notice not applicable</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
</tr>
<tr>
<td>22.07.2009</td>
<td>Calcium carbide and magnesium based reagents</td>
<td>Notice not applicable</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
<td>Irrelevant</td>
</tr>
<tr>
<td>07.10.2009</td>
<td>Power Transformers</td>
<td>No</td>
<td>7</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>11.11.2009</td>
<td>Heat stabilisers</td>
<td>No</td>
<td>11</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>19.05.2010</td>
<td>DRAMs</td>
<td>Yes</td>
<td>10</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>23.06.2010</td>
<td>Bathroom fittings &amp; fixtures</td>
<td>No</td>
<td>17</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>30.06.2010</td>
<td>Pre-stressing steel</td>
<td>No</td>
<td>17</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>20.07.2010</td>
<td>Animal feed phosphates</td>
<td>Yes (hybrid)</td>
<td>7</td>
<td>6</td>
<td>1 (Timab)</td>
</tr>
<tr>
<td>09.11.2010</td>
<td>Airfreight</td>
<td>No</td>
<td>11</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>08.12.2010</td>
<td>LCD</td>
<td>No</td>
<td>6</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>13.04.2011</td>
<td>Washing Powder</td>
<td>Yes</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>12.10.2011</td>
<td>Exotic fruit</td>
<td>No</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>19.10.2011</td>
<td>CRT Glass</td>
<td>Yes</td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>7.12.2011</td>
<td>Refrigeration Compressors</td>
<td>Yes</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
</tbody>
</table>

\(^{2752}\) It should be kept in mind that, according to the Settlement Notice (para 34) the Notice applies to any case pending before the Commission at the time of or after its publication in the Official Journal, i.e. on 2 July 2008. Furthermore, the initiation of settlement proceeding can take place at any point in time, but no later than the date on which the Commission issues a statement of objections against the undertakings concerned (Settlement Notice (para 9). This means that undertakings could not follow the settlement path in all the cases where the Commission issued the statement of objections before the publication of the Notice.
<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Hybrid</th>
<th>Yes</th>
<th>No</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>28.03.2012</td>
<td>Freight Forwarding</td>
<td>No</td>
<td>14</td>
<td>0</td>
<td>14</td>
</tr>
<tr>
<td>28.03.2012</td>
<td>Mountings for windows and window-doors</td>
<td>No</td>
<td>9</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>27.06.2012</td>
<td>Water Management Products</td>
<td>Yes</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>05.12.2012</td>
<td>TV and computer monitor tubes</td>
<td>No</td>
<td>7</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>10.07.2013</td>
<td>Wire Harnesses</td>
<td>Yes</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>27.11.2013</td>
<td>Shrimps</td>
<td>No</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>04.12.2013</td>
<td>Yen Interest Rate Derivatives</td>
<td>Yes (hybrid)</td>
<td>7</td>
<td>6</td>
<td>1 (ICAP)</td>
</tr>
<tr>
<td>04.12.2013</td>
<td>Euro Interest Rate Derivatives</td>
<td>Yes (hybrid)</td>
<td>7</td>
<td>4</td>
<td>3 (Crédit Agricole, HSBC and JPMorgan)</td>
</tr>
<tr>
<td>29.01.2014</td>
<td>Polyurethane Foam</td>
<td>Yes</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>05.03.2014</td>
<td>Power Exchanges</td>
<td>Yes</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>19.03.2014</td>
<td>Bearings</td>
<td>Yes</td>
<td>6</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>2.04.2014</td>
<td>Steel Abrasives</td>
<td>Yes (hybrid)</td>
<td>5</td>
<td>4</td>
<td>1 (Pometon)</td>
</tr>
<tr>
<td>02.04.2014</td>
<td>Power cables</td>
<td>No</td>
<td>11</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>25.06.2014</td>
<td>Mushrooms</td>
<td>Yes (hybrid)</td>
<td>4</td>
<td>3</td>
<td>1 (Riberebro)</td>
</tr>
<tr>
<td>03.09.2014</td>
<td>Smart card chips</td>
<td>No</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>21.10.2014</td>
<td>Swiss Franc Interest Rate Derivatives - CHF LIBOR</td>
<td>Yes</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>10.12.2014</td>
<td>Paper envelopes</td>
<td>Yes</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>28.2.2015</td>
<td>Swiss Franc Interest Rate Derivatives - Bid Ask Spread Infringement</td>
<td>Yes</td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
</tbody>
</table>
The table shows that while Settlement Notice was applicable (or could have been applied) in 32 cases in total, the Commission adopted settlement decisions in 21 cases. Hence, the Notice was applied in nearly 66% of the cases. The fact that the Commission applied the Notice in a majority of cases should be interpreted positively. These ciphers demonstrate that although the Commission clearly does not consider each case suitable for settlement, at the same time, it has invested considerable efforts to make the procedure work in an important number of cases.

In addition, reaching a full settlement with all the parties involved in the cartel was possible in a majority of the settled cases, namely in 16 cases. In turn, one or more companies decided not to follow or to discontinue the settlement procedure in five (hybrid) cases. In these cases the Commission still settled the case with the parties that were willing to do so. Generally, only one cartel participant decided not follow the settlement route. However (and more remarkably), in the *European Interest Rate Derivatives* case, three companies out of seven followed the standard (non-settlement) cartel procedure while four cartel parties settled their case.\(^{2753}\) Despite this unusual situation, the fact that in the five hybrid cases, only seven undertakings involved decided not to settle, indicates that the Commission has generally succeeded in creating incentives for companies to commit to the settlement procedure.\(^{2754}\)

The table also shows that the level of complexity of the settlements in terms of cartel participants differed from case to case from two undertakings (in *Power Exchanges, Swiss Franc Interest Rate Derivatives - CHF LIBOR and Parking heaters*) to ten undertakings in *DRAMs*. The fact that the Commission was able to reach a settlement with ten parties in the *DRAMs* case clearly illustrates that, despite the initial lack of experience, the procedure can successfully operate even when a considerable number of parties, with different interests, are involved. However, it is interesting to observe that the number of undertakings involved in the non-settled cases was generally higher than that of the settled cases. This indicates that cases with a lower number of parties are *a priori* (and logically) easier to settle.

### 5. Practical lessons learned from the application of the procedure

Settlements can provide significant benefits to both Commission and undertakings. From the Commission’s point of view, they can bring about more efficiency gains\(^{2755}\) while reinforcing effectiveness and deterrence. For companies considering to follow the settlement route, the settled

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\(^{2753}\) See further *infra* section 5.3 of this Chapter.

\(^{2754}\) While that the cases which were not settled involved a total of 125 undertakings, 75 undertakings in total settled their case with the Commission.

\(^{2755}\) These benefits will mainly be realized in the context of drafting and translations, access to file, oral hearing and interpretation and less appeals.
cases suggest that the benefits of the procedure are not limited to the stipulated 10% fine reduction and reduced legal costs that flow from a simpler administrative procedure. More precisely, the settlements firstly illustrate the benefits of the accumulation of leniency and settlement discounts. Secondly, it seems that settling companies may benefit from a more flexible approach as regards the application of the fining policy. Next, companies should not fear a strict approach in the application of the procedure in hybrid cases. Last but not least, settlements offer sufficient safeguards for the parties involved.

In the next part, the settlement procedure is assessed from a practical point of view. This analysis will elucidate whether the Commission’s application of the system is appropriate to induce companies to settle their case.

5.1. Combining settlements and leniency discounts

As commented above, settlements and leniency are separate but complementary enforcement tools which serve different aims and, as a result, reductions under both systems can be accumulated for undertakings if and when they are entitled to both.\textsuperscript{2756}

Following the publication of the Settlement Notice it was, however, argued that the (introduction of the) settlement procedure could undermine the efficiency of the leniency program.\textsuperscript{2757} In particular it was feared that final settlement decisions would not reflect the level of leniency reductions expected by the parties and that, as a result, their willingness to cooperate could diminish. Arguably, parties may avoid to cooperate beyond their legal obligations when there is no certainty that their cooperation is going to be rewarded (under the leniency and/or the settlement system). This could, indeed, have not only a negative impact on the settlement system, but also discourage companies to apply for leniency.

The following table provides an overview of all the decisions that have been adopted following the cartel settlement procedure. The table also specifies the leniency discounts granted in these cases to settling and non-setting firms.

<table>
<thead>
<tr>
<th>Cartel settlements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date settlement decision</td>
</tr>
<tr>
<td>19.05 2010</td>
</tr>
<tr>
<td>20.07 2010</td>
</tr>
<tr>
<td>13.04 2011</td>
</tr>
</tbody>
</table>

\textsuperscript{2756} Settlement Notice, para 33.
\textsuperscript{2757} See P. VERMA AND P. BILLIET, “Why would” 4.
<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Leniency Notice</th>
<th>Fines Reduction</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.10.2011</td>
<td>CRT Glass</td>
<td>No (100%; 50%, 0%; 2)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>7.12.2011</td>
<td>Refrigeration Compressors</td>
<td>Yes (100%, 40%, 15%, 20%, 25%)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>27.06.2012</td>
<td>Water Management Products</td>
<td>No (100%, 0%; 2)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>10.07.2013</td>
<td>Wire Harnesses</td>
<td>Yes ²⁵⁷⁸</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>4.12.2013</td>
<td>Yen Interest Rate Derivatives</td>
<td>No (100%, 40%- 25%; 4, 0%; 2 (JPMorgan and ICAP)</td>
<td>No (ICAP)</td>
<td></td>
</tr>
<tr>
<td>4.12.2013</td>
<td>Euro Interest Rate Derivatives</td>
<td>Yes (100%, 50%, 30%, 5%)</td>
<td>Information unavailable for Crédit Agricole, HSBC and JPMorgan.</td>
<td></td>
</tr>
<tr>
<td>29.01.2014</td>
<td>Polyurethane Foam</td>
<td>No (100%, 50%; 3, 0%; 1)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>5.03.2014</td>
<td>Power Exchanges</td>
<td>Leniency Notice was not applied</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>19.03.2014</td>
<td>Bearings</td>
<td>No (100%, 40%, 30%, 20%; 2, 0%; 1)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>2.04.2014</td>
<td>Steel Abrasives</td>
<td>No (100%, 0%; 3)</td>
<td>No (Pometon)</td>
<td></td>
</tr>
<tr>
<td>25.06.2014</td>
<td>Mushrooms</td>
<td>No (100%, 30%, 0%)</td>
<td>Yes, Riberebro 50%</td>
<td></td>
</tr>
<tr>
<td>21.10.2014</td>
<td>Swiss Franc Interest Rate Derivatives - CHF LIBOR</td>
<td>Yes (100%, 40%)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>28.02.2015</td>
<td>Swiss Franc Interest Rate Derivatives - Bid Ask Spread Infringement</td>
<td>No (100%, 30%, 25%, 0%; 1)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>10.12.2014</td>
<td>Paper envelopes</td>
<td>No (50%, 25%, 10%; 2, 0; 1)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>17.06.2015</td>
<td>Parking heaters</td>
<td>Yes (100%, 45%)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>15.07.2015</td>
<td>Blocktrains</td>
<td>Yes (100%, 45%, 30%)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>27.01.2016</td>
<td>Alternators and starters</td>
<td>Yes (100%, 30%, 28%)</td>
<td>All firms settled</td>
<td></td>
</tr>
<tr>
<td>19.07.2016</td>
<td>Trucks</td>
<td>No (100%, 40%, 30%, 10%, 0; 1)</td>
<td>All firms settled</td>
<td></td>
</tr>
</tbody>
</table>

²⁵⁷⁸ In this the different leniency discounts concerned various infringements. Sumitomo is granted immunity from fines for all infringements. The following reductions of the fine were granted to the other undertakings: Yazaki: 30 % for the Toyota and Honda infringements; 50 % for the Nissan infringement; Furukawa: 40 % for the Toyota and Honda infringements; SYS: 45 % for the Renault (W95 Platform) infringement and 40 % for the Renault (W52/98 Platform) infringement and Leoni: 20 % for the Renault (W52/98 Platform) infringement.
The experience of the Commission in the application of the procedure illustrates the strong complementary nature between settlements and the leniency system. It is noteworthy, that in practice companies cooperating under the leniency regime are typically also interested in or willing to settle their case. This has to do with the fact that in order to apply for leniency application, companies are also required to submit incriminating evidence which confirms the (relevant facts of the) infringement.\textsuperscript{2759}

In all the settled cases, except for two, the Commission granted immunity to “whistle-blowers” under the Leniency Notice. Furthermore, the settled cases show that important leniency discounts, ranging from 5\% to 50\%, were also granted to firms which cooperated in the Commission’s case but did not fulfil the criteria to obtain immunity. These firms were able to maximise their final discount in fines by adding the fixed fine reduction of 10\% which is granted on the basis of the settlement system. The leniency reductions combined with the additional settlement discount of 10\%, appear to satisfy companies’ expectations and motivate them to follow the settlement path. Given the proven potential of the procedure to attract leniency applicants into settlements, the combined use of these enforcement tools appears an appropriate enforcement choice.

Further, the fact that leniency and settlements are separate mechanisms also implies that firms can partake in the settlement procedure and received a 10\% discount in fines without cooperating under the Leniency Notice. In fact in 13 cases, one or more undertakings decided to settle their case with the Commission even though they had not obtained any kind of lenient treatment.\textsuperscript{2760} The Power Exchanges case (where the Leniency Notice was not applied) and the Water Management Products case (where only one out of the three participants was a leniency applicant) are in this sense good examples of cases in which companies were interested in settling their case even if they did not qualify for a reduction under the Leniency Notice.\textsuperscript{2761} The application of the settlement system clearly reaffirms that undertakings should not fear that the Commission will not settle their case if they have not applied for leniency.\textsuperscript{2762} In addition, although it has been pointed out that the 10\% settlement reward in itself carries only a marginal incentive to settle,\textsuperscript{2763} the fact that companies settled their case without having obtained a lenient treatment also indicates that the 10\% reduction is high enough to encourage companies to follow the settlement procedure.

\textsuperscript{2759} See also F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 10 of the online version of this article.
\textsuperscript{2760} ICN, “Cartel Settlements” 7-8.
\textsuperscript{2761} See supra Table 1.
\textsuperscript{2762} F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 9-10 of the online version of this article. These authors also comment in this sense that settlements can also be appropriate and succeed in the absence of a high share of leniency applicants, provided that other elements supporting the settlement route are present.
\textsuperscript{2763} See e.g. S. P. BRANKIN, “The First Cases” 167. This commentator compares the 10\% reduction to the reductions available in other jurisdictions and concludes that “[b]y international standards, the deal on offer is not a generous one. The only guaranteed reward is a 10 per cent fine reduction. Recent settlements in the United Kingdom have involved 35 per cent reductions in fines. In the United States, settling parties obtain reductions of 30 to 50 per cent from the bottom of the sentencing guidelines”. Interview of G. VAN GERVERN AND M. HANSEN in D. VASCOTT, “EU Cartel Settlements: are they working?”, 2013 (April 8) Global Competition Review News, 1-15, at 7 (hereafter: ‘(Interview of) G. VAN GERVERN AND M. HANSEN in D. VASCOTT’). M. HANSEN notes that “[s]uccessful court challenges can yield much more than 10 per cent. Therefore, incentives for parties to settle should be substantial’. This aspect is however questionable. See further infra section 5.4 of this Chapter.
On the other hand, the *hybrid* decisions in *Animal Feed Phosphates and Mushrooms*, illustrate that the withdrawal by a firm from the procedure should, in principle, not be an impediment to obtain a reduction under the leniency program.\(^{2764}\)

Based on the settled cases it can be concluded that the choice of the Commission to categorically distinguish leniency from settlement reductions there does not seem to entail any disadvantages for a company involved in a Commission cartel investigation. Whether leniency applicant or not, companies may engage in settlement discussions and see if such an interesting (settling) opportunity arises.

### 5.2. The (flexible) application of the fining policy

Deciding whether or not to settle a case is an important issue for companies. When cartelists wish to settle their case, they have to acknowledge their guilt, accept the range of fines envisaged by the Commission, and waive their rights to full access the file and to an oral hearing. Undertakings will (and should),\(^{2765}\) therefore, only opt to settle their case when the scope to contest their liability is limited.

Although the Commission has a clear interest in presenting a flexible procedure encouraging defendants to follow the settlement path, it is not inclined to grant lower fines just for the sake of making settlement procedures more attractive. The Commission has thus frequently emphasised that it does not negotiate or bargain on the scope of its envisaged objections, the use of evidence or the range of likely fines to motivate parties to take part in the settlement proceedings.\(^{2766}\) For that reason the Commission sticks to its established fining formulas. The basic parameters for the fine calculations remained, therefore, in conformity with the established Commission’s practice.\(^ {2767}\)

The benefit of the settlement procedure is that, in contrast to the ordinary cartel proceeding, companies have the opportunity to directly engage with the Commission and openly discuss with

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\(^{2764}\) This case is analysed in more detail below. It should be noted that, at the time of writing (29/10), the rest of decisions in hybrid cases have not been published.

\(^{2765}\) See further *infra* section 5.4 of this Chapter.


\(^{2767}\) Case T-456/10, *Timah Industries and Cie financière et de participations Roullier (CFPR) v Commission*, para 74. See also K. VAN HOVE AND R. BURTON, “Direct Settlement: The European Commission’s decision in the recent DRAMs case sheds light on how the cartel settlement procedure is working in practice”, 2010 (June) *Competition Law Insight*, 8-9, at 8 (hereafter: ‘K. VAN HOVE AND R. BURTON, “Direct Settlement”’). These authors explain that in practice ‘the Commission remains in the driving seat throughout cartel settlement process’. They clarify that ‘[t]his is not surprising: as indicated at the time the procedure was launched, the EU’s settlement procedure is not conceived as involving negotiation or US-style plea bargaining’. It is interesting to note that these authors are respectively partner and senior associate in Van Bael & Bellis (Brussels). This law firm represented one of the defendants in the DRAMs case.
the case team about the manner in which these parameters should be applied.\textsuperscript{2768} By giving defendants an ‘opportunity to assert their views on the potential objections against them’,\textsuperscript{2769} the Commission has clearly created some room to make the settlement option more attractive. Companies settling their case may, thus, be able to put forward arguments that influence the Commission’s views on various aspects of the case that affect the calculation of the fine.\textsuperscript{2770}

The table below provides an overview of all the cartel decisions that have been adopted since 2009. This list, which includes both settlement and regular decisions, specifies for each decision (i) the number of cartel participants, (ii) the application of mitigating circumstances, (iii) the consideration of claims for inability to pay and (iv) the application of deterrence multipliers.\textsuperscript{2771} An assessment of these decisions, may clarify whether the Commission is inclined to be more flexible in the calculation of the fines when the cartel participants decide to settle their case, compared to cases where undertakings followed the regular procedure.

<table>
<thead>
<tr>
<th>Date decision</th>
<th>Decision</th>
<th>Settlement</th>
<th>Number of cartel participants</th>
<th>Mitigating circumstances</th>
<th>Claims for inability to pay</th>
<th>Deterrence multiplier and number of firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>28.01.2009</td>
<td>Marine hoses</td>
<td>No</td>
<td>6</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>08.07.2009</td>
<td>E.On - GdF collusion</td>
<td>No</td>
<td>2</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>22.07.2009</td>
<td>Calcium carbide and magnesium based reagents</td>
<td>No</td>
<td>9</td>
<td>None</td>
<td>6 rejected 1 accepted</td>
<td>None</td>
</tr>
</tbody>
</table>

\textsuperscript{2768} This aspect has been acknowledged by the Commission and practitioners. See interview of F. Laina in D. Vascott 5. F. Laina comments that ‘[s]ettlement is built on trust and good communication between the Commission and each of the parties. Companies expect to be able to discuss important issues with the Commission openly and without delay’. K. Van Hove and Richard Burton also report that, in practice, the settlement procedure ‘allows defendants to engage directly with the Commission and to gain insight into the Commission’s thinking in a way that is not possible in a regular cartel proceeding. Importantly, the settlement meetings allow for a frank and meaningful dialogue between the defendants and the Commission case team on points of contention’. See also K. Van Hove and R. Burton, “Direct Settlement” 8; D. Anderson and R. Cuff, “Cartels in the European Union: Procedural Fairness for Defendants and Claimants”, 2011 (34-3) Fordham International Law Journal, 385-430, at 407 also available at http://ssrn.com/abstract=1831446

\textsuperscript{2769} Settlement Notice, para 16.

\textsuperscript{2770} See also K. Van Hove and R. Burton, “Direct Settlement” 8-9. Given the possibility to openly discuss with the Commission in order to obtain other potential benefits, M. Marquis argues that the Commission’s settlement involves ‘bounded black box bargaining’. He uses the concept “bounded” because in the settlement context the Commission may only alter the application of certain parameters. As regards the “black box”, he argues that the system is designed “to obscure some of the dialectical exchanges between the Commission and the undertakings concerned, obscurity being a key tool for the Commission and a key inducement for undertakings”. M. Marquis, “Settling cartel” 9-10.

\textsuperscript{2771} These factors have been chosen because those are the factors that, according to some commentators, have been used by the Commission to make the settlement route attractive for companies.
<table>
<thead>
<tr>
<th>Date</th>
<th>Category</th>
<th>Received</th>
<th>Quantity</th>
<th>Delivery Percentage</th>
<th>Requests Type</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>07.10.2009</td>
<td>Power Transformers</td>
<td>No</td>
<td>7</td>
<td>18%:2</td>
<td>No requests</td>
<td>1.2:2 (firms) 1.1:1</td>
</tr>
<tr>
<td>11.11.2009</td>
<td>Heat stabilisers</td>
<td>No</td>
<td>11</td>
<td>None</td>
<td>2 rejected</td>
<td>1.7:1</td>
</tr>
<tr>
<td>19.05.2010</td>
<td>DRAMs</td>
<td>Yes</td>
<td>10</td>
<td>5%:1 10%:2</td>
<td>No requests</td>
<td>1.2:1 1.1:2</td>
</tr>
<tr>
<td>23.06.2010</td>
<td>Bathroom fittings &amp; fixtures</td>
<td>No</td>
<td>17</td>
<td>None</td>
<td>5 rejected</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>5 accepted</td>
<td>(50%:3;25%:2)</td>
</tr>
<tr>
<td>30.06.2010</td>
<td>Pre-stressing steel</td>
<td>No</td>
<td>17</td>
<td>5%:2,15%:1</td>
<td>10 rejected</td>
<td>1.2:1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3 accepted</td>
<td>(25%,50%,75%)</td>
</tr>
<tr>
<td>20.07.2010</td>
<td>Animal feed phosphates</td>
<td>Yes</td>
<td>7</td>
<td>None</td>
<td>1 rejected</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1 accepted</td>
<td>(70%)</td>
</tr>
<tr>
<td>09.11.2010</td>
<td>Airfreight</td>
<td>No</td>
<td>11</td>
<td>15%:All 10%:4</td>
<td>5 rejected</td>
<td>None</td>
</tr>
<tr>
<td>08.12.2010</td>
<td>LCD</td>
<td>No</td>
<td>6</td>
<td>No</td>
<td>No requests</td>
<td>1.2:1</td>
</tr>
<tr>
<td>13.04.2011</td>
<td>Washing Powder</td>
<td>Yes</td>
<td>3</td>
<td>None</td>
<td>No requests</td>
<td>1.1:1</td>
</tr>
<tr>
<td>12.10.2011</td>
<td>Exotic fruit</td>
<td>No</td>
<td>2</td>
<td>20%:1</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>19.10.2011</td>
<td>CRT Glass</td>
<td>Yes</td>
<td>4</td>
<td>15%:2 18%:1</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>07.12.2011</td>
<td>Refrigeration Compressors</td>
<td>Yes</td>
<td>5</td>
<td>18%:1 10%:1</td>
<td>1 accepted</td>
<td>1.2:1</td>
</tr>
<tr>
<td>28.03.2012</td>
<td>Mountings for windows and window-doors</td>
<td>No</td>
<td>9</td>
<td>5%:1</td>
<td>None rejected 1 accepted (45% reduction)</td>
<td>None</td>
</tr>
<tr>
<td>28.03.2012</td>
<td>Freight Forwarding</td>
<td>No</td>
<td>14 (in 4 different cartels)</td>
<td>None</td>
<td>No requests</td>
<td>1.1:2 1.2:1</td>
</tr>
<tr>
<td>05.12.2012</td>
<td>TV and computer monitor tubes</td>
<td>No</td>
<td>7</td>
<td>None</td>
<td>1 accepted</td>
<td>1.1:1 1.2:1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(amount not available)</td>
<td></td>
</tr>
<tr>
<td>27.06.2012</td>
<td>Water Management Products</td>
<td>Yes</td>
<td>3</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>10.07.2013</td>
<td>Wire Harnesses</td>
<td>Yes</td>
<td>5</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>27.11.2013</td>
<td>Shrimps</td>
<td>No</td>
<td>No</td>
<td>Accepted but information unavailable</td>
<td>1 rejected</td>
<td>None</td>
</tr>
<tr>
<td>04.12.2013</td>
<td>Yen Interest Rate Derivatives</td>
<td>Yes</td>
<td>7</td>
<td>Information not published</td>
<td>Information not published</td>
<td>Information not published</td>
</tr>
<tr>
<td>04.12.2013</td>
<td>Euro Interest Rate Derivatives</td>
<td>Yes</td>
<td>7</td>
<td>Information not published</td>
<td>Information not published</td>
<td>Information not published</td>
</tr>
<tr>
<td>Date</td>
<td>Description</td>
<td>Required?</td>
<td>QTY</td>
<td>Discount</td>
<td>Requests</td>
<td>Notes</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------------------</td>
<td>-----------</td>
<td>-----</td>
<td>----------</td>
<td>----------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>29.01.2014</td>
<td>Polyurethane Foam</td>
<td>Yes</td>
<td>5</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>5.03.2014</td>
<td>Power Exchanges</td>
<td>Yes</td>
<td>2</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>19.03.2014</td>
<td>Bearings(^\text{2772})</td>
<td>Yes</td>
<td>6</td>
<td>15%:1</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>2.04.2014</td>
<td>Steel Abrasives(^\text{2773})</td>
<td>Yes</td>
<td>5</td>
<td>15%:1</td>
<td>1 rejected</td>
<td>None</td>
</tr>
<tr>
<td>02.04.2014</td>
<td>Power cables</td>
<td>No</td>
<td>11</td>
<td>5%:4</td>
<td>1 rejected</td>
<td>None</td>
</tr>
<tr>
<td>25.06.2014</td>
<td>Mushrooms</td>
<td>Yes</td>
<td>4</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>03.09.2014</td>
<td>Smart card chips</td>
<td>No</td>
<td>4</td>
<td>Decision not available</td>
<td>Decision not available</td>
<td>Decision not available</td>
</tr>
<tr>
<td>21.10.2014</td>
<td>Swiss Franc Interest Rate Derivatives - CHF LIBOR</td>
<td>Yes</td>
<td>2</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>10.12.2014</td>
<td>Paper envelopes</td>
<td>Yes</td>
<td>5</td>
<td>10%:1</td>
<td>2 accepted (discounts not published)</td>
<td>None</td>
</tr>
<tr>
<td>28.2.2015</td>
<td>Swiss Franc Interest Rate Derivatives - Bid Ask Spread Infringement</td>
<td>Yes</td>
<td>4</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>17.06.2015</td>
<td>Parking heaters</td>
<td>Yes</td>
<td>2</td>
<td>None</td>
<td>No requests</td>
<td>None</td>
</tr>
<tr>
<td>15.7.2015</td>
<td>Blocktrains</td>
<td>Yes</td>
<td>3</td>
<td>None</td>
<td>No requests</td>
<td>1:1 1:1 1:1</td>
</tr>
<tr>
<td>21.10.2015</td>
<td>Optical disc drives</td>
<td>No</td>
<td>8</td>
<td>Decision not available</td>
<td>Decision not available</td>
<td>Decision not available</td>
</tr>
<tr>
<td>27.01.2016</td>
<td>Alternators and starters</td>
<td>Yes</td>
<td>3</td>
<td>15%:1</td>
<td>No requests</td>
<td>Yes:3 (not published)</td>
</tr>
<tr>
<td>19.07.2016</td>
<td>Trucks</td>
<td>Yes</td>
<td>4</td>
<td>Decision not available</td>
<td>Decision not available</td>
<td>Decision not available</td>
</tr>
</tbody>
</table>

\(^{2772}\) Furthermore, in *Bearings* the Commission exercised its margin of appreciation (pursuant to 37 of the Guidelines on fines), to reduce the level of that part of the fine for which a subsidiary is solely liable to 10% of its own turnover instead of the worldwide turnover of the undertaking. Case AT.39922 — *Bearings* [2014] OJ C 238/10, paras 14-15.

\(^{2773}\) In *Steel Abrasives*, the Commission took a similar approach for two undertakings. In this case fines had to be capped at 10% of the total turnover. The Commission declared that "[f]or this reason, [it] exceptionally exercised its discretion in accordance with point 37 of the Guidelines and reduced the fines in a way that takes into account the characteristics of the companies and their differences in participation in the infringement’. Case AT.39792 — *Steel Abrasives* [2014] OJ C 362/8, para 12. The decision does, however, not indicate the amount of the discount. Commission, Press Release IP/11/359, “Antitrust: Commission fines producers of steel abrasives € 30.7 million in cartel settlement”.

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These decisions illustrate that while settling undertakings could often benefit from the application of mitigating circumstances, this was also the case of undertakings that followed the regular route. In fact, in the settled cases, mitigating circumstances were applied for one or more undertakings in 7 cases, whereas in 11 cases no mitigating circumstances were found. Or in other words, mitigating circumstances were applied in 39% of the settlements. With respect to the non-settled cases, mitigating factors were established for one or more firms in 6 cases, while in 8 cases no mitigating factors were applied. In the non-settled cases, mitigating circumstances were thus found in 43% of the cases. The fact that the fine was adjusted on the basis of mitigating factors more often in the non-settlement decisions than in the settled cases, indicates that the consideration by the Commission of this calculation parameter is, as such, not directly linked to the application of the settlement procedure.

With respect to claims for inability to pay, the table shows that in 3 settled cases such claims were accepted for one or more undertakings, whereas in 1 case this claim was rejected for all undertakings which invoked it. This means that this policy has been applied in 75% of the settled cases. As regards the non-settled cases, the inability to pay policy was applied for one or more undertakings in 6 cases (75%) and rejected for all undertakings which requested it in 2 cases (25%). While this information appears to suggest that in not settled cases, the inability to pay policy was applied in an important percentage of cases, this finding must be nuanced. In particular, it is important to keep in mind that in the context of inability to pay claims, the Commission can only adapt the fine on the basis of this policy when undertakings make such a request. Therefore, to conduct an appropriate assessment on the application of the inability to pay policy, one should look at the total number of companies that made such a claim, rather than to the number of cases in which the policy was applied.

Looking at the number of firms that claimed the application of the inability to pay policy, it appears that in the settled cases the claims of four undertakings were accepted while two were denied. This information contrasts with the ciphers concerning non-settled cases. In this type of cases, the claims for inability to pay of 29 undertakings were rejected and those of 12 undertakings were granted. Or put differently, while in the settled cases the Commission accepted to apply the inability to pay policy for 66.6% of the firms, in non-settled cases, such claims were only accepted for 29% of the undertakings.

It should be admitted that, as the inability to pay policy has only been applied in a relatively low number of settled decisions, such cases may not be seen as fully representative. However, as the examination above suggests, it is a fact that the Commission appears to apply this policy in a considerably more limited number of non-settled cases. Bearing in mind the Commission’s strict approach in non-settled cases, this may be seen as an indication of the (increased) flexibility of the Commission to listen to the undertaking’s (ability to pay) concerns when they settle their case.

Last but not least, the decisions listed above show that in the settled cases the Commission did not find necessary to apply a deterrence multiplier in 12 cases, while in 5 cases a deterrence multiplier was applied to one or more undertakings. In non-settled cases the deterrence multiplier was applied for one or more undertakings in 6 cases and it was not applied in 9 cases. In terms of percentages, the Commission did only apply a deterrence multiplier in 30% of the settled cases, whereas in the non-settled cases this percentage amounts to 40%. Although it should be admitted that the more frequent application of the deterrence multiplier in the non-settled cases is most likely due to
objective deterrence considerations – taking into account the margin of discretion of the Commission to apply this factor\textsuperscript{2774} – it cannot be excluded that the Commission adopted a less strict approach in the context of settlements.

5.3. The Commission’s (relative) willingness to adopt hybrid settlements

To date, 5 out of 21 settlement decisions adopted by the Commission have been issued in hybrid cases.\textsuperscript{2775} These decisions illustrate that the Commission is, in principle, not reluctant to use the settlement procedure in cases where not all cartel participants offered (or confirmed) their settlement submissions.

It is true that directly opting for a restrictive approach as regards the offering of settlements in hybrid cases have been a quite tempting option for the Commission. Bearing in mind that the settlement procedure is set up with the main goal of obtaining procedural efficiencies, it might be doubtful whether in such circumstances this goal can be completely achieved. Ideally, the case should thus be settled with each one of the parties which initially engaged in the settlement discussions.\textsuperscript{2776}

However, the Commission realised that such restrictive approach would make the procedure look unattractive for cartel participants. The settled cases illustrate that the fact that a company decides withdraw from the procedure does not necessarily imply that the Commission will discontinue the settlement to the detriment of all the other parties, which are still interested in and committed to follow the procedure. In this context, two situations can be distinguished. Firstly, the situation in which one or more undertakings are simply not interested in following the procedure from the start. Secondly, the situation in which all cartel parties are initially willing to participate in the settlement but in the course of the procedure one (or some) of them decide(s) to opt out\textsuperscript{2777}

As regards the first type of cases ALEXANDER ITALIANER indicated that, in practice, the Commission will assess up front whether there is a unanimous willingness to settle and where this is not the case it will proceed with the ordinary procedure. This means that in cases that appear to be ‘hybrid’ from the start, the Commission will most likely not pursue a settlement. This approach is justified by the fact that in these cases the purpose of the settlement, that is to achieve efficiency benefits, would be compromised from the start.\textsuperscript{2778}

In the second type of cases a cartel participant may decide to opt out when it is informed about the elements of the case – including the range for the fine – and it does not agree with the Commission’s view.\textsuperscript{2779} In this scenario, by the time it becomes clear that one firm is not willing to settle, considerable efforts have already been made by both the Commission and the other undertakings

\textsuperscript{2774} See Fining Guidelines, point 30. See further infra Chapter 10.

\textsuperscript{2775} See supra section 4 of this Chapter. It should be noted that not all the information concerning these decisions is available.

\textsuperscript{2776} F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 8 of the online version of this article.


\textsuperscript{2778} H. SU, “Interview with Alexander Italianer” 2. See also F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 8 of the online version of this article.

\textsuperscript{2779} F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 9 of the online version of this article.
involved to reach an understanding. Taking into account the invested efforts, on the one hand, and the potential gains that can still be achieved by settling the case with the remaining parties and limiting the number of appeals, on the other hand, pursuing the settlement seems an appropriate option for the Commission. Settlements in hybrid cases are, however, not ideal in enforcement terms as the Commission must still follow the ordinary route for the party that is not willing to settle.

In *Animal Feed Phosphate* (2010), one company *Timab* decided to discontinue the procedure at a very late stage (after having held several settlement meetings with the Commission) and the Commission continued settling the case with the other parties. For the non-settling firm the Commission followed the ordinary non-settlement procedure. The company was granted full access to the file, a hearing took place and the Commission adopted a separate fully motivated SO and standard prohibition decision. Moreover, the final decision was also appealed. In these circumstances, the intended efficiency gains reached by settling the case were reduced to a substantial extent. *Flavio Laina and Elina Laurinen* argued that if a similar situation would occur in the future, the Commission would carefully balance the advantages of shifting back to the regular antitrust procedure with all firms against those of settling with some parties. To this end, an individual assessment, considering for instance the reasons and timing for a firm opting out, could help.

In 2013, the Commission reported that the settlement talks in *Smart Card Chips* were discontinued, due to lack of progress. This is the first case in which the Commission decided to shift back to the normal procedure for all parties, hereby completely blocking the settlement route for all. This case shows that even if settlements can promote deterrence as they lead to quicker decisions, the Commission does not intend to pursue settlements at any cost. The responsibility of the Commission to enforce the competition rules effectively and adopt decisions in the public interest, underscores the decision to discontinue the settlement. When a common vision on the existence and the characteristics of a cartel cannot be reached, settlement is not a feasible option. Former Commissioner for Competition, *Joaquin Almunia* indicated that, if this turns out to be the case, ‘the Commission will not hesitate to revert to the normal procedure and to pursue the suspected infringement’.

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2781 Case T-456/10, *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission*, para 12-13. It is recalled that, in contrast, under the Settlement Notice, para 20(d), settling parties confirm in their settlement submissions that they do not envisage requesting access to the file or requesting to be heard in an oral hearing, unless the settlement SO and decision do not reflect the settlement submission.
2782 Case T-456/10, *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission*. This decision is analysed below.
2783 Flavio Laina is Head of the Cartel Settlement Unit in the Cartel Directorate of the European Commission’s Directorate General for Competition; Elina Laurinen is Principal Administrator in the same Directorate. (The authors stress that the opinions contained in this article are personal and do not necessarily reflect the Commission’s opinion).
2784 F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 9 of the online version of this article.
2785 It should be noted that the rest of cartel decisions addressed to non-settling companies have not been made published yet.
2787 Ibid.
2788 See Commission, Press Release IP/13/346 “Antitrust: Commission sends statement of objections to suspected participants in smart card chips cartel”; F. LAINA AND E. LAURINEN elaborate on the interesting question whether the scope of the infringement in a regular case resulting from a discontinued settlement case against all the involved companies should be identical to the scope of the latter. In the authors’ view ‘the scope of the infringement does not
The settled cases tested the Commission’s ability to react to hybrid situations. The experience effectively dispels the fear of skeptics that the Commission would use the settlement option as a case closure device for straightforward cases only. The Commission has, nevertheless, proved that the refusal of an individual company to settle will not undermine others’ settlement discussions outright. On the other hand, the Commission has also shown that it will pursue settlements only in cases in which efficiency gains can be potentially maximised. Basically, cases that turn out to be hybrid once the settlement has been launched (i.e. the second type of cases) are analysed on a case by case basis in order to ascertain whether sufficient efficiency gains can be attained.

Cases that are hybrid from the start will normally be deemed not suitable for settlement. Closing the settlement door entirely in these “initially hybrid cases” may, however, not be the most appropriate option. It is true that efficiency savings are always maximised in full settlements. Still, in initially hybrid cases considerable efficiencies may also be obtained depending on the features of the case. One may think, for instance, of a case involving a high number of parties, ten for example, in which only one undertaking refuses to settle from the beginning. In this scenario, there are still nine companies that are potentially willing to confess their guilt, follow the streamlined procedure and move forward. Even though it is possible that in the course of the settlement procedure one or more companies decide to drop out and that the saving are not maximised, considerable efficiency gains can still be realised when the number of settling firms is (relatively) high. Savings in resources generally increase as the number settling undertakings rises. Furthermore, when a company decides not to settle from the beginning, the Commission will not need to invest efforts in reaching an understanding with this firm during settlement discussions. This may also facilitate the case. Finally, the difference between initially hybrid cases and subsequently hybrid cases may become irrelevant when it comes to enhancing efficiency in the proceedings. This can be more clearly illustrated with an example. If a cartel involves seven participants and three of them decide not to settle, it is irrelevant whether one company decides not to settle from the start and two other companies withdraw later from the settlement or whether the three undertakings discontinue the procedure once it has been started. Considering settlements directly unavailable in initially hybrid cases, without taking into account the particular circumstances of the case, might not be an optimal approach in enforcement terms.2789

have to be identical under both procedures’. They explain that ‘[s]ettlement means convincing the interlocutor. Should it become impossible for one or more reasons to convince one or more companies, the Commission will have to reflect and investigate why it was not able to convince its interlocutors. It cannot be excluded that such reflection brings new elements into the picture or that in the absence of procedural efficiencies the Commission deems it necessary to conduct an additional investigation the result of which might have an impact on the scope of the infringement’. This statement confirms that the Commission is willing to adopt a more cooperative and flexible approach in the context of settlements. If this procedural route is no longer an option, the Commission will pursue its classic strict approach against cartels within the framework of the regular antitrust procedure. F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 9 of the online version of this article.

2789 See sharing this view M. MARQUIS, “Settling cartel” 6; P. D. CAMESASC, “EU competition Settlements at a Crossroads”, Competition Law 360, footnote 2; available at http://www.law360.com/articles/213629/eu-competition-settlements-at-a-crossroads. (This author comments that ‘[e]ven a “hybrid” with, say, one company dropping out of settlement is significantly more appealing to the Commission: one full case plus appeals against one company with the implicit backing of all other companies that have agreed to settle and sign up to the facts, the Commission’s interpretation thereof, the characterization of the infringement, etc). See also C. VOLLMER, “Settlements in German competition law”, 2011 (32-7) ECLR, 350-356, at 350.
Experience suggests also that the Commission is, in effect, also aware of the potential attractiveness of hybrid settlements, regardless of the distinction between initially and subsequently hybrid cases.\textsuperscript{2790} In fact, in \textit{European Interest Rate Derivatives} the Commission decided to settle the case even if three parties out of seven followed the standard (non-settlement) cartel procedure.\textsuperscript{2791} In other cases, the Commission has also reached settlements, regardless of the relatively high proportion of non-settling companies.\textsuperscript{2792} For instance, one company out of five undertakings in \textit{Steel Abrasives} and one out of four in \textit{Mushrooms}.\textsuperscript{2793}

The Commission is certainly assessing whether, overall, hybrid cases are worthwhile. In order to answer this complex question, the Commission should conduct an examination of the case in which special attention is given to the overall number of cartel participants, the question whether or not all parties are willing to settle from the outset (and if not, how many parties are not interested).\textsuperscript{2794} This assessment may indeed suggest whether settling specific hybrid cases is beneficial enough for the Commission to actively pursue this approach.

5.4. The issue of withdrawal

Very recently, the General Court issued its judgment in Timab, the first ruling on a settlement case. This case which deals with the relationship between the standard cartel procedure and the Commission’s cartel settlement procedure, also provides some interesting insights on the dynamics of fine calculation in hybrid cases.

The Timab case arose out of the cartel investigation in \textit{Animal Feed Phosphates}. In this case, the Commission initially entered into settlement discussions with all the cartel parties including thus Timab.\textsuperscript{2795} In the context of the settlement procedure, Timab had provided information which indicated that the cartel had started approximately 15 years earlier (\textit{i.e.} in 1978) than the Commission could have established without this evidence.\textsuperscript{2796} As a result of having provided such information in the context of the settlement procedure, Timab was meant to benefit from: (i) the calculation of its fine on the basis of lower average annual sales figures;\textsuperscript{2797} (ii) a 10\% reduction in fines for settling the case; (iii) a 17\% reduction for leniency; and (iv) a 35\% reduction for cooperation outside of the terms of the Leniency Notice for the provision of the information which extended the duration from 1978 to 2003.

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\textsuperscript{2790} It should be recalled that, at the time of writing, the decisions adopted for the non-setting companies in hybrid cases are not available. It can thus not be examined whether these decisions related initially hybrid or subsequently hybrid cases.

\textsuperscript{2791} There is no further information available on this case.

\textsuperscript{2792} See for a complete overview Table 1.

\textsuperscript{2793} Unfortunately, there is no information available (at the time of writing 13/11) as regards the nature of the hybrid settlement, i.e. “initially hybrid” or “hybrid in the process”.

\textsuperscript{2794} Arguably, in the context of the screening of cases it may also be interesting (or even useful) to look at the cooperation provided by undertakings in the context of the investigation and at discounts obtained by the parties under the Leniency Notice. As shown in Tables 1 and 2, ICAP in the \textit{YIRD} cartel, received no lenient treatment and decided not to settle its case. Timab, which also withdrew from the procedure and appealed the decision, only received a reduction of 5\% under the leniency programme. Unfortunately, there is no more information available with respect to the other non-settling companies.

\textsuperscript{2795} Case T-456/10, \textit{Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission}, paras 8-9.

\textsuperscript{2796} \textit{Ibid.}, paras 77-78.

\textsuperscript{2797} This is due to the fact that the average would have included the early years of the cartel, stretching back as far as 1978.
During the settlement discussions, the Commission informed Timab that it faced a range of likely fines of €41-44 million. This range of likely fines was based on the duration that was under discussion and included the above mentioned benefits. 2798 However, after the Commission had held three settlement meetings with Timab, 2799 this company decided to opt-out, as it did not agree with the analysis presented by the Commission during settlement discussions. 2800 When Timab withdrew from the settlement, the Commission reverted to the regular procedure. 2801 Under the standard procedure, more precisely in its reply to the Statement of Objections, Timab contested its participation in the cartel for the period 1978 to 1993.

In July 2010, the Commission issued two decisions. One decision was addressed to the settling undertakings and the other decision was addressed to Timab. 2802 The final Commission decision addressed to Timab accepted the argument that there was no evidence of its participation in a single and continuous cartel for an initial period of 15 years. Accordingly, the Commission shortened the duration of the infringement from 26 years (1978 to 2004) to 11 years (1993 to 2004). 2803 However, the final fine imposed on Timab amounted to nearly €60 million, instead of the €44 million earlier estimated, for an infringement which was shorter than that discussed during the settlement talks.

Timab considered that it was being ‘penalised’ for having withdrawn from the settlement procedure by a fine which is greater than that which they were entitled to expect and, as a consequence, appealed the Commission’s decision.

The General Court emphasised that the settlement procedure and the standard procedure are two separate procedures. That being said, in hybrid cases, the guidelines on fines remain fully applicable and ‘in determining the amount of the fine, there cannot be any discrimination between the participants in the same cartel with respect to the information and calculation methods’. 2804 These methods ‘are not affected by the specific features of the settlement procedure’. 2805 The Court accepted that, ‘at first glance, such an increase in the amount of the fine, when the duration of the infringement has been reduced by nearly 15 years, may seem paradoxical’. However, it clearly stated that ‘the Commission applied the same method when calculating the range of fines at the stage of the settlement procedure and the amount of the fine ultimately imposed as part of the standard procedure’. 2806

Taking a closer look at the method of calculation of the fine in this case, the Court observed that the difference between the amount proposed as part of a settlement and the final amount was due to the

2798 Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 79.
2799 Ibid, para 116.
2800 Ibid, para 10.
2801 Ibid.
2802 The applicants had access to the file, responded to the statement of objections on 2 February 2010 and took part in a hearing which was held on 24 February 2010. Ibid, para 12.
2804 Ibid, para 74.
2805 Ibid.
2806 Ibid, para 81-82.
persons and of a number of reductions that were applied (only) as part of the settlement. In addition, since Timab challenged the existence of an infringement prior to 1993 during the regular procedure, the Commission was faced with a new set of evidence and was required to review the file, redefine the duration taken into account and, where appropriate, to readjust the method for the calculation of the fine. Accordingly, the elimination of the period 1978-1993 from the duration of the infringement resulted in a review of the application of the Leniency Notice and of the 2006 Fining Guidelines.

The Court considered that, since the Commission could only prove that Timab participated in the cartel from 1993 to 2004, it was no longer possible to apply the 35% reduction initially planned for mitigating circumstances, ‘outside the leniency programme’ for helping the Commission extend the duration of the infringement before 1993. Likewise, the shorter duration of the infringement also had an impact on the 17% leniency reduction which was diminished to 5%. Besides losing these reductions, the General Court explained that the average annual sales figure during the infringement period 1993-2004 was higher than during the period 1978-2004. This had the immediate effect of increasing the average amount of the value of sales and therefore the additional amount. All these factors led the Commission to depart significantly from the € 41-44 million range estimated in the context of the settlement procedure, despite of the fact that the duration of the infringement had significantly decreased.

In any event, the Court also held that when undertakings decide to withdraw from the settlement procedure, and the regular procedure applies by default, the Commission is no longer bound by the range indicated during the settlement discussions. Undertakings may thus not claim a legitimate expectation that the likely range of fines would be applied. The Court concluded that the Commission did not penalise the Timab for its withdrawal from the settlement procedure.

This case is arguably very fact-specific. However, it provides some interesting insights as to the working of the settlement procedure and what companies considering to follow this procedural path can expect.

Compared to the standard procedure, the settlement route entails important advantages for undertakings. One of the most notable benefits of the settlement procedure is that it offers complete legal certainty as regards the range of likely fines that the Commission is up to impose. As the

2807 In particular, the Court states that ‘the Commission was faced with a new set of evidence: it was no longer able to rely on the applicants’ declarations in their application for leniency, the new element being the abandonment of the first period (1978-1993), which had been taken into account during the settlement procedure’. Ibid, para 90.

2808 Ibid.

2809 See point 29 of the 2006 Fining Guidelines.

2810 Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 95. The Court held in this context that ‘it may be inferred from the fact that the Commission finally granted a 5% discount by way of leniency for the second period (1993 to 2004) instead of a 17% reduction, which covered the period from 1978 to 2004, that it considered that the statements relating to the period used had limited added value and that the self-incriminating statements covering the first period (1978 to 1993) — the only basis on which the Commission could have found that the applicants had participated in the agreement during that period — had significant added value’ (para 191).

2811 Ibid, paras 86-87.

2812 Ibid, para 124.

2813 Timab has appealed the General Court judgement to the CJEU. At the time of writing, the grounds of appeal are not public.

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General Court stated ‘the effectiveness of the settlement procedure and the principle of the protection of legitimate expectations requires that the Commission be bound, in that procedure, by its estimate of the amount of the fine’. 2814

Once this range of likely fines has been disclosed, cartel participants may misuse this knowledge to (attempt to) calculate according to the Fining Guidelines whether the final fine will be lower following the settlement path or contesting the whole case. The General Court has, however, made clear that – given the important distinction between the settlement procedure and the regular procedure – the range of likely fines no longer applies when undertakings chose to withdraw from the settlement. With this statement the General Court closes the door for cartel participants which attempt to abuse from the settlement procedure.

This case shows that while the settlement procedure is obviously voluntary, undertakings should only engage in the settlement discussions with the honest intention of settling their case. This was most probably not the case of Timab. As the Court explained the settlement procedure is suitable for companies which face incriminating evidence and are willing to admit their involvement in the infringement. 2815 If these conditions are not fulfilled from the outset, settling should not be (seen as) an option for a cartel participant. As the Timab case shows (given the lack of binding effect of the range of fines) going down the settlement path with no intention or wish to settle is a risky option. Although the Commission is obliged to apply its Fining Guidelines and in this case its reasoning is correct and coherent, the ruling in Timab demonstrates that the choice of whether or not to settle involves complexities that cannot always be fully calculated or predicted. 2816

6. Measuring the effectiveness of the settlement procedure: efficiency savings for Commission (and undertakings)

The analysis above has shown that, the structure of the design of the system, combined with the approach of the Commission in practice, constitute an appropriate combination to induce companies to settle. However, in order to affirm that the system is successful or effective, it is also necessary to answer the question whether the procedure is fully achieving its key efficiency goals.

The settled cases confirm that the procedural efficiencies that the Commission pursues have mainly been accomplished. This benefit also appears to be one of the reasons why firms chose to settle. Companies that have taken part in some successfully settled cartels have confirmed their positive experience and have provided encouraging feedback for other undertakings to follow the settlement path. 2817

One of the key features of the settlement procedure is that oral communication in settlements replaces to an important extent the written character of the standard procedure. 2818 This means that,

2814 Case T-456/10, Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission, para 124.
2815 Ibid, para 61.
2816 This aspect is also linked to the fact that the Commission also retains a considerable margin of discretion in the calculation of fines. See further infra Chapter 10.
2817 See F. Laina AND E. Laurinen, “The EU Cartel Settlement” 2 of the online version of this article.
2818 F. Laina was asked in an interview ‘Why are some of the steps in the settlement process only done in writing? Are there no ways around this?’ In his reply he stated that settlement means ‘discussions’. Therefore, written steps are restricted to the minimum. The Commission gives an oral presentation of its objections and expects, in turn, that firms
in practice, a great part of the efficiencies are accomplished by diminishing the drafting work for both undertakings and the Commission.\footnote{2819} These efficiency savings can be illustrated by comparing regular Commission decisions in cartel cases to settlement decisions. While in classic cases Statements of Objections and decisions contain several hundreds of pages, settlements amount on average to 20-40 pages.\footnote{2820}

Next, by simplifying the procedure, settlements also entail considerable benefits for the Commission in terms of procedural organisation. The more limited access to the file in the settlement procedure enables the Commission to reduce the time spent on preparing access to the file. The use of an agreed single procedural language instead of multiple also has a significant beneficial impact for the Commission.\footnote{2821} These advantages have been recognised by practitioners. MARC HANSEN, partner at Latham & Watkins, commented that:

\begin{quote}
the shorter procedure of the EU settlement is still better than the alternative of an ordinary procedure with a full access to the file, a fully detailed statement of objections, an oral hearing lasting almost a week, an extensive reply to the statement of objections, and a fully motivated decision, which in most instances will be challenged before the EU courts in Luxembourg, thus adding four or five years to the entire timeline\footnote{2822}.
\end{quote}

The overall increased efficiency in the handling of cartel cases, also means that the duration of the procedure should be shortened and cases should be brought to an end faster. The Commission indeed stressed that one of the main advantages for companies to settle a case is that the procedure offers a means of achieving a prompt resolution of the matter, which allows companies to move on with their business and avoid the additional cost and distraction of extended administrative proceeding.\footnote{2823}

The length of the procedure depends on a number of factors such as the complexity of the case and the number of settling parties. In the DRAMs case (2010), despite the fact that the lack of familiarity in the use of the system most likely influenced the length of the process, the Commission was able
to issue the final settlement decision over one year after having opened proceedings. The Animal Feed Phosphate cartel (2010), the first hybrid settlement case, also took over a year to complete since the formal opening of the proceedings. Still, in this case procedural savings were also undermined since one of the parties finally opted not to settle its case. In reverting back to the cumbersome ordinary procedure for one firm, the Commission had to issue a full SO and allow for access to the file and an oral hearing. In addition, the Commission’s infringement decision was subsequently appealed.

Although the specific circumstances of the two first settled cases may have had a negative impact on the procedural savings, it should be noted that these cases had already been initiated under the normal procedure as the settlement instrument was not yet available. Following the entry into force of the system, they were remodeled as settlement cases, as the parties appeared suitable candidates. In this sense DRAMs and Animal Feed Phosphate are not really representative.2824

In the four next settlement cases – that is Consumer Detergents (2011), CRT Glass (2011), Refrigeration Compressors (2011) and Water Management Products (2012) – the application of the settlement system allowed to reduce significantly the period between the initiation of the investigation and the final decision. According to Commission’s representatives the Consumer Detergents case was concluded in less than three years, the CRT Glass and Refrigeration Compressors cases in three years and Water Management Products in three years and six months.2825 In the standard procedure, the handling of a cartel case can be significantly longer. From the formal opening of the proceedings pursuant to Article 11(6) of Regulation 1/2003, these cases were resolved in a period ranging from 14 months (Refrigerator Compressors)2826 to 17 months (Water Management Products).2827,2828 The settlement discussions in these four cases (i.e. Consumer Detergents, CRT Glass, Refrigeration Compressors and Water Management Products) lasted from six months in Consumers Detergents2829 to 13 months in Water Management

2824 Interview of F. LAINA in D. VASCOTT 2; F. LAINA and E. LAURINEN, “The EU Cartel Settlement” 5 of the online version of this article.
2826 In Refrigerator Compressors the Commission formally opened proceedings pursuant to Article 11(6) of Regulation 1/2003 on 13 October 2010. Between 15 November 2010 and 14 September 2011 the settlement discussions were conducted. On 11 October 2011 the Commission issued the SO and, on 7 December 2011 it adopted the decision. See Case COMP/39.600 — Refrigerator compressors [2012] OJ C 122/6, paras 19-24.
2827 In Water management products, the investigation was initiated following an immunity application on 21 October 2008. The formal proceedings pursuant to Article 11(6) of Regulation 1/2003 were initiated on 27 January 2011. Settlement meetings between each party and the Commission took place between 16 February 2011 and 20 March 2012. On 25 April 2012, the Commission adopted a Statement of Objections and in June 2012 it rendered its decision. Case COMP/39.611 — Water management products [2012] OJ C 335/4, paras 10-17.
2828 In Consumer detergents and CRT Glass the period since the formal opening of the case until the adoption of the final decision amounted to 16 months and 15 months respectively. In Consumer Detergents the Commission initiated proceedings pursuant to Article 11(6) of Regulation 1/2003 on 21 December 2009. The settlement meetings between the parties and the Commission took place between 3 June 2010 and 7 January 2011. On 9 February 2011, the Commission adopted a Statement of Objections Decision of 13 April 2011. The final decision was issued by the Commission on 13 April 2011. See Case COMP/39.579 — Consumer detergents [2011] OJ C 193/14, paras 8-14. In CRT Glass the Commission opened proceedings pursuant to Article 11(6) of Regulation 1/2003 on 29 June 2010. The settlement meetings took place between July 2010 and July 2011. In the same month the Commission adopted the SO. Three months later the decision was rendered. See Case COMP/39.605 — CRT Glass [2012] OJ C 48/18, paras 8-19.
2829 In Consumer Detergents the Commission commented in the Press Release that ‘the settlement discussions started in the second half of 2010, after the companies indicated that they were prepared to settle, according to a procedure introduced in 2008. In January 2011, they all clearly and unequivocally acknowledged their respective liability for the infringement. A Statement of Objections reflecting the parties’ submissions was notified to them in February 2011 and
The relatively short duration of the settlement meetings is promising given that this phase of the procedure is the most time consuming.2831

The following settlements illustrate that procedure is currently well established and that additional efforts are being made to shorten the total duration of time spent on the settlement procedure.2832 The Wire Harnesses settlement (2013), was completed in less than a year since the Commission opened proceedings.2833 In European Interest Rate Derivatives (2013) and Yen Interest Rate Derivatives (2013) the Commission declared that ‘[t]hey are one of the swiftest cartel settlements decided by the Commission, showing the full potential of the efficiencies offered by the settlement procedure’.2834 This is indeed reflected in the short length of the proceedings. In Yen and European Interest Rate Derivatives (2013) the Commission opened proceedings in February 2013 and March 2013 respectively. Only a few months later, in December 2013, both decisions were issued.2835 Similarly, the subsequent settlements in Polyurethane Foam (2014), Power exchanges (2014), Bearings (2014) and Steel Abrasives (2014), were also concluded within roughly a year since the proceedings were initiated by the Commission.2836 The duration of settlement discussions also appears to be reduced. In Bearings (2014), for instance, settlement meetings between each party and the Commission only lasted a few months from March 2013 until early December 2013.2837, 2838

A related, and yet different, aspect that has an important impact on efficiency and resource saving is the likelihood of appeal before the European Courts. The absence or very small likelihood of

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2830 Interview of F. Laina in D. Vascott 2. F. Laina also commented on the additional value of the reduced length of the proceeding by stressing that ‘[i]n each of these cases the application of the settlement procedure allowed a significant reduction in the overall duration of the cartel procedure’. Given the impact of the (duration of the) settlement discussions on the (duration of the) whole procedure, F. Laina and E. Laurinen stress the need to approach these discussions pragmatically. Particularly, they comment that ‘[b]ased on the Commission’s experience, some interlocutors still tend to open discussion on clear facts, which unnecessarily delays the procedure. The purpose at this stage is only to identify whether a common position may be found on the basis of the factual evidence which has already been set. If a company has decided to head for settlement in pursuit of a faster resolution, it should show this interest consistently during the discussion stage. F. Laina and E. Laurinen, “The EU Cartel Settlement” 8 of the online version of this article.

2831 According to F. Laina and E. Laurinen in the first settled cases the discussions consumed at least two-thirds of the total duration of the settlement stage. F. Laina and E. Laurinen, “The EU Cartel Settlement” 8 of the online version of this article.

2832 It should be noted that there is no information available as regards the date of initiation of the investigation.

2833 In this case the Commission opened proceedings in August 2012 with a view to engaging in settlement discussions. Settlement meetings with the parties took place between 25 September 2012 and 14 May 2013. The decision was issued on 10 July 2013. See Case AT.39748 — Automotive wire harnesses [2013] OJ C 283/5, paras 27-29.

2834 Commission, Press Release IP/13/1208, “Commission fines banks €1.71 billion for participating in cartels in the interest rate derivatives industry”.

2835 Ibid.


2838 Unfortunately, at the time of writing, no details are available on the duration of Canned Mushrooms and Swiss Franc interest rate derivatives.

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subsequent litigation before the European Courts is also perceived as an important benefit both for the Commission as well as for the companies.\textsuperscript{2839} As commented above parties retain the right to challenge the Commission decision before the European Courts. Nevertheless, appeals were from the start expected to be reduced since settling parties have voluntarily acknowledged an infringement and their liability for it.

So far, Commission and undertakings have been able to benefit from substantial savings in litigation since none of the settling parties have appealed the Commission’s infringement decisions. The Commission attaches great importance to this aspect of efficiency which is often overlooked. Appeal proceedings by definition require a substantial investment of time and resources. Taking into account that standard cartel cases frequently generate several appeals, the savings that can be achieved are indeed remarkable. In addition, the fact that cases are appealed also has an impact on the total length of the proceedings. When Commission decisions are challenged, the duration of the litigation of the case are to be added to the duration of the administrative proceedings.\textsuperscript{2840} This adds a couple of years to the timeline. Experience shows that firms are aware of and wish to enjoy these advantages. In practice, it appears that parties chose to settle when, on the basis of their own assessment of the case, they consider that there is little point in challenging the Commission decision.\textsuperscript{2841}

As a whole, it can be affirmed that despite its relatively slow start, the settlement procedure has become an effective cartel resolution tool in Europe. Cases are handled more quickly and the length of the European cartel settlements has been progressively reduced.\textsuperscript{2842} Regular cartel proceedings appear to last three and a half years on average from the initiation of the investigation to the adoption of the Commission’s final decision, excluding appeals.\textsuperscript{2843} Experience demonstrates that the settlement system can shorten the procedure by two years from the moment the investigation is launched until the infringement decision is issued.\textsuperscript{2844} \textsuperscript{2845} The benefits linked to the less frequent

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\item \textsuperscript{2839} M. MARQUIS adds out that ‘if appeals are averted then the benefits are also shared by the courts in Luxembourg, which may divert their resources to potentially better use’. M. MARQUIS, “Settling cartel" 3-4.
\item \textsuperscript{2840} See also e.g interview of F. LAINA in D. VASCOTT 3; A. SCORDAMAGLIA, “The new Commission settlement” 63.
\item \textsuperscript{2841} See, however, emphasising the potential benefits of appeals G. VAN GERVE AND M. HANSEN in D. VASCOTT 7.
\item Van Gerven notes that ‘[w]ith the European courts becoming more active in scrutinising cartel decisions, some firms may be willing to take their chance in Luxembourg. I am also more sensitive than before to the issue that if you settle (early) while others fight on, you may not have, in retrospect, the best outcome. But that is basically a question of risk taking and of knowing the strengths and weaknesses of your case’.
\item \textsuperscript{2842} The acceleration of the procedure in the most recent settled cases has been possible inter alia thanks to the internal deadlines. Pursuant to the Settlement Notice certain deadlines are applicable to specific formal steps of the procedure. Particularly, companies must confirm their interest in settlement within two weeks after the proceedings are initiated. When the settlement discussions have ended, companies must provide their settlement submission within three weeks. After the notification of the Statement of Objections, firms have two weeks to reply. See Settlement Notice, paras 11, 17, and 26. According to the practice of setting deadlines most likely influenced the discussions of technical issues that the Commission carries out with the settlement participants between the first and the second formal settlement meeting.
\item F. LAINA AND E. LAURINE, “The EU Cartel Settlement” 8 of the online version of this article.
\item A. STEPHAN, “The Direct Settlement” 42-43 of the online version of this article. A. Stephan argues that the ‘most important savings in the settlement procedure clearly comes between the SO and the final decision, when accesses to the file and requests for oral hearings by infringing firms typically occur. Looking at cartel cases delivered since 2001, this period averages 12-13 months. Hence, assuming the settlement procedure operates as smoothly as the notice envisages, a potential reduction in the procedure time by up to a third may be possible. This should free up significant resources which can be employed in the next cartel case; providing more timely punishment to more infringements, and consequently increasing deterrence’.
\item Based on my own data base this is, however, difficult to estimate since most cartels cases are opened based on leniency applications and the dates of such applications are as a general rule not published.
\item F. LAINA AND E. LAURINE, “The EU Cartel Settlement” 8 of the online version of this article. However, it has also been argued that the proceedings still take too much time. See e.g. interview of G. VAN GERVE AND M. HANSEN in D.
appeals are also clear. Even though the Commission recognises that there is some margin for further progress, compared to the intense and time consuming regular procedure the settlement route, clearly constitutes an attractive alternative for both Commission and cartel participants.

7. Concluding remarks

The analysis conducted in this Chapter has shown that a cartel settlement system entails considerable efficiency benefits for both undertakings and the Commission. Still, in order to ensure that the settlement system is effective and adequate from a public enforcement perspective its design should present two key aspects. First, companies must not be granted a right to settle. Secondly, the Commission must conduct a full investigation and establish the key facts of the case before initiating the procedure. In the European settlement system the Commission remains in the driving seat throughout the whole procedure. In addition, the Commission’s settlement system can only be followed after the Commission has completed its investigation. This enables the Commission to determine which cases have the potential to obtain substantial efficiency benefits and are, accordingly, suitable for settlement. The presence of these two features in the design of the procedure ensure that, despite the 10% fine reduction granted to companies which settle their case – and which corresponds to enforcement losses – settlements are a generally desirable enforcement instrument.

Further, in order to be effective the system must also be used in a significant proportion of cases. The Commission has thus an obvious interest in presenting an appealing settlement procedure that encourages companies to settle. If the system fails to attract settlement candidates, that would not only have adverse consequences for the system itself, but also for the Commission’s case handling and administrative capacity.

Dealing with the first settlement cases represented an important challenge for the Commission. Nevertheless, the Commission managed to adopt a flexible approach to the settlement system, providing sufficient incentives for the cartel participants to follow it. The settlement decisions demonstrate the Commission’s willingness to adopt an open-minded policy that provides the necessary incentives for firms to guarantee the success of the settlement system. On the other hand, cartel participants also play an important role in the proper working of the system. Companies not only seem increasingly prepared to fully commit to the procedure by not opting out once the settlement discussions have started. They also appear to adopt a pragmatic approach during the settlement discussions which, in turn, allows to shorten the length of the proceedings.

VASCOTT 6. M. HANSEN comments that ‘[w]hile it is generally expected that future cases will be dealt with more quickly, the length of the EU cartel settlements have so far exceeded 15 months on average. This time frame is definitely too long taking into account the fact that exhaustive investigations of several years generally precede EU settlement proceedings’.

2846 See F. LAINA AND E. LAURINEN, “The EU Cartel Settlement” 8 of the online version of this article; interview of F. LAINA in D. VASCOTT 2. F. LAINA highlights that, in order to improve the efficiency of the procedure, commitment to the procedure is needed on both sides. With respect to companies, such commitment can be shown by also involving their managers and legal representatives in the settlement. The Commission, on the other hand, is willing to discuss key issues openly and without delay.
CHAPTER 10. The European Commission’s fining policy

Cartel activity differs in important ways from other types of anticompetitive conduct addressed by (European) antitrust law. One of the most important defining features of cartels is their well-known deliberate nature. Very frequently, cartels are operated by a group of individuals who fully realise that their conduct is extremely harmful and therefore illegal. Given this deliberate nature of cartels and the detrimental effects they produce on the economy and consumers, there is no doubt that cartel participants must face the consequences of their illegal behavior. In accordance with this reasoning, sanctions should be a key component of all competition law enforcement regimes in every jurisdiction, and competition authorities should, in turn, be equipped with adequate sanctions.

At the EU level, administrative fines for undertakings represent the principal tool in the European Commission’s enforcement arsenal. Throughout the years, the Commission’s Fining Policy has clearly gone through a learning process. This process has not only served to enhance the transparency and objectivity of the Commission’s fining system by, for example, adopting and revising the Guidelines on fines in 1998 and 2006 respectively. Moreover, we can observe that the Commission has progressively adapted its fining strategy over the last decades in order to maximise the effectiveness of its sanctions and try to achieve complete deterrence. The general adjustment of the level of the fines to promote deterrence can be seen as the main outcome of this lengthy learning process. In effect, deterrence considerations can be considered the main key driver in the Commission’s fining policy.

In accordance with what was concluded in Chapter 5, the modernisation and decentralisation reforms have triggered a spontaneous convergence process. In this learning process, Member States have followed the example of comparable rules in the European Union. The enforcement system of the Commission has represented a blueprint for many Member States, which have modelled their competition law enforcement systems upon the Commission’s model. Next to this convergence trend based on the Commission’s regime, an increasing divergence trend can be identified in a number of Member States, which prefer to accommodate their domestic preferences in their national sanctioning systems. These Member States share the view that – even if the Commission...
constantly refines and develops new enforcement tools aiming at ensuring optimal enforcement – the current administrative sanctioning system based (only) on fines for undertakings may have reached its limit. This, in turn, opens the debate on the question whether the Commission’s corporate fines system should (not) be complemented with other forms of penalties or measures to increase deterrence.

Against this brief background, this chapter discusses the Commission’s fining policy in cartel cases. To this end, this chapter is structured as follows. Firstly, it provides an overview of the economic theory underlying the fining policy. This discussion will allow us to understand the theoretical foundations of the Commission’s fining system and to better assess the factors that should be taken into account by the Commission to calculate the amount of antitrust fines. Next, following a discussion on the general principles of the European antitrust fining system, the theory and practice of the Commission’s fining methodology is discussed analysed in depth. This part is based most notably on an assessment of the Commission’s fining decisions as well as the relevant case law where the fining parameters are interpreted. As the Commission enjoys a considerable margin of discretion in the setting of fines under its Guidelines, this examination will clarify which precise factors or parameters are taken into account by the Commission in the calculation of fines in cartel cases as well as the individual weight given to each factor. Once the Commission’s method to calculate fines as applied in practice has been discerned, the crucial question of this examination will be addressed, namely: (to which extent) does the design and application of the Commission’s fining methodology in cartel cases take into account the key economic principles to calculate optimal fines and thus to produce deterrence. This structure will be followed individually for (i) the practice previous to the introduction of the first Fining Guidelines, (ii) the 1998 Fining Guidelines and (ii) the 2006 revision of the fining methodology.

1. Economic analysis underlying the Commission’s fining policy

The influence of economic analysis on competition policy in Europe has been expanding over the last twenty years. Economic analysis has indeed progressively become an essential tool to ensure that the application and interpretation of the substantive European competition rules promotes economically efficient behaviour. In the same vain, economic concepts can also be used to guide the enforcement of the antitrust rules. Economic analysis is, however, not an exact science. In order to build a coherent system, economic theory relies on strong assumptions. Such assumptions combined with the lack of available data, significantly limits the application of economic concepts in the assessment of fines for competition violations. Therefore, measuring the econometrically optimal fine for each firm involved in a given (through the network) will have important implications for the national systems of competition law”. H. VEDDER, “Spontaneous” 20-21.


antitrust violation does not seem viable in practice. Still, theory on optimal fines constitutes useful guidance for competition authorities and can provide a close proxy to fix the amount of effective fines as closely as possible to the level of an economically optimal fine. The ‘economics of punishment’ and the optimal fine theory may shed some light on and allow for a coherent understanding of the Commission’s methodology to calculate fines and allow to identify potential shortcomings of the way fines are imposed.

The basic model of enforcement of legal rules through punishment is Becker’s model, which is based on the assumption, that the criminal is a rational individual, who calculates the private profits and harm stemming from his behaviour before deciding whether to act or not. The application of economic concepts to the enforcement of a legal provision is, thus, intrinsically connected to (i) the incentives for an individual to engage in the illegal activity, (ii) the costs of enforcement to manipulate those individual incentives and (iii) the welfare benefits that are obtained when the rule is enforced, compared to the situation in which the rule is not enforced.

Considering these basic elements, the legislator can develop some devices aiming at influencing the rational cost-benefit analysis of the offender in order to achieve compliance with the legal rule. The key instrument of the legislator is actually the use of a legal threat, i.e. the idea that unpleasant consequences must be faced when a prohibition is violated. The modification of the behaviour of the addressees of the legal threat is called the deterrent effect. Or in the words of W. Wils, ‘[t]he idea of deterrence is to create a credible threat of penalties which weighs sufficiently in the balance of expected costs and benefits to deter calculating companies from committing antitrust violations’. From an economic perspective, a fine can be considered “optimal” when it causes the highest deterrent effect at the lowest possible cost while generating the greatest welfare benefits.

An enforcement agent has two major tools to influence the rational cost-benefit analysis: (i) the probability of effectively applying the threat (i.e. the probability of detection and conviction) and (ii) the magnitude of the legal threat or sanction.

The probability of detection and conviction will depend on the amount of efforts that are invested in the detection of the illegal practice. Investing resources and efforts in detection is, on the other

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2856 See further the analysis below.
2858 G. Becker, “Crime and Punishment: An Economic Approach”, 1968 (76-2) Journal of Political Economy, at 169–217 (hereafter: ‘G. Becker, “Crime”’). Niels, H. Jenkins and J. Kavanagh Further elucidate this aspect. These authors comment ‘Why do you park your car neatly between the white lines of a parking bay and put enough money in the parking meter? Economists have two answers to this: — because you know that otherwise you’ll get a fine; — you have an intrinsic motivation to be law-abiding, so you would pay the parking meter even if the chance of a fine were low. The second answer is more akin to the principles of behavioural economics. Economists have joined those studying law and psychology in looking at the mindset of people who are tempted to break the law. In essence, the traditional economic framework sees would-be offenders making a rational trade-off between the rewards of the illegal activity and the risk of being caught’. G. Niels, H. Jenkins and J. Kavanagh, Economics for Competition Lawyers, Oxford, Oxford University Press 2011, 640 p., at 475 (hereafter: ‘G. Niels et al. Economics’).
2861 W. Wils, “Optimal Antitrust Fines” 8 of the online version of this publication.
2862 See also e.g. G. Niels et al. Economics 475.
hand, extremely costly. One can thus establish a relationship of mutual substitution between resources dedicated to enforcement and the size of the sanction: an increase in resources increases probability and thus allows to decrease the sanction. Conversely, a decrease in resources diminishes probability of conviction, requiring therefore a larger sanction.\textsuperscript{2863} Given this correlation between the probability of detection and the level of the sanction, the same result in terms of deterrence can in theory be achieved following two different approaches. One may decide to invest in intense enforcement and set low fines (which lead to a high amount of criminals being caught) or, one can decide to limit (the resources to be invested in) enforcement activity and impose higher fines.\textsuperscript{2864} This particular relationship emphasises the need to find an appropriate balance between probability of detection and magnitude of the sanction.

One of the most influential visions is Becarria’s theory on crimes and punishments. In essence, in Becarria’s view, crimes can be prevented more effectively when there is certainty rather than severity of punishment. Hence, investment of resources in detection should be combined with mild rules on sanctions. Put differently, in order to achieve deterrence, the probability to be effectively convicted should be increased, while the size of the sanction should be reduced.\textsuperscript{2865} On the other side of the spectrum, Becker reaches the opposite conclusion based on a purely economic analysis. According to Becker, given that detection involves high costs and resources, the optimal sanction must be fixed at the highest feasible level considering the ability to pay of the offender, as a consequence of which, the probability of detection can be set at the lowest (and less costly) level.\textsuperscript{2866} This strategy thus involves very high fines which are only seldom imposed.

There are however various reasons why this strategy may not be optimal and should not – or cannot – be adopted in practice. First, companies are more likely to engage in illegal conduct when the probability of detection and punishment is low – even if fines are very high – than when the probability of being convicted is higher and the punishment less severe.\textsuperscript{2867} Furthermore, imposing

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\textsuperscript{2864} The disadvantage of the first option is that enforcement costs are high. The disadvantage of the second possibility is that the fines may be disproportionate for those few criminals who do get caught. On the basis of the second option, a justice system may frown on a criminal having to pay a fine of €5,000 for a crime that cost society only €1,000. G. NIELS et al. Economics 475.
\textsuperscript{2865} C. BECCARIA, Dei delitti e delle pene 1764, Milan, Comune Milano (ed) 1981, at 174.
\textsuperscript{2866} G. BECKER, “Crime”. Becker’s model is based on the assumption that raising the level of financial sanctions is costless. See also e.g. P. MANZINI, “European Antitrust in Search” 6; W. WILS, “Optimal Antitrust Fines”17 of the online version of this publication.
\textsuperscript{2867} This reasoning is related to the so-called availability bias. As commented above, in order to determine their behavior, companies or individual decision-makers analyse (all the existing relevant information about) the probability of detection and punishment, and the amount of the fine. The availability heuristic is based on the notion that if something can be recalled, it must be important, or at least more important than alternative solutions which are not as readily recalled. Subsequently, under the availability bias, people tend to rely heavily on recent incidents, which can easily recalled because they happened close to them or were stressed publicly. (A. ESGATE AND D. GROOME, An Introduction to Applied Cognitive Psychology, Hove, UK and New York, Psychology Press 2005, 352 p., at 201; R. B. KOROBKIN AND T.S. ULEN, “Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics”, 2000 (88-4) California Law Review, 1051-1142, at 1085-1090). While imposing very high fines makes this sanction easy to recall, on the other hand, if such sanction is not imposed frequently companies will easily forget this information and, thus, ignore it in their decision making process. It appears more effective to raise the frequency of punishment assuming that if an individual knows that this probability is higher or knows someone who has been punished for a comparable violation, this information is likely to be recalled and lead to an overestimation of the probability of being fined. W. WILS, “Optimal Antitrust Fines” 17-18 of the online version of this publication.
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high fines is problematic in the light of the principle of proportionality of penalties. Finally, high fines may also be problematic when they exceed the ceiling of a companies’ ability to pay.

The socially optimal degree of law enforcement depends on the question whether the benefits of fighting crime exceed the costs of enforcement. In particular, taking into account the important costs of enforcement, it has to be determined whether the rule or prohibition in question is worth full enforcement or not. The answer to this question will depend on the harm resulting from the illegal activity. The prohibition of restrictions by object under Article 101(1) TFEU, which never fall under the scope of Article 101(3) TFEU, is inter alia based on the presumption that certain types of agreements are by their very nature extremely damaging for the competitive process. In the case of restrictions by object, full ex ante deterrence (i.e. a level of sanctions and/or probability high enough to deter every illegal activity) could be considered a socially adequate means. Still, when relatively costly enforcement is required to achieve that goal, fully enforcing the prohibition is likely not to be a suitable objective. In particular, in the words of E. L. CAMILLI the ‘enforcement efforts will be allocatively efficient only up to a point where the marginal cost of that enforcement is equal

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2869 P. MANZINI, “European Antitrust in Search” 6-7. P. MANZINI points out that setting the fine at a level that is larger than the firm’s assets may have some undesired effects. In particular, he comments that, ‘[i]n this case, the punishment risks not fulfilling its tasks., in fact a sanction greater than all the possession of the offender is party unrecoverable and therefore does not sufficiently deter. Moreover the punishment may jeopardise the market’s competitiveness. Of the impossibility to pay sanction leads a firm to bankruptcy the firms competitors will acquire its shares and the markets will become more monopolistic. As a consequence, we would have the rather paradoxical effect of a sanction that impairs competition instead of protecting it’. Although this reasoning leads to a sanction policy that is less rigorous towards small firms (and therefore discriminatory against large firms) it has obtained some credit on European level. For a more detailed discussion of undertakings ability to pay as a limit for fines see e.g. W. WILS, “Optimal Antitrust Fines” 17-21 of the online version of this publication. The relevance of the inability to pay issue is, however, limited in practice as in the 2006 Fining Guidelines, the Commission takes into account this consideration in the final calculation of fines. See further infra section 5 of this Chapter.

2870 Furthermore, Becker’s model is based on the assumption that increasing the magnitude sanctions was costless. However, an increasing magnitude of sanction vis à vis a decreasing investment and costs in detection also involves costs. Judicial errors, particularly of type II (innocents are convicted) are more harmful when very high fines are imposed. This type of errors is also more likely to occur if few resources are invested in detection. When type II errors occur, not only there is a general decrease in deterrence and thus in welfare. Innocents will also suffer the harm following from the payment of higher fines. E. L. CAMILLI, “Optimal and Actual” 3.

2871 Put differently, having a police force and a court (or a competition authority) with the necessary resources comes at a price. The socially optimal degree of law enforcement will thus depend on the question whether the benefits of fighting the crime exceed the costs of enforcement is this essential. Commonly, the socially optimal degree of law enforcement is usually not to catch 100% of criminals, but to catch a lower percentage. In other words, depending on the circumstances, it can be more efficient to let some criminals get away with it. See e.g. E. L. CAMILLI, “Optimal and Actual” 3.

2872 See further supra Chapter 4.
to the marginal gain for the society due to the reduction of the offences committed’. The application of this reasoning in cartel cases shows that there are solid arguments to combat cartels through enhanced deterrence. In cartel agreements, the existence of deadweight loss deriving from the increase of prices constitutes a full social loss that is not outbalanced by the higher gains obtained by the cartel participants. Although complete ex ante deterrence for every anticompetitive behaviour is not efficient or viable, it appears that in the case of cartels there are plausible grounds to introduce fines designed to achieve an optimal level of deterrent effects.

The next question that should be addressed is what should be the reference point to calculate fines. Economic analysis suggests that the optimal sanction amount should be calculated on the basis of the objective consequences of the offender’s misconduct. The scholarly community is basically divided into two competing approaches as regards the determination of an optimal sanction. One of the prevalent approaches endorses gain-based sanctions. This type of sanctions forces the offender to disgorge the gain achieved through the violation. According to this approach, the expected fine should be fixed at the level of the offender’s expected gain resulting from the infringement. The reasoning is that by eliminating the expected gain, rational individuals will have no incentive to engage in illegal conduct. An alternative approach is the harm-based sanction. On the basis of this method, the expected fine should be set at the level of the social harm stemming from the violation. As a result, violators will absorb or “internalise” the social damage of their actions.

In the antitrust sector, these different approaches and their social and economic implications can be described as follows. Suppose that the total social harm produced by anticompetitive conduct equals 150 (100 corresponding to the direct higher cost for consumers due to the price increase and 50 resulting from the loss of productive resources). Assume also that the profits of the companies that participated in the activity is 130 (100 representing surplus wealth extracted directly from consumers, and 30 resulting from lower production costs). According to gain-based sanctions, the fine that would prevent firms from adopting this conduct would be 130. In turn, based on the harm-based approach, the sanction would be 150. The implications of the two approaches are far more apparent in a situation where the firm’s gain is greater than the social harm produced by the

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2873 The deterrent goals of competition law sanctions and the application of economic analysis of penalties are openly considered the main priority of competition authorities. See OECD, “Hardcore cartels: recent progress” 27.


2875 This concept contrasts with theories that suggest that sanctions should be determined on the basis of both objective and subjective factors. Therefore, not only factors such as the harm caused or the gain obtained should be considered, but also elements such as the personal and psychological profile of the guilty person or his attitude must be taken into account. P. MANZINI, “European Antitrust in Search” 1.

2876 See commenting on both approaches S. ODED, Corporate Compliance: New Approaches to Regulatory Enforcement, Cheltenham, Edward Elgar Publishing Ltd 2013, 336 p., at 23 (hereafter: ‘S. ODED, Corporate Compliance’).


2878 S. ODED, Corporate Compliance 23; W. WILS, “Optimal Antitrust Fines” 22 of the online version of this publication.


2880 See also using this example P. MANZINI, “European Antitrust in Search” 4. For other illustrative examples see G. NIELS et al. Economics 475 et seq.
infringement. For example, suppose that the firm’s gain is equal to 160 (100 being the transfer of consumer surplus and 60 from cost reductions) whilst the social harm is only 150. In this hypothesis, the gain based sanction would be equal to 160 and would still act as a deterrent. On the other hand, a harm-based sanction would be set at 150. This amount would, however, not deter companies from engaging in anticompetitive conduct because, after paying the fine of 150, firms still retain a benefit of 10.

As this brief example illustrates, harm-based sanctions are not fully apt to have the same deterrent effect as gain-based sanctions. The objective of harm-based sanctions is simply to suppress inefficient behaviour, i.e. conduct diminishing total society wealth. In contrast, if the illegal behaviour is efficient in terms of total welfare, the (harm-based) sanction should be set at a level that would impede it.

The gain-based sanction is rooted in the assumption that any surplus transfer from consumers to firms is always negative and thus undesirable, even if the practice in question has a positive overall impact on total welfare. This sanction is designed to deter all antitrust violations irrespective of their size. Therefore, it always neutralises the firm’s benefits, even when such benefits exceed the harm caused to consumers. In the light of this consideration, this approach appears specially desirable if one takes the view that the primary objective of antitrust is to generally prevent wealth transfers from consumers to producers, and thereby to preserve competition as a process or structure. As discussed in Chapter 3, this is indeed the case for the European Union’s competition law and policy system. In contrast, the calculation of fines on the basis of harm reflects the view that the primary goal of the antitrust rules is to maximize total economic efficiency i.e. the sum of the economic welfare of both buyers and sellers (consumers and producers). If one adheres to this view about the goals of antitrust, harm-based sanctions are well suited since they consider both the welfare of antitrust violators as well as the welfare of their victims.

There are two additional arguments not to give complete preference to harm-based sanctions. First, the harm-based sanction theory is not meant to embed a moral or ethical condemnation of

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2881 See G. NIELS et al., Economics 475 et seq., as these authors point out ‘[o]ne problem with setting fines with reference to the cost of the crime to society is that this may not have a deterrent effect if the fine is lower than the benefit obtained by the criminal. If you are in a real hurry to get to a client meeting on time, and the fine for speeding is only €30, you may well consider that a cost worth bearing (especially if there is a chance that you may not even get caught). In contrast, if the fine is €300, your rational calculation may lead you to behave differently (it will depend on many factors, such as how much the client is worth to you or what your hourly rate is, or what the chances are of being caught).


2883 Ibid 4-5.


2885 W. WILS, “Optimal Antitrust Fines” 13-14 of the online version of this publication.

2886 This is indeed the view of the Chicago School. See further supra Chapter 3. See also W. WILS, “Optimal Antitrust Fines” 13 of the online version of this publication. However, the definition and character of harm based sanctions implies that the application of harm-based sanctions most likely does not neutralise the redistributive effects of an anticompetitive (yet economically efficient) practice. When a harm-based sanction is imposed on a company (which may still retain some profits from the practice), the actual injured parties (i.e. those whose means have been reduced by the anticompetitive practice) must bear the negative impact of the practice for the benefit of increasing general welfare. The lack of attention given by harm based sanctions to distributive problems explains why it has not been adopted in several areas of law. M. MANZINI, “European Antitrust in Search” 4-5.

2887 W. WILS, “Optimal Antitrust Fines” 13 of the online version of this publication.
misconduct. When a fine is calculated on the basis of the harmful effects produced by the illegal conduct, one must accept that prohibited activity will occur if the gain resulting from it is greater than the harm. Harm-based sanctions do not reflect social reprobation but solely seek to “price” antitrust violations.\textsuperscript{2888} Second, the calculation of harm-based sanction is rather complex compared to the calculation of punishment based on the gain of the infringement.\textsuperscript{2889} To determine the optimal fine for a concrete infringement, one has to quantify the overall harm produced to parties other than the offender. Such quantification not only includes the monopoly transfer, but also the portion of the deadweight loss borne by consumers and the probability of conviction. The difficulties to quantify these factors make imposing harm based-fines highly costly from an administrative perspective, which has a negative impact on deterrence.\textsuperscript{2890} Given that deterrence must be achieved by the most efficient (and thus less costly) means, the option to calculate sanction based on the gain of the illicit conduct should prevail.\textsuperscript{2891}

The discussion above has made clear that an effective deterrent should take away the prospect of gain from cartel activity. However, not all cartels are uncovered and punished. Accordingly, when a firm is considering whether or not to enter into a cartel, it would take into account not only the amount of expected gain but also the likelihood that the cartel would be discovered and sanctioned.

To attain optimal deterrence, the diminished detection probability in cartel cases has to be compensated by raising the level of the sanction. The lower the probability of actually applying the sanction, the larger the sanction must be and \textit{vice versa}. In economic terms this implies that the amount of the penalty will always be inversely proportionate to the probability of detection.\textsuperscript{2892}

In the light of the discussion above, it can be concluded that the minimum fine to achieve deterrence should be equal to the (expected) gain from the violation multiplied by the inverse of the probability of detection. The optimal sanction formula can thus be defined as follows:

\[
\text{Sanction} = \text{gain} \times \text{duration} \times \frac{1}{P}
\]

\textsuperscript{2888} P. MANZINI, “European Antitrust in Search” 5; G. NIELS \textit{et al.}, \textit{Economics} 475 et seq; R. COOTER, “Prices and Sanctions”, 1984 (84) \textit{Columbia Law Review}, 1523-1560; J. C. COFFEE, “Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It”, 1992 (101-8) \textit{Yale Law Journal}, 1875-1893; W. WILS, “Optimal Antitrust Fines” 14 of the online version of this publication. As W. WILS explains ‘the imposition of punishment for antitrust violations has not only a deterrent effect, in that it helps creating a credible threat of punishment for those who would be willing to commit violations on the basis of a profit calculation, but also has a moral effect, in that it sends a message to the spontaneously law-abiding, reinforcing their moral commitment to the rules. This moral effect is weakened, or even eliminated, under the internalization approach, because the antitrust fine is not presented as 'a sanction for doing what is forbidden' but rather as the 'price for doing what is permitted'”.

\textsuperscript{2889} W. WILS, “Optimal Antitrust Fines” 14-15 of the online version of this publication; P. MANZINI, “European Antitrust in Search” 5.

\textsuperscript{2890} W. WILS, “Optimal Antitrust Fines” 14-15 of the online version of this publication.

\textsuperscript{2891} See also defending the prevalence of gain-based sanctions OECD, “Fighting Hard Core Cartels” 72.

\textsuperscript{2892} P. MANZINI, “European Antitrust in Search” 5-6; W. WILS, “Optimal Antitrust Fines” 12 of the online version of this publication.
2. General principles concerning the fining policy

2.1. The objectives of the European fining policy

According to Article 103(1) TFEU the Council, on a proposal from the Commission and after consulting the European Parliament, shall lay down the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102. Such regulations or directives must be designed in particular ‘to ensure compliance with the prohibitions laid down in Article [101(1) and in Article 102] by making provision for fines and periodic penalty payments’. This field is now regulated by Article 23 and Article 24 of Regulation 1/2003.2893

Neither Regulation 1/2003 nor its predecessor Regulation 17 established what the objectives of the Commissions’ fining policy are (supposed to be). In the early 1980s, the Court of Justice made a clear statement on this subject in *Musique Diffusion France* and indicated that in imposing fines, the Commission should bear in mind two key objectives. First, the imposition of fines is meant to punish/sanction the company that committed the infringement and, second, the Commission should seek to prevent repeated infringements and thereby reinforce the prohibition contained in Article 101 TFEU.2894 The Commission’s fining policy has, therefore, a punitive as well as a deterrent character. While the punitive nature of fines is reflected in the sanction imposed on the specific undertaking which infringed the European competition rules, the deterrent effect of fines must be both general and specific. This means in particular that the imposition of fines for competition law violations must not only prevent that the firm concerned engages again in illegal activity, but also that other businesses commit a violation of the antitrust rules in the future.2895 2896 In the Commission’s view, only fines can have both a punitive and a preventive or a deterrent effect,2897 which justifies the imposition of high fines on the basis of their specific deterrent effect.2898

2893 Since fines for substantive infringements are imposed on the basis of Article 23 of Regulation 1/2003, this section will only focus on this provision.
2894 See Judgment of the Court of 7 June 1983, Joined Cases 100–103/80, *Musique Diffusion Française v Commission (Pioneer)* [1983] ECR 1825, para 106. See also M. MONTL, SPEECH/00/295. In this speech the than Competition Commissioner stated that ‘[w]e can only reverse the tendency [of cartels] through tough enforcement that creates effective deterrence. The risk of being uncovered and punished must be higher than the probability of earning extra profits from successful collusion’.
2896 According to the ICN Report on setting fines, ‘several competition authorities noted that their fining policy in cartel cases pursues multiple goals (deterrence, retribution, recovery of excess cartel profits), and these are not mutually exclusive. Having said this, the vast majority of responding agencies have indicated that fines are intended to deter the addressees from engaging in the same illicit conduct in the future (i.e. specific deterrence), as well as to dissuade other potential infringers from forming or joining anticompetitive cartels (i.e. general deterrence)’. ICN, “Report on Setting fines in ICN jurisdictions”, Report to the 7th ICN Annual Conference Kyoto, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf
2.2. The Commission’s role in imposing fines

On the basis of Article 23 of Regulation 1/2003, the Commission can impose fines on undertakings and associations of undertakings if they, either intentionally or negligently, infringe Article 101 TFEU (or Article 102 TFEU). Article 23 of Regulation 1/2003 is thus to be seen as one of the instruments at the disposal of the Commission to perform its role of supervisor of the European competition rules. According to settled case-law, the implementation of a general competition policy includes the task of applying the principles set out in Articles 101 and 102 TFEU in individual cases, as well as the duty to provide general guidance as regards the behavior of economic operators in the market.²⁸⁹⁹ In light of this, the imposition of fines under Article 23 is an essential part of the EU competition policy.²⁹⁰⁰

The Commission has a wide margin of discretion to develop and enforce European competition law and policy. This discretionary power is, for instance, reflected in its competence to adjust the amount of fines to the level that is needed to fully achieve its competition policy objectives.²⁹⁰¹ This means in particular that within certain margins, the Commission is entitled to raise the level of fines to attain (general and specific) deterrence.²⁹⁰²

The Commission’s discretion to calculate fines for competition law infringements is, however, limited by a number of fundamental principles of European law.²⁹⁰³ These are in particular the non-discrimination rule,²⁹⁰⁴ the *ne bis in idem* principle,²⁹⁰⁵ and the proportionality principle. This last

²⁸⁹⁹ Joined Cases 100–103/80, *Musique Diffusion Francaise v Commission (Pioneer)* [1983] ECR 1825, para 105. It is also important to keep in mind that under Article 31 of Regulation 1/2003 the Court has unlimited jurisdiction to review the Commission decisions imposing fines. On the basis of this power, it may cancel, reduce or increase the fine.


²⁹⁰² Joined Cases 100–103/80, *Musique Diffusion Francaise v Commission (Pioneer)* [1983] ECR 1825, para 108. In the same line, the Commission is entitled to impose only symbolic fines when the European competition rules have never been applied before in a specific type of case.


²⁹⁰⁴ In accordance with the Court’s settled case-law, when the amount of the fine is determined, the application of different methods of calculation cannot lead to any discrimination between the undertakings which have participated in the same infringement of Article 101 TFEU (Judgment of the Court of 12 November 2014, *Case C-580/12 P, Guardian Industries Corp., and Guardian Europe Särl v Commission*, para 62; Judgment of the Court of 19 July 2012, *Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International and others*, C-628/10 P and C-14/11 P, para 58).

²⁹⁰⁵ The principle of *ne bis in idem* is based on the principles of equity and proportionality entrenched in the constitutional law of the Community. It is confirmed by Article 50 of the Charter of Fundamental Rights of the European Union. It is also enshrined in Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. With regard to this principle, the ECJ stated in *Walt Wilhelm* (C-14/68, *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1) that equity requires that an earlier sanction must be taken into account in determining the level of any subsequent sanctions to be imposed. In *Limburgse Vinyl Maatschappij* the Court stated that ‘the principle of non bis in idem, […] , precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision’. 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 NV and others v Commission* [2002] ECR I-8375, para 59. See also CFI Case T-224/00, *Archer Daniels Midland Company and Archer Daniels
principle plays an important role in the calculation of fines from a deterrent perspective. More specifically, the principle of proportionality requires that the measures adopted by Community institutions do not exceed what is appropriate and necessary for attaining the objective pursued. In relation to the calculation of fines, it is well established that the gravity of infringements – which is an essential factor to calculate fines – has to be determined by reference to numerous factors. The principle of proportionality thus requires the Commission to set the fine proportionately to the factors taken into account to assess the gravity of the infringement and also to apply those factors in a way that is consistent and objectively justified.

2.3. The nature of the fines

Sanctions adopted by the Commission to penalise competition law infringements are imposed exclusively on undertakings and not natural persons. The European Union competition law system — by contrast to that of the United States and a number of Member States — does not allow (criminal or administrative) actions to be taken against individuals, such as managers, chief executives, employees or any other natural persons responsible for the infringement. As a result, only undertakings can, in principle, be sanctioned by the Commission.

Article 23(5) of Regulation 1/2003 specifies that decisions of the Commission imposing fines do not have a criminal-law nature. Instead, they are considered administrative sanctions, just like all proceedings before the Commission. This is due to the fact that the legislative competences of


2906 It is indeed settled case-law that regard must be had to the principle of proportionality in connection with the imposition of fines for cartel offences. See 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 Rørindustri and others v Commission [2005] ECR I-5425, para 319, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland and others v Commission [2004] ECR I-123, para 365.


2909 The fact that the Commission cannot impose fines on the individuals who actively participated in the cartel is frequently criticised. This issue will be analysed below in more detail.

2910 It should, however, be noted that in certain cases below individuals are regarded as undertakings. See further infra section 2.4 of this Chapter.

the European Union are limited to matters in respect of which competence has been transferred to it by the Member States. The competence of the European Union in criminal matters is therefore limited. That being said, Article 23(5) constitutes an important clarification as Member States have the possibility to enforce the European antitrust rules by means of criminal sanctions.

2.4. The concept of undertaking (and the parental liability doctrine)

Pursuant to Article 23(1) and 23(2) of Regulation 1/2003, fines may only be imposed on undertakings and associations of undertakings.

The term undertaking is not defined in the Treaty or in Regulation 1/2003. The meaning of this concept has been elucidated in the case-law, where a functional approach has been taken to interpret the notion of undertaking. According to settled case-law, any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, should be considered an undertaking. The case-law also clarifies that the concept of undertaking under European

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2912 Articles 4-6 TFEU.
2913 Cf. C. Van Den Wyngaert, Introduction to international and European criminal law, Antwerp, Maklu 2003, at 27. This situation changed after the creation of the criminal justice pillar in the Maastricht Treaty and, above all, after the Court of Justice issued two important judgements in this regard. In these judgments, the former European Community was empowered in exceptional cases with criminal law competences and was entitled to engage in criminal procedure (Judgment of the Court of Justice of 13 September 2005, C-176/03, Commission v Council [2005] ECR I-7879; Judgment of the Court of Justice of 23 October 2007, C-440/05, Commission v Council, [2007] ECR I-9097. This law has been perpetuated in Article 83(2) TFEU).

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competition law does not require that the economic unit in question has legal personality.\textsuperscript{2917} Likewise, it is also irrelevant whether the economic unit consists of several natural or legal persons.\textsuperscript{2918} In competition law, an economic unit that participates in commercial dealings is considered an undertaking, regardless of its legal structure and status.\textsuperscript{2919} 2920 In its decisions imposing fines, the Commission as well as the European Courts refer to the concept of ‘economic unit’. Such economic units ‘consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement’.\textsuperscript{2921}

Since undertakings are thus economic, rather than legal entities, an undertaking under Article 101 TFEU does not necessarily correspond to the definition of a legal person under national corporate law (e.g a limited liability company).\textsuperscript{2922} Therefore, an economic unit comprising different legal or natural persons may form a single undertaking for competition law purposes.

\textsuperscript{2917} 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 Rørdindustri and others v Commission [2005] ECR I-5425, para 112.


\textsuperscript{2920} It should be noted that in certain cases natural persons can be regarded as undertakings. This may be the case of, for example, entrepreneurs doing business without having a company such as inventors, artists, and athletes, independent entrepreneurs, and so on where they commercially exploit the product of their talent. It is therefore possible that a contracting party of an agreement, which grants him, particularly rights peculiar to him and distinct from those of an undertaking be regarded as an undertaking himself (Case 42/84, Remia v Commission [1985] ECR 2545, para 50). In this situation, a fine may be imposed on the natural person who is considered an undertaking for competition law purposes. Furthermore, non-profit-making organizations may also be regarded as undertakings if they are involved in any commercial dealings. On the other hand an individual who is merely a partner or shareholder cannot be regarded as an undertaking (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørdindustri and others v Commission ECR [2005] I-5425, para 111). See for a more detailed discussion of this subject W. WILS, “The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons”, 2000 (25-2) ELRev, 99-116. See, more generally discussing the concept of undertaking e.g. O. ODUDE, “The Meaning of Undertaking within 81 EC”, 2005 Cambridge Yearbook of European Legal Studies, 211-241; N. DUNNE, “Knowing When To See It: State Activities, Economic Activities, and the Concept of Undertaking”, 2010 (16) Columbia Journal of European Law, 427-436; K. P. E. LASOK, “When Is an Undertaking Not an Undertaking?”, 2004 (25-7) ECLR, 383-385; A. JONES, “The Boundaries of an Undertaking in EU Competition Law”, 2012 (8-2) European Competition Journal, 301-331, available at http://ssrn.com/abstract=2131740.


For the application of the European competition rules, the definition of the term undertaking implies that the unified market behavior of a parent company and its subsidiaries takes precedence over the formal or legal separation between legal entities. Two companies operating under a corporate level integrated commercial policy, on the same markets and using the same distribution system constitute an economic unit in competition law terms and should, therefore, be regarded as a single undertaking. As a result, the economic unity of the undertaking enables the Commission to hold the parent company jointly and severally liable for antitrust violations committed by one of the group’s subsidiaries. Still, given that infringements are committed by undertakings but that decisions terminating the infringement and imposing fines can only be addressed to legal persons, a complex assessment must often be conducted in order to assess to which legal person the infringement should be attributed.

The concept of undertaking will include both a subsidiary and its parent company when at the time of the infringement (i) the parent company is found to be able to exert decisive influence on the subsidiary and (ii) it did in fact exercise such influence.

The general rule is that the Commission has to establish the existence of such decisive influence. In this regard, it is specifically relevant to assess whether the subsidiary does independently decide its own conduct on the market, or carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic and legal links between them. In addition, the Commission will consider a number of factors, including organisational factors such as the management power of one of the undertakings to provide leadership for the other, or the accumulation of the functions that are performed by the same individuals within the board of the parent company and its subsidiary.

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2924 Case T-541/08, Sasol and others v Commission, para 32.
2928 Judgment of the General Court 12 July 2011, T-132/07, Fuji Electric v Commission [2011] ECR II-4091, para 184; see also 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 Rørdindustri and others v Commission [2005] ECR I-5425, paras 118-120. In this case the conclusion that an economic unit existed was reached on the basis of a series of documents, which established that a natural person controlled the companies concerned, held 489
In the specific case of a parent company holding (nearly) 100% of the capital of a subsidiary which has committed an infringement there is, however, a rebuttable presumption that the parent actually had exercised decisive influence over the conduct of the subsidiary. The situation, it is up to the parent company to rebut the presumption of influence by adducing sufficient evidence that the subsidiary acted autonomously of the parent company. In order to do so, the parent company cannot merely call into question the factual elements adduced by the Commission in support of the presumption. It should provide comprehensive, detailed and coherent facts showing that the subsidiary acted autonomously on the market. The ECJ has stated in this context that ‘the simple fact that the share capital of two separate commercial companies is held by the same persons or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other’.

If the parent company succeeds in reverting the presumption, the Commission will then need to provide evidence that the parent company actually exercised decisive influence on the subsidiary.

The parental liability doctrine has a significant impact on the way fines are calculated. This concept is not only important because it allows the Commission to target the entire corporate group and thus impose higher fines. Likewise, the 10% turnover ceiling for fines as set out in Article 23 of Regulation 1/2003 applies to the entire undertaking, thus combining the turnover of the subsidiary and the parent company. This implies that the maximum level of fines will be set at a higher level because it includes the turnover of the whole corporate group. Finally, rules on recidivism apply to the whole group, which increases the probability of applying this aggravating circumstance.

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key functions in the managing bodies of those companies and also represented the various undertakings at meetings where the cartel was arranged.  

2929 Judgment of the Court of Justice of 10 September 2009, C-97/08, Akzo Nobel NV and others v Commission [2009] ECR I-8237, para 60; Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10, para 59. See further commenting this aspect P. HUGHES, “Competition Law Enforcement and Corporate Group Liability—Adjusting the veil”, 2014 (35-2) ECLR, 68-87; I. W. VERLOREN VAN THEMAAT AND M. C. VAN HEEZIK, “Het toerekeningsleerstuk: de balans opgemaakt”, 2010 NTER, 90-95. This presumption does not only exist when there is a direct relationship between the parent company and its subsidiary, but also in cases where an indirect connection exists, in the form of an intermediate company (see Judgment of the Court of Justice of 20 January 2011, C-90/09 P, General Química and others v Commission, [2011] ECR I-1, para 90). The presumption of liability is based on the fact that a company which holds the entire capital of a subsidiary, can by definition exert a decisive influence over the conduct of its subsidiary. In addition, the application of such a presumption is also justified by the fact that the parent company, when it is the sole shareholder of the subsidiary, possesses all the necessary instruments to ensure that the commercial policy of the subsidiary matches its own policy. Case T-541/08, Sasol and others v Commission, paras 146-147.

2930 Judgment of the Court of Justice of 10 September 2009, C-97/08, Akzo Nobel NV and others v Commission [2009] ECR I-8237, para 60; Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10, para 59. See further commenting this aspect P. HUGHES, “Competition Law Enforcement and Corporate Group Liability—Adjusting the veil”, 2014 (35-2) ECLR, 68-87; I. W. VERLOREN VAN THEMAAT AND M. C. VAN HEEZIK, “Het toerekeningsleerstuk: de balans opgemaakt”, 2010 NTER, 90-95. This presumption does not only exist when there is a direct relationship between the parent company and its subsidiary, but also in cases where an indirect connection exists, in the form of an intermediate company (see Judgment of the Court of Justice of 20 January 2011, C-90/09 P, General Química and others v Commission, [2011] ECR I-1, para 90). The presumption of liability is based on the fact that a company which holds the entire capital of a subsidiary, can by definition exert a decisive influence over the conduct of its subsidiary. In addition, the application of such a presumption is also justified by the fact that the parent company, when it is the sole shareholder of the subsidiary, possesses all the necessary instruments to ensure that the commercial policy of the subsidiary matches its own policy. Case T-541/08, Sasol and others v Commission, paras 146-147.

2931 Judgment of the Court of Justice of 10 September 2009, C-97/08, Akzo Nobel NV and others v Commission [2009] ECR I-8237, para 60; Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10, para 59. See further commenting this aspect P. HUGHES, “Competition Law Enforcement and Corporate Group Liability—Adjusting the veil”, 2014 (35-2) ECLR, 68-87; I. W. VERLOREN VAN THEMAAT AND M. C. VAN HEEZIK, “Het toerekeningsleerstuk: de balans opgemaakt”, 2010 NTER, 90-95. This presumption does not only exist when there is a direct relationship between the parent company and its subsidiary, but also in cases where an indirect connection exists, in the form of an intermediate company (see Judgment of the Court of Justice of 20 January 2011, C-90/09 P, General Química and others v Commission, [2011] ECR I-1, para 90). The presumption of liability is based on the fact that a company which holds the entire capital of a subsidiary, can by definition exert a decisive influence over the conduct of its subsidiary. In addition, the application of such a presumption is also justified by the fact that the parent company, when it is the sole shareholder of the subsidiary, possesses all the necessary instruments to ensure that the commercial policy of the subsidiary matches its own policy. Case T-541/08, Sasol and others v Commission, paras 146-147.

2932 The ECJ has stated in this context that ‘the simple fact that the share capital of two separate commercial companies is held by the same persons or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other’.

2933 The ECJ has stated in this context that ‘the simple fact that the share capital of two separate commercial companies is held by the same persons or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other’.

2934 The fact that it is difficult to provide the necessary evidence to rebut the presumption does not imply that such presumption is de facto irrefutable. Judgment of the Court of Justice of 30 April 2014, C-238/12 P, FLSmidth & Co. A/S v Commission, para 28.

2935 See on the turnover limit infra section 2.6 of this Chapter.

2936 D. GERADIN, “The EU Competition Law Fining” 16 of the online version of this paper. See further the analysis below of the Commission’s fining practice.
2.5. Intention or negligence

According to Article 23(2) of Regulation 1/2003, the Commission may impose fines on undertakings that intentionally or negligently infringe Articles 101 and 102 TFEU.2935 Although the Commission is required to establish intent or negligence, in its decisions, very frequently no clear distinction between these situations can be found.2936

Infringements are committed intentionally or negligently, and can be sanctioned with a fine, if the company in question could not have been unaware of the anti-competitive nature of its conduct.2937 In essence, an intentional infringement is committed if an undertaking has the intention to commit the action that is designed to restrict competition, without the intention to restrict competition or to infringe the competition rules being required.2938 Negligence, on the other hand, implies that the undertaking in question could reasonably foresee that its conduct has anti-competitive effects.2939

The fact that the Commission is only required to establish intent or negligence makes sense given the alternative nature of these conditions. Furthermore, the Court of Justice considers intentional and negligent infringements to be equally serious.2940 Nevertheless, the (analysis of the) Commission’s cartel decisions shows that the intention of the parties to deliberately restrict competition by participating in agreements which go directly against the goals of the Treaty is one of the factors that is commonly underlined and considered in the context of the calculation of the fines. This approach is not unsurprising as the reference to an ‘intentional’ or ‘negligent’ infringement reflects at least to a certain extent the degree of culpability of the undertakings in question.

2.6. Maximum fine

Article 23(2) of Regulation No 1/2003 specifies that ‘the financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.2941 Where the infringement of an association relates to activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member’.

2936 This practice was also accepted by the Court of Justice in its Judgment of 25 March 1996, C-137/95 P, SPO a. o. v Commission [1996] ECR I-1611, paras 53-57).
2941 It should be recalled that the discussion as regards the imputability of liability to parent companies must be considered in order to determine whose turnover must be taken into account (see in this line Judgment of the General Court of 9 December 2014, T-472/09 and T-55/10, SP SpA v Commission, para 308). Recently, the ECJ noted that when an undertaking responsible for an infringement is acquired by another undertaking within which it retains, as a subsidiary, the status of a distinct economic entity, the Commission must take account of the specific turnover of each of those economic entities in order to apply to them, where necessary, the 10% upper limit. (Judgement of the Court of Justice of 4 September 2014, C-408/12 P, YKK Corporation a.o. v Commission, para 60).
According to the ECJ, this quantitative limit seeks to ensure that the fines are proportional to the size of the undertakings.\footnote{Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, paras 119 and 120; Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering Corp and others v Commission [2004] ECR II-2501, para 533.} The total turnover of the undertaking is thus meant to reflect the importance and influence on the market of the undertaking in question.\footnote{Case C-580/12 P, Guardian Industries Corp. and Guardian Europe Sàrl v Commission, para 53; Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, para 119; Judgment of the Court of first Instance of 6 April 1995, T-144/89, Cockerill-Sambre v Commission [1995] ECR II-947, para 98; CFI 7 July 1994, T-43/92, Dunlop Slazenger v Commission [1994] ECR II-441, para 160.} The 10% limitation prevents the Commission from imposing fines which undertakings, given their size as indicated by their total turnover, would not be able to pay.\footnote{Case T-541/08, Sasol and others v Commission, para 444; Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, paras 119 – 121; T-472/09 and T-55/10, SP SpA v Commission, para 307.}

With respect to the meaning of the concept ‘turnover’, the European Courts have confirmed that this refers to the total turnover of the undertaking in question,\footnote{For confirmation that the 10 per cent figure refers to worldwide turnover see e.g. CFI 14 July 1994, T-77/92, Parker Pen v EC Commission ECR [1994] II-549, para 94, citing Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, para 121; Judgment of the Court of 8 February 1990, C-279/87 Tipp-Ex v Commission [1990] ECR I-261, para 39.} not to its volume of sales in the European Union or its turnover in respect of the products in whose market the infringement was committed.\footnote{The latter point of reference, as will be seen, is used to determine the basic amount of the fine on the basis of the 2006 Guidelines.} It is, however, established case-law that the 10% cap applies only when it gives an indication of the importance and influence of the undertaking on the market.\footnote{The Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 1/2003, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking’s real economic situation during the period in which the infringement was committed. See Case C-580/12 P, Guardian Industries Corp. and Guardian Europe Sàrl v Commission, para 53; Case T-541/08, Sasol and others v Commission, para 444; CFI 15 March 2000, T-25/95, T-26/95, T-30/95-T-32/95, T-34/95-T-39/95, T-42/95-T-46/95, T-48/95, T-50/95-T-65/95, T-68/95-T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, Cimenteries CBR v Commission [2000] ECR II-491, para 5022; CFI 20 March 2002, T-28/99, Sigma Tecnologie di rivestimento Srl v Commission [2002] ECR II-1845, para 91; C-199/92 P, Hüls v Commission [1999] ECR I-4287, para 195. In Hüls, the ECJ stated that: ‘[. . .] in determining the fine, account may be taken both of the overall turnover of the undertaking, which gives some indication, however approximate and imperfect it may be, of the size and economic strength of that undertaking, and of the part of that turnover represented by the goods concerned in the infringement which therefore serves to provide an indication of the extent of that infringement [. . .]’.} It follows that the limit is not necessarily related to the period of the infringement sanctioned, which may have ended several years before the date on which the fine is imposed, but to a period closer to that date.\footnote{See in this line Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10, para 389; T-472/09 and T-55/10, SP SpA v Commission, para 307.} In particular, the upper limit of 10% refers to the financial year preceding the date of the decision.\footnote{See also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, Tokai Carbon Co. Ltd and others v Commission [2004] ECR II-1181, para 365. Although the business year has not been specifically defined, it can be assumed that it refers to a period of 12 months (E. ENGELSLING and H-H. SCHEIDER, “Article 23” 1789).} 

As the Commission’s practice shows, the 10% limit only applies after the fine has been calculated in accordance to its Fining Guidelines. In this regard, the (now) General Court has clarified that this limit does not prohibit the Commission from using an intermediate amount in its calculations higher than 10% of the turnover of the affected undertaking, provided that the ultimate fine imposed does

\footnote{2942}
not exceed this maximum limit.\textsuperscript{2950} In addition, it should be kept in mind that the prescribed limit of 10\% applies to each infringement that is committed by an undertaking in a given market. This means that if a cartel is operating on three closely related relevant markets, the cartel is accordingly qualified as three separate infringements, leading to an individual application the turnover cap for each infringement.\textsuperscript{2951}

With respect to the imposition of fines on associations of undertakings, Regulation 1/2003 (now explicitly) establishes that associations can be fined for an amount of up to 10\% of the joint turnover of their members.\textsuperscript{2952} When 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.\textsuperscript{2953} This special rule is justified on the basis of the economic impact that decisions by associations of undertakings.

The possibility to take into account the turnover of all undertakings belonging to an association is justified by the fact that the impact of the association in the market can only be properly reflected by the turnover of all of its members.\textsuperscript{2954} Article 23(4) of Regulation 1/2003, in addition, elaborates on how to proceed when the association of undertakings is insolvent.\textsuperscript{2955}

\subsection*{2.7. Limitation periods}

The Commission’s power to impose fines for infringements of European competition law is subject to limitation periods.

\begin{itemize}
\item \textsuperscript{2951} This occurred, for instance in \textit{Graphite elektrodes}. The Commission decision in this case was confirmed by the Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, \textit{Tokai Carbon Co. Ltd and others v Commission} [2004] ECR II-1181; see also E. ENGELSGING AND H-H. SChEDER, “Article 23” (1788).
\item \textsuperscript{2952} The (now) General Court established in \textit{Groupe ment des Cartes Bancaires} that the maximum limit of 10 per cent of turnover must be calculated in relation to the turnover achieved by each of the undertakings participating in the agreements or concerted practices or by all the members of the association, ‘at least where, by virtue of its internal rules, the association is able to bind its members’. CFI 23 February 1994, Joined Cases T-39/92 and T-40/92 \textit{Groupement des Cartes Bancaires ‘CB’ and Europay International SA v Commission} [1994] ECR II-49, paras 136 et seq. See confirming this case, T-29/92 \textit{SPO v Commission} ECR [1995] II-289, para 385. In this case the Court notes that “[t]he influence which an association of undertakings may have had on the market depends not on its own "turnover", which reveals neither its size nor its economic power, but rather on the turnover of its members which gives an indication of its size and economic power’. See also e.g. T-472/09 and T-55/10, \textit{SP SpA v Commission}, para 308.
\item \textsuperscript{2953} See E. ENGELSGING AND H-H. SChEDER, “Article 23” 1798.
\item \textsuperscript{2955} Under Article 23(4) of Regulation 1/2003, in case of insolvency the association is obliged to require contributions from its members to cover the amount of the fine. If such contributions have not been made within the time limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of the association. If such payments have not fully covered the amount of the fine, the Commission may require payment of the balance by any of the members of the association which were active in the market where the infringement occurred. The Commission will not require payment from the undertakings which (i) show that they have not implemented the (infringing) decision of the association, (ii) that they were not aware of its existence or (iii) that they actively distanced themselves from it before the Commission started investigating the case. The rules introduced in Regulation 1/2003 considerably improved the situation existing under Article 15 of former Regulation 17, which did not stipulate that the members or the association were jointly and severely liable. This situation could prevent the collection of fines in practice. See Commission’s White Paper on Modernization, paras 127–128 referring to Joined Cases T-213/95 and T-18/96 \textit{Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission} [1997] ECR I-1739.
\end{itemize}
Pursuant to Article 25 of Regulation 1/2003, the imposition of penalties is limited to a period of five years for substantive infringements. In order to determine this period, time begins to run on the day on which the infringement is committed. However, infringements of Article 101 (and of Article 102 TFEU) practically never consist in one single action that took place on a precise day. Accordingly, Regulation 1/2003 provides an alternative starting date for repeated or continuous infringements. For this type of infringements, time begins to run on the day on which the infringement stopped. This alternative starting date for continuous infringements has logically led to a large body of case-law and literature as to when exactly various anti-competitive acts can be considered part of a single continuous infringement. In this regard, the ECJ has established in essence that when the various actions form part of an ‘overall plan’, owing to their identical object that distorts competition within the market, the Commission is entitled to impute liability for those actions according to the participation in the infringement considered as a whole. To take this particularity into account, the starting date of the limitation period is effectively extended to the final instance of anticompetitive conduct. The Commission generally takes the view that complex cartel agreements should be regarded as single continuing infringement.

The five year limitation period can be interrupted. In particular, any investigatory action taken by the Commission or a NCA notified to at least one of the undertakings implicated in the infringement, interrupts the limitation period for all the undertakings involved. With each interruption the five

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2956 In Sumitomo Chemical, it was confirmed that the five-year limitation period only applies to the Commission’s ability to impose a fine but not to its ability to address infringement decisions to undertakings. CFI 6 October 2005, Joined Cases T-22/02 and T-23/02 Sumitomo Chemical v Commission [2005] ECR II-4065, para 37.

2957 Article 25(2) Regulation 1/2003.


2959 See for an illustrative example e.g. CFI 17 December 1991, T-7/89 SA Hercules Chemicals NV v Commission [1991] ECR II-1711, para 310: ‘[. . .] the applicant participated in a single infringement which began in November 1977, when it subscribed to an agreement fixing a target price for 1 December 1977, and continued until November 1983. In this regard, it should be noted that the continuity of the infringement between the conclusion of that agreement and the agreements and concerted practices found from 1979 onwards is borne out by the contacts with other producers which the applicant maintained without interruption beginning in 1977 [. . .]’. For a case in which the CFI, having taken the view that insufficient evidence had been given of the existence of a continuous infringement between two dates on which there had indeed been specific instances of infringements, declared the first infringement time-barred, see T-43/92, Dunlop Slaezenger v Commission [1994] ECR II-441, para 84.

2960 According to Article 25(3) of Regulation 1/2003, actions which interrupt the running of the period include in particular: (a) written requests for information by the Commission or by the competition authority of a Member State; (b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State; (c) the initiation of proceedings by the Commission or by the competition authority of a Member State; (d) notification of the statement of objections of the Commission or of the competition authority of a Member State. In FETTSCA, the former CFI underlined that the interruption of the five-year limitation period is an exception to the rule and must be interpreted narrowly. This implies, inter alia, that requests for information which aimed at artificially prolonging the limitation period cannot be necessary. Case T-213/00 CMA CGM and others v Commission [2003] ECR II-913, para 488.

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year period starts running afresh. However, interruptions may not extend the total duration between termination of the infringement and the imposition of the fine to more than two times the limitation period. This basically means that the imposition of a fine will definitely be time-barred after a period equal to twice the limitation period has elapsed (i.e. 10 years from the date the infringement ceased). The limitation period is suspended as long as the decision is pending before the Court of Justice (including both the ECJ and the General Court). If the limitation period is suspended, the maximum time limit will be extended with the suspension period.

3. The Commission’s fining policy prior to 1998

For nearly three decades, the Commission imposed fines without having published any official guidance. In this period, the Commission’s competence to impose fines was based on Article 15(2) of Regulation 17. According to this provision, the Commission could ‘impose on undertakings or associations of undertakings fines of from 1000 to 1.000.000 units of account (ECU/EUR), or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement’, when they infringed the European antitrust provisions. In fixing the amount of the fine, this rule (only) specified that ‘regard shall be had both to the gravity and to the duration of the infringement’. No further reference was made to the starting point used to establish the amount of the fine, other factors or parameters which could be considered, or the influence of each factor on the exact amount of the fine.

The fine first in a cartel case was imposed by the Commission in 1969 in *Quinine*. For the next ten years, it was (and still is) generally accepted that the level of fines for competition law infringements remained relatively low. This situation changed in 1979 when the Commission stated in *Pioneer* that it intended to reinforce the deterrence effect of fines by raising the general level of fines in cases of serious violations. In *Musique Diffusion*, the Court of Justice confirmed the legality of the Commission’s policy strategy and affirmed that the Commission was justified in

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2961 Art 25(5) of Reg 1/2003. See, for instance, CFI 16 November 2006, Case T-120/04, *Peróxidos Orgánicos, SA v Commission* [2006] ECR II-4441. In this case the limitation period was interrupted by the sending of information requests.

2962 Article 25(3)-(5) Regulation 1/2003.


2965 Under Regulation 1/2003, the corresponding provision of Article 15(2) is Article 23(2).


suddenly raising the level of fines to deter other undertakings from committing infringements.\textsuperscript{2969} The Commission has thus the power to impose different levels of fines on companies according to the gravity and the duration of the infringement, and to use the level of fines imposed as a deterrent.\textsuperscript{2970} Moreover, the fact that the Commission set fines of a certain level in the past does not prevent it from raising the level of fines in order to ensure the implementation of its competition policy.\textsuperscript{2971} \textsuperscript{2972} In the general context of the fining policy, the \textit{Musique Diffusion} case can be considered a turning point in the Commission’s stance towards fines for anticompetitive activity.

In order to find some guidance as to the method to calculate fines it is necessary to explore the Commission’s practice. The Commission decisions imposing fines have always enumerated certain factors which had been considered in setting fines.\textsuperscript{2973} Although these decisions contained some information, the Commission did not provide any specific explanation as to the role of each of these factors and how they led the Commission to calculate the precise fine imposed.\textsuperscript{2974} \textsuperscript{2975} Similarly, during this period the European Courts were not inclined to clarify the role of the factors taken into account in the calculation of fines.\textsuperscript{2976} As a general rule, the Court’s assessment of the method of calculation of fines simply confirmed that the Commission was (and is) entitled to have regard to a large number of factors, the nature and importance of which vary accordingly to the type of infringement and the specific circumstances of the case.\textsuperscript{2977} Still, on certain occasions, the Commission revealed some details of its calculation during the appeal procedure. In order to obtain a better insight into the method of calculation of fines, previous decisions as well as the judgments

\begin{footnotesize}
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\item \textsuperscript{2970} JOINED CASES 100–103/80, \textit{Musique Diffusion Française v Commission (Pioneer)} [1983] ECR 1825, para 106.
\item \textsuperscript{2971} See as regards the role of the Commission’s in the context of the fining policy supra section 2.2 of this Chapter.
\item \textsuperscript{2972} In fact, prior to the introduction of the Guidelines, the Commission commonly relied on this discretion to impose varying levels of fines for competition law infringements. On the other hand, as it is examined below, the lack of Guidelines combined with the fact that the Commission made an extensive use of its discretion implied that, at times, there was little continuity in its decisions. See also observing this point R. RICHARDSON, “Guidance without guidance -a European revolution in fining policy? The Commission’s new guidelines on fines”, 1999 (20-7) ECLR, 360-371, at 361 (hereafter: “R. RICHARDSON, “Guidance without””).
\item \textsuperscript{2973} See further infra “Table 1” of this Chapter.
\item \textsuperscript{2974} In the decision in \textit{Cartonboard} the Commission explained that in considering the different duration of the infringement for the individual undertakings involved, it did not intend ‘in calculating each fine to employ some precise mathematical formula reflecting the exact number of days, months or years for which that producer adhered to the cartel’. Case IV/C/33.833 - \textit{Cartonboard} [1994] OJ L 243/1, para 169. See confirming this approach Judgment of the Court of 16 November 2000, Case C-283/98 P, \textit{Mo och Domsjö v Commission} [2000] ECR I-8855, para 47; Case T-303/02, \textit{Westfalen Gassen Nederland v Commission} [2006] ECR II-4567, para 151. In these cases the European Courts held that ‘when determining the amount of each fine, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose’. See further infra section 2.1 of this Chapter.
\item \textsuperscript{2975} See also stressing this point J. KILLICK, “Is it now time” 1-2.
\item \textsuperscript{2976} L. McGOWAN, “At the Commission’s Discretion” 650. According to this author ‘[t]he use of the seemingly powerful weapon of financial penalties has proven somewhat problematic and contentious. The Commission has been criticized for its reluctance to provide any substantial reasoning on how it arrives at an individual fining decision and moreover its decisions have often been accompanied by doubts over impartiality and the way in which the Commission has handled the case’.
\item \textsuperscript{2977} See also stressing this aspect W. WILS, “E.C. Competition Fines” 35.
\item \textsuperscript{2978} Joined Cases 100–103/80, \textit{Musique Diffusion Française v Commission (Pioneer)} [1983] ECR 1825, paras 120-121.
\end{itemize}
\end{footnotesize}
of the European Courts upon review, can therefore provide some interesting insights and shed some light on the Commission’s methodology.

3.1. Starting point to calculate the fine

The judgement of the Court of Justice in Musique Diffusion (1983) was one the first rulings that shed some light on the method used by the Commission to set the starting point to calculate fines. More precisely, the Commission admitted in the appeal procedure that in the period before the adoption of the contested decision (i.e. the Pioneer decision) it had not imposed fines exceeding 2% of the total turnover of the undertaking in question, even for serious infringements. In contrast, in Pioneer the fines ranged from 2 to 4% of turnover. This case was thus the first in which it imposed a level of fines considerably higher than in the past. The Commission further explained that the different percentages took sufficient account of the gravity and duration of the infringements established, the size of the undertakings and the aggravating circumstances mentioned in the decision. A deeper analysis of the decision in the Pioneer case may further elucidate the Commission’s methodology.

The Pioneer decision (1979) clearly shows that the Commission paid particular attention to the serious and conscious nature of the infringements in the calculation of fines. In fact, the Commission firmly stated that ‘all the parties concerned in the present case knew that they were acting […] with a view to restricting competition. This deliberate nature of the infringement justified the imposition of a large fine’. To elaborate on this statement, the Commission referred to the opinion of Advocate-General, J. P. WARNER in Miller International Schallplatten GmbH v. Commission, who affirmed that ‘a fine of 10 % of turnover may be taken to be appropriate to an intentional infringement of the gravest kind and of considerable duration. At the other end of the scale a fine of less than 1 % is appropriate for a merely negligent infringement of the most trivial kind and continuing only for a short period of time, in a case where nonetheless, the circumstances

2979 Joined Cases 100–103/80, Musique Diffusion Francaise v Commission (Pioneer) [1983] ECR 1825, para 103. See commenting on the average fine before and after the Musique Diffusion Francaise judgement e.g. M. FURSE, “Article 15(2) of Regulation 17: fines and the Commission's discretion”. 1995 (16-2) ECLR, 110-115, at 114 (hereafter: ‘M. FURSE, “Article 15(2)” ’). According to this author ‘[t]he average fine imposed before Pioneer was ECU 120,668, the average level after Pioneer stands at ECU 1,519,950’.
2980 The Court of Justice accepted the Commission’s practice and held that ‘it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those factors an importance disproportionate to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure’. Joined Cases 100–103/80, Musique Diffusion Francaise v Commission (Pioneer) [1983] ECR 1825, para 121. See further the analysis below.
2981 This emphasis on the deliberate nature of the infringement should not be surprising given the statements made by the parties of the case. In particular, the Commission underlined in its decision that one party commented in a letter that ‘I am well aware of EEC rules regarding parallel exports but quite frankly at times I am more concerned with justice than the law itself’ Commission Decision of 14 December 1979 (IV/29.595 - Pioneer Hi-Fi Equipment) [1980] OJ L 60/21, para 49. It appears that the recklessness shown by the participants of the agreement motivated the Commission to impose fines at a higher level.
warrant the imposition of some fine’. This statement, in line with the Commission’s findings, indeed suggests that the turnover of the parties played an essential role in the calculation of the fine. Although the Commission seemed reluctant to officially endorse this method, the importance of the turnover as a starting point to calculate the fines is (even) more apparent in its later decisions.

For instance, in Floral (1979) the Commission pointed out that ‘[i]n fixing the amount of the fine the Commission must accordingly proceed on the basis of the relatively small turnover achieved by the manufacturers via Floral, without, however, ignoring completely their importance in the total market for compound fertilizers’. The decision in Woodpulp (1984) stated that ‘[i]n determining the fine on the individual firms […] the Commission has taken into consideration […] their respective average shipments of bleached sulphate wood pulp to the Community in the last year of the period under review and - to a lesser extent - the individual total turnover of each’. In Roofing felt (1986) the Commission also commented that ‘[t]he fines have been set at a level commensurate with the gravity and duration of the infringements taking into account each firm's aggregate turnover and turnover from roofing felt in Belgium and, in Belasco's case, its annual expenditure’.

The Commission followed the same approach in Soda-ash - Solvay, ICI (1990) and pointed out that ‘substantial fines should be imposed on both Solvay and ICI in respect of this infringement. Solvay’s sales of soda-ash in the Community in 1988 came to ECU […] million while ICI's were ECU […] million.’

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2983 Opinion of Advocate-General, J. P. Warner in Case 19/77, Miller International Schallplatten GmbH v Commission [1978] ECR 131. For the decision appealed see Commission Decision of 1 December 1976 (IV/29.018 - Miller International Schallplatten GmbH) [1976] OJ L 357/40. This decision related an exclusive dealing agreement including an export prohibition. In this decision the Commission only referred to the deliberate and serious nature of the infringement and to its duration to calculate the fine.

2984 In this appeal procedure in Miller the Commission accepted that that the fine imposed represented 0.73% of the applicant's turnover and stated that ‘[c]oncerning the amount of the fine […] a fine amounting to 0.73% of the applicant's turnover is of a low order in terms of the discretionary power which it enjoys and it cannot be accused of misuse of that power'. Case 19/77, Miller International Schallplatten GmbH v Commission [1978] ECR 131.


A few years later, the Commission decided to modify the approach based on the undertakings’ turnover figures. More precisely, the Commission announced in its 1992 Competition policy report its intention to increasingly consider in its calculation of fines ‘[t]he financial benefit which companies infringing the competition rules have derived from infringements. Wherever the Commission [could] ascertain the level of the ill-gotten gain, even if it cannot do so precisely, the calculation of the fine may have this as its starting-point. When appropriate that amount could then be increased or decreased in the light of the other circumstances of the case, including the need to introduce an element of deterrence or penalty in the sanction imposed on the participating companies’.

This approach is well reflected in the *Helsinki Agreement* decision (1992), in which the Commission made an approximate calculation of the profit derived from the agreement. In particular, the Commission stated in *Helsinki Agreement* (1992) that: ‘[t]he annual gain for French banks could be estimated approximately on the basis of three elements. First the average amount of a Eurocheque is ECU 134 but one can assume that, as occurs with payment cards, the average amount of the Eurocheques issued in retail outlets is less than the average amount of cheques issued at banks for cash, in which case the average amount to be taken into consideration would be a little less than ECU 134, say around ECU 100. Secondly the annual number of Eurocheques is approximately one million. Thirdly the average commission applied to Eurocheques is approximately 1 %. In total therefore the annual gain can be valued at approximately ECU 1 million’. As the Agreement took effect on 1 December 1983 and was notified on 16 July 1990, the duration of the infringement is six-and-a-half years. In view of the fact that the number of Eurocheques made out each year to French traders must have been slightly smaller, before 1988, than the figure of 1 million for that year, it can be estimated that the Helsinki Agreement must have earned the French banking sector approximately ECU 5 million in commissions from traders. This is income deriving from the use of Eurocheques by French traders.

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2999 Commission Decision of 5 October 1973 (IV/27.010 - *Deutsche Philips GmbH*) [1973] OJ L 293/40, para V(2): ‘DPG is an undertaking of importance in the electrical industry. Both its turnover from sales of electric shavers and its share of the market for this product are considerable’.

2990 Commission Decision of 23 December 1977 (IV/29.176 - *Vegetable parchment*) [1978] OJ L 70/54, para 85: ‘In order to decide the extent of each undertaking's participation in this concerted practice, it is necessary to consider its sales volume in the markets concerned and their total output of vegetable parchment’.

2991 Commission Decision of 23 November 1984 (IV/30.907 - *Peroxygen products*) [1985] OJ L 35/1, para 57: ‘[i]n 1980, the last year in which the cartel was definitely known to have been in operation, the turnover of the Interox grouping in the products concerned in the EEC amounted to some ... million ECU’.


2993 Case IV/31.149 - *Polypropylene* [1986] OJ L 230/1, para 109: ‘[i]n assessing the fines to be imposed on individual undertakings the Commission has taken into consideration […] their respective deliveries of polypropylene to the Community and their individual total turnover’.

2994 Case IV/31.865, PVC [1989] OJ L 74/1, para 52: ‘[i]n fixing the general order of fines to be imposed the Commission has also taken into that […] PVC is a major industrial product with sales of over ECU 3 000 million annually in Western Europe’.


from an Agreement which is illegal’. 2997 2998 Despite the Commission’s intention to base its calculation of fines on the illegal gains deriving from an anticompetitive practice, its decisions show that this methodology was only adopted in a clear minority of cases. It is most likely that the Commission did not have the necessary information to calculate the gain. 2999

A couple of years later, in the press release concerning the Cement cartel (1994), the Commission explicitly admitted its reliance on the turnover method. More precisely it accepted that ‘the basic levels of the fines imposed on the undertakings and associations of undertakings were set in accordance with usual calculation practice, which is normally based on the Community turnover in the product concerned’ (emphasis added). 3000 The use of this calculation method was explicitly acknowledged in the appeal of the Cartonboard (1994) decision, where Commission stated that ‘[f]ines of a basic level of 9 or 7.5% of [the Community] turnover were imposed’. 3001

With regard to the method employed by the Commission for the determination of fines, it can be concluded that in the period preceding the adoption of the 1998 Guidelines, the point of reference to calculate fines was generally based on two main factors. First, the Commission significantly relied on (a percentage of) the turnover of the product in the relevant market. 3002 Second, and far more

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2998 After taking into account the illegal gain deriving from the agreement as a point of reference the Commission considered a number of aggravating and mitigating factors. On the one hand, the indirect unquantifiable profit derived from the agreement and the lack of cooperation from the parties, were considered aggravating factors. On the other hand, the Commission found that various mitigating including should be applied. These included (i) the spontaneous termination of the agreement in the sense that it was done before the adoption by the Commission of a prohibition decision, (ii) the fact that the French banks mentioned the existence of the Helsinki Agreement in a reply to a request for information, but the Commission did not chose to investigate it more vigorously and (iii) the fact that this is the first decision imposing fines in the banking sector. Case IV/30.717-A - Eurocheque: Helsinki Agreement [1992] OJ L 95/50, paras 82-91.
2999 See implicitly acknowledging this aspect IV/29.672-Floral [1980] OJ L 39/51, para 7(b). See also Commission, XXIst Report on Competition Policy 1991, Brussels, para 139. In this report the Commission stated that such profits would constitute the point of reference to calculate fines only when such profits could be (approximately) estimated. See also e.g. W. Wils, “E.C. Competition Fines” 35-36.
3000 See Commission, Press Release IP/94/1108. In addition, according to this press release, the level of fines further took account of the seriousness of the infringement (market sharing and exchanges of information), its duration (since 1983), the involvement of the undertakings or associations of undertakings in each of the practices, and the market conditions. In the Commission decision in Cement no reference is however made to the turnover of the undertakings in the calculation of the fines.
3002 While the starting point to calculate fines was generally the turnover of the relevant product market, in certain decisions the combined turnover in all the undertakings products was used (see also W. Wils, “The Commission's New Method for Calculating Fines in Antitrust Cases”, 1998 (23-3) ELRev, 252-263, at 254-255 (hereafter: ‘W. Wils, “The Commission's New Method”’)). The Commission considered the (total) turnover as a factor giving an indication of the effective economic capacity and size of the undertakings. See accepting this practice Joined Cases 100-103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, para 121. However, if the Commission considered that total turnover was not representative for the real importance of the undertakings in the market affected other factors can be used. See in this context e.g. CFI 29 November 2005, Case T-62/02, Union Pigments AS v Commission [2005] ECR II-05057, para 152. In this case in this case, the (former) Court of First Instance confirmed the Commission’s approach of taking into account both market shares and the turnovers of the undertakings with a view to determining the relative importance of the undertakings in the relevant market. The Court of First Instance indeed commented that “[i]n an analysis of the ‘effective economic capacity of the offenders to cause significant damage to competition’, which involves an assessment of the real importance of those undertakings in the market affected, that is to say their influence on the market, the total turnover is an imprecise guide. It is of course possible for a powerful undertaking with a multitude of different activities to have only an incidental presence in a specific product market. Similarly, an undertaking with a strong position in a geographical market outside the Community may have only a weak position in the Community or EEA market. In such cases, the mere fact that the undertaking in question has a high total turnover does not necessarily mean that it has a decisive influence in the market affected”.
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infrequently, the Commission used the illegal gains achieved by a company as a starting point when the calculation of such gains was possible.3003

### 3.2. Factors influencing the gravity of the infringement

Once the starting point had been determined, other factors were applied to reach the final amount of the fine. In line with Article 15(2) of former Regulation 17, the duration of the infringement was systematically considered in the calculation of fines. The rest of the parameters influencing the final amount of the fine were all brought under the heading of gravity. In what follows next, the factors considered by the Commission in the assessment of the gravity of the infringement are considered in more detail.3004

The table below lists the factors taken into account by the Commission in the calculation of the fines in cartel cases since 1969 (i.e. the year of the adoption of the first fines for cartel cases) until the adoption of the 1998 Fining Guidelines. The table contains several columns, which indicate on the one hand, the name of the decision and, on the other, all the factors taken into account by the Commission in the fine calculation. These factors include:

1: Severe nature of the infringement; measures contrary to the objectives of the Treaty  
2: Awareness of illegality (intention)  
3: Combined market share of all the undertakings (dominance)  
4: Negative effects of the infringement  
5: Limited effects of the agreement  
6: Regulation of the market  
7: Product or sector of particular importance; special nature or value of the products  
8: Secrecy and complex organisation  
9: (Unquantifiable) benefit from the infringement  
10: Lack of monitoring and retaliation measures  
11: Recidivism  
12: Extent of participation or degree of involvement  
13: Role in the infringement (decisive or limited)

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3004 As the Commission’s decisions show, the concept duration is less open to interpretation than that of gravity. The Commission’s assessment of the duration parameter was therefore limited to establishing the period during which the European competition rule had been infringed. (In the words of M. FURSE ‘[w]hile ‘duration’ is a term of science, ‘gravity’ is a term of art’. M. FURSE, “Article 15(2)” 111). Most frequently the Commission remain vague and only observed that ‘the duration of the infringements, […] covered a period of several years’. Commission Decision of 2 January 1973 (IV/26 918 - *European sugar industry*) [1973] OJ L 140/17, para IV(2). In other cases more emphasis was placed on the long duration of the infringement see e.g. Case IV/30.907 - *Peroxyn products* [1985] OJ L 35/1, paras 54-55. In *Peroxyn products* the Commission found that “the agreements and concerted practices is that they are of extreme gravity and were of long duration. […] the "home market" arrangement dated from almost the very establishment of the common market while in the case of the individual agreements these ran from 1958 for France, from 1969/70 for the Benelux and Germany, and from 1974 in persulphates”. Commission Decision of 26 November 1986 (IV/31.204 - *MELDOC*) [1986] OJ L 348/50, para 79. In *MELDOC* the Commission stated that “[t]hese factors to be taken into consideration are the long duration of the cartel (since 25 December 1977 until 1986)’. Case IV/31.149 - *Polypropylene* [1986] OJ L 230/1, para 107. In *Polypropylene*, the Commission found that “[t]he infringement was of relatively long duration, having begun in 1977”.

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14: Importance (size) of the undertaking and position in the market

15: Losses of a firm and difficult market situation (crisis)

16: (Extent of) Cooperation

The Commission's considerations on the undertaking's turnover were generally made in this context.
### Factors taken into account in the assessment of gravity

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<thead>
<tr>
<th>Cartel decision</th>
<th>Common factors</th>
<th>Firm specific factors</th>
<th>Other</th>
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<td>Kleurstoffen (1969)</td>
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<td>Internationaal Kininekartel (1969)</td>
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<td>Pittsburgh Corning Europe - Formica Belgium – Hertel (1972)</td>
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<td>Deutsche Philips GmbH (1973)</td>
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<td>-Negligence</td>
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<td>European sugar industry (1973)</td>
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<td>Papiers peints de Belgique (1974)</td>
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<td>Preserved mushrooms (1975)</td>
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<td>Vegetable parchment (1977)</td>
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<td>Floral (1979)</td>
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<tr>
<td>Cast iron and steel rolls (1983)</td>
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<td>- Measures to reduce transparency</td>
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<td>Peroxygen products (1984)</td>
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<td>X</td>
<td>X X X X X</td>
<td>-Intention was good -Agreement was public</td>
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<td>Flat-glass Benelux (1984)</td>
<td>X X X</td>
<td>X X X</td>
<td>-Disrespect of negotiations</td>
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5829 In *Internationaal Kininekartel* (para 40), the Commission stated that Nedchem and Boehringer played a decisive role in the formation and implementation of the agreement.

5830 In Case IV/30.988 - *Agreements and concerted practices in the flat-glass sector in the Benelux countries* [1984] OJ L 212/13 (para 54), the Commission found that two firms had played an active decisive role, while five undertakings only had a supportive role.
### Table

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Description</th>
<th>Details</th>
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<tbody>
<tr>
<td>IV/31.204</td>
<td>MELDOC (1986)</td>
<td>X X X X X X X - Legal novelty</td>
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<tr>
<td>IV/31.149</td>
<td>Roofing felt (1986)</td>
<td>X X X X X X - Involvement after investigation</td>
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<tr>
<td>IV/31.865</td>
<td>Polypropylene (1986)</td>
<td>X X X X X X X - Involvement after investigation</td>
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<td>IV/31.553</td>
<td>LdPE (1988)</td>
<td>X X X X X X X</td>
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<tr>
<td>IV/31.865</td>
<td>PVC (1988)</td>
<td>X X X X X X X - Involvement after investigation</td>
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<tr>
<td>IV/31.204</td>
<td>Flat glass (1988)</td>
<td>X X X X X X X - National authorisation</td>
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<td>IV/31.204</td>
<td>Welded steel mesh (1989)</td>
<td>X X X X X X X - Withdrawal of some firms</td>
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<td>IV/31.204</td>
<td>Soda-ash - Solvay, ICI</td>
<td>X X X X X - Lack of benefit of one firm</td>
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<td>X X X X X - Conduct did not change after complaints</td>
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<td>IV/31.204</td>
<td>Scottish salmon board (1992)</td>
<td>X X X X X - National authorisation</td>
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<td>IV/31.204</td>
<td>Cewal, Cowac and Ukwal (1992)</td>
<td>X X X X X X - Conduct did not change after complaints</td>
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5831 In Case IV/31.204 - MELDOC [1986] OJ L 348/50 (paras 80-81), three firms were considered as founding members and one as leader. Furthermore, two other undertakings were found to have a special responsibility for the dumping practices. Only one company played a less central role.

5832 In Case IV/31.149 - Polypropylene [1986] OJ L 250/1 (para 109), the Commission stated that one firm was the leader of the cartel while four firms formed the (general) core of the agreement.

5833 In Case IV/31.865, PVC [1989] OJ L 74/1 (para 53), one firm played only a peripheral role.

5834 In Case IV/31.553 - Welded steel mesh [1989] OJ L 260/1 (para 205), the Commission put some emphasis on a Decision taken by the French authorities (Decision of 4 September 1985) imposing fines on some undertakings involved for violations of French domestic competition law (Article 50 of Decree No 45 - 1483) in respect of the same conduct. These fines totalled FF 1 520 000 for the relevant undertakings concerned in the present case. See further as regards the Commission’s approach as to recidivism depending on the authority that had adopted the decision infra section 5.3.1.7(a)(i) of this Chapter.

5835 This decision is, unfortunately, not available.
<table>
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<tr>
<th>Agreement</th>
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<td>-Retaliation measures</td>
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<td>-No secrecy</td>
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<td>-Authorisation by national authorities</td>
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<td>Distribution of railway tickets by travel agents</td>
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<td>-Legal novelty</td>
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<td>PVC (1994)</td>
<td>X</td>
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<tr>
<td>Cartonboard (1994)</td>
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5836 In this case the illegal gains were used as a point of reference to calculate the fines. Moreover the indirect gains cartel were also taken into account in the general calculation of the fine (supra).

5837 In Case IV/30.717-A - Eurocheque: Helsinki Agreement [1992] OJ L 95/50 (para 79), the French Banks were considered the initiators of the cartels.

5838 Interestingly, in Cases IV/33.126 and 33.322 - Cement [1994] OJ L 343/1 (para 65.9) underlined that ‘Dyckerhoff, Heidelberger, CBR, Asland, Ciments Français, Lafarge, ENCI, Cimpor and Blue Circle performed, through their most senior staff, the function of Head Delegates within Cembureau either at the time when the agreement or principle of non-transhipment to home markets was agreed or during the period of its implementation: there is thus no doubt as to the essential role of these undertakings in the conclusion and/or implementation of the agreement’.

5839 In PVC, the Commission drew a distinction between the full members of the cartel and Shell which operated on the periphery.

5840 The Commission pointed out in Case IV/C/33.833 - Cartonboard [1994] OJ L 243/1 (para 168) that the cartel was largely successful.

5841 In Case IV/C/33.833 - Cartonboard [1994] OJ L 243/1 (para 170) the Commission found that five companies were ringleaders.
The Commission considered that the *Ferry operators* cartel was only partially successful. See IV/34.503 - *Ferry operators - Currency surcharges* [1997] OJ L 26/23, para 65.

In this case two firms were considered ringleaders. *Ibid*, para 66.

<table>
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<tr>
<th>Stichting Certificatie Kraanverhuurbedrijf (1995)</th>
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<td><em>Fenex</em> (1996)</td>
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- Voluntarily stopped

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5842 The Commission considered that the *Ferry operators* cartel was only partially successful. See IV/34.503 - *Ferry operators - Currency surcharges* [1997] OJ L 26/23, para 65.

5843 In this case two firms were considered ringleaders. *Ibid*, para 66.
3.2.1. Serious nature of the infringement (factor 1)

The Commission’s practice shows that cartels were considered from the very outset as particularly serious practices.\textsuperscript{5844} The serious nature of cartels was explicitly mentioned in the context of the calculation of the fines in 30 out of 37 decisions.

Already in 1969, the Commission noted in \textit{Quinine} that the gravity of the infringement must involve an assessment of the extent to which competition is restricted. Agreements concerning, for instance, the fixing of sales prices and discounts, the protection of domestic markets or establishing quotas of supply, restrict competition by their very nature.\textsuperscript{5845} In addition, the Commission underlined in a considerable number of cartel decisions that the division of markets by means of collusive arrangements constitutes an infringement which is contrary to the most fundamental objectives of the Treaty, namely the creation of a single market.\textsuperscript{5846}

The consideration of the serious nature of the infringement is in line with the concept of object restriction set out in (now) Article 101(1) TFEU. As examined in Chapter 4, the concept of object restrictions is based on the fact that certain forms of collusion between undertakings can be regarded as being injurious to the proper functioning of normal competition.\textsuperscript{5847} From this perspective, it can be argued that by stating that a certain agreement was restrictive by nature, the Commission was in fact considering the harmful effects flowing from the arrangement.

3.2.2. Deliberate character of the infringement (factor 2)

Article 15(2) of Regulation 17 referred to infringements committed either intentionally or negligently.\textsuperscript{5848} It was not further specified how the intentional or negligent nature of the behaviour affected the amount of the fine. The Commission’s decisions dating from the period prior to the adoption of the 1998 Guidelines stressed the deliberate character of infringements when assessing their gravity in 24 out of 37 cases.

For example, in \textit{Soda-ash - Solvay, ICI} (1990), the Commission stated that ‘[o]ver a long period of time, the two major producers of soda-ash in the Community have knowingly concerted their commercial policies so as to avoid all competition between them in an important industrial product and a market […]. Accordingly, the Commission considered that the infringement was of considerable gravity’.\textsuperscript{5849}

Likewise, in \textit{Cartonboard} (1994), the Commission observed that the undertakings involved in the infringement had deliberately infringed Article 101 TFEU with ‘full knowledge of the unlawful

\textsuperscript{5844} This aspect was indeed stressed in a great majority of Commission’s decisions. See for an overview of these decisions infra “Table 1”.


\textsuperscript{5846} Case IV/33.133-B: \textit{Soda-ash - Solvay, CFK} [1991] OJ L 152/16, para 64. See further Table 1.

\textsuperscript{5847} See further supra Chapter 4.

\textsuperscript{5848} The same reference is made in the corresponding provision of Regulation 1/2003, namely Article 23(2). See for a more extensive analysis of this subject supra section 2 of this Chapter.

nature of their enterprise and awareness of the risk of substantial penalties.\textsuperscript{5850} Accordingly, the Commission considered that the infringement was of considerable gravity.\textsuperscript{5851}

Arguably, the deliberate nature of certain infringements may provide an answer to the question whether the parties had expected to obtain gains by participating in the infringement. It is safe to assume that if companies believe that by taking part in an agreement they will incur losses, they will decide not to join such practice. If, on the other hand, firms are aware of the illegal nature of a certain type of agreement and they still decide to take part in it, it can be presumed that they –at least – expected to obtain profits, regardless of whether or not they finally did.

3.2.3. Collective market share (factor 3)

The total share of the market held by the infringing companies was one of the most common factors as it was explicitly considered by the Commission in the calculation of fines in 20 decisions. The infringement was seen as more serious or graver by the Commission when the market shares of the undertakings that participated in it, accounted for a considerable part of the market.

In *Wood pulp* (1984), for instance, the Commission underlined that the firms accounted for nearly two-thirds of this market.\textsuperscript{5852}

In the same line, in *PVC* (1988)\textsuperscript{5853} and *Cartonboard* (1994)\textsuperscript{5854} the Commission explained that, in determining the general level of fines, it considered that the undertakings participating in the infringement virtually covered the whole of the market.

The consideration of the total market share of the cartel is related to the actual effects the agreement may have on the market. It is indeed well known that cartels can only succeed in raising the level of prices or maintaining their market shares when the whole market share held by all the cartel participants is sufficiently large.\textsuperscript{5855} When the collective market share of (all) the members of the agreement can be established, it can be affirmed that it is at least more likely that the collusion succeeds.

3.2.4. Product or sector of particular importance (factor 7)

Both the value of the market, in the sense of economic significance, and the importance of the product were frequently (i.e. in 13 cases) considered by the Commission.

\textsuperscript{5850} Case IV/C/33.833 - *Cartonboard* [1994] OJ L 243/1, para 167.
\textsuperscript{5851} For an overview of the cases in which the significant deliberate nature of the infringements was stressed see Table 1.
\textsuperscript{5853} Case IV/31.865, *PVC* [1989] OJ L 74/1, para 52.
\textsuperscript{5854} Case IV/C/33.833 - *Cartonboard* [1994] OJ L 243/1, para 168.
\textsuperscript{5855} See illustrating this point Case IV/26.623 - *Entente internationale de la quinine* [1969] OJ L 192/5, para 40 (this decision was only published in Dutch): ‘[v]oor Nedchem en Boehringer moet worden gewezen op de dominerende invloed die zij hebben uitgeoefend op de opstelling en de toepassing der overeenkomsten. Nedchem heeft het grootste aandeel voor kinine en kinidine . Op de grondstoffenmarkt is haar positie daarentegen, na het verlies van de Indonesische bezittingen merkbaar slechter geworden. Voorts dient in aanmerking te worden genomen, dat Nedchem herhaaldelijk heeft gepleit voor betrekkelijk lagere verkoopprijzen. Boehringer kon zijn positie op de kinine - en kinidinemarkt in de loop van de jaren verbeteren. Hij staat wat het marktaandeel voor kinine en kinidine betreft op de tweede plaats. Op de grondstoffenmarkt bezit Boehringer, door zijn Kongoelse plantages en verwerkingsfabriek, de grootste invloed. Tijdens de bestaansduur van het kartel heeft Boehringer herhaaldelijk voor hoge prijzen gepleit. See further on the concept of market dominance and, more generally, on the working of cartels *supra* Chapter 2 section 5.3.
In Sugar (1973), the Commission commented that ‘account should be taken of the fact that it is a matter of a product of particular importance to the consumer’.  

In Wood pulp (1984), the Commission noted that ‘the European market in bleached sulphate pulp is economically significant’.

In Polypropylene (1986), the decision indicated that ‘the polypropylene market is an important and rapidly expanding industrial sector worth in western Europe some 1 500 million ECU in 1983’.

Also in Far Eastern Freight Conference (1994) the Commission paid attention to the nature and value of the services in question.

Admittedly, it is difficult to see how the relevance of a specific product can be measured. One possible explanation may relate to the substitutability of the product in question. From this perspective, this factor may (indirectly) relate to the harm caused on consumers by the agreement. On the other hand, the economic significance or value of a market could be linked to the profitability of the agreement. If a market has no value from a financial point of view, there is no reason to collude from the outset.

### 3.2.5. Secrecy and complex organisation (factor 8)

In order to avoid sanctions and to attain the key objective of raising prices, cartel participants progressively developed mechanisms to force the implementation of the collusive agreement and to conceal their (established) illegal behaviour. The Commission, on the other hand, saw the need to take into account this specific feature of cartels in the assessment of its fines and, thereby, (attempted to) penalise this type of behaviour. This consideration was particularly made in seven cases.

For instance, in Polypropylene (1986) and PVC (1988), the Commission found that the cartel parties deliberately set up and operated a secret and institutionalized system of regular meetings to fix prices and quotas in an important industrial product.

Comparably, the Commission observed in Cartonboard (1994) that ‘[a] particularly grave aspect of the infringement is that in an attempt to disguise the existence of the cartel the undertakings went so far as to orchestrate in advance the date and sequence of the announcement of each major producer of the new price increases’.

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5859 Commission Decision of 21 December 1994 (IV/33.218 - Far Eastern Freight Conference) [1994] OJ L 378/17, para 150. In particular the Commission noted that ‘in 1992 the cost of supplying inland transport services for 10 of the largest members of the FEFC was some ECU 477 million. This amount is probably representative, in real terms, of the cost of supplying inland transport services by those 10 lines for years both before and since 1992. The annual value of the services in question is therefore considerable and represents a significant cost for the Community's industry’.
5860 See e.g. M. FURSE, “Article 15(2)” 111. In the view of this author ‘[t]hat the product market should be relevant is surprising. The problems raised by such an approach are evident. There is no way to quantify the importance of a product to a consumer save by the willingness to pay which is a feature of every day purchase’.
5861 This interpretation is coherent with Case IV/26.623 - Entente internationale de la quinine [1969] OJ L 192/5, para 38: ‘[d]eze beperking was bijzonder ingrijpend, omdat de daaraan deelnemende ondernemingen een dominerende positie op de markt innemen en omdat het bij kinine en kinidine gaat om produkten die van bijzondere betekenis zijn als geneesmiddelen en die niet in ieder opzicht door substitutieprodukten kunnen worden vervangen’.
The Commission’s approach is logical given that secret practices are more difficult to detect than public practices.\textsuperscript{5864} This not only means that enforcement is by definition more costly.\textsuperscript{5865} A cartel that is active in the market for a long period generally produces more harm to competition than a cartel that is promptly detected. Furthermore, when companies set up complex organisation mechanisms – including, for instance, frequent meetings, the attribution of the role of leader to certain members or the application of monitoring or retaliation measures – it is more probable that the cartel in question produces a negative effect on the market.\textsuperscript{5866}

3.2.6. (Unquantifiable) benefit from the agreement (factor 9)

When the illegal benefits stemming from a cartel could not be quantified, the Commission occasionally referred to such (immeasurable) gains as a ground to impose substantial fines.\textsuperscript{5867}

The Commission decision in Floral (1979) indicated that ‘[t]he three French manufacturers concerned benefited in equal proportions from the profits’. The Commission attached particular importance to such profits and noted that ‘[t]he fact that they shared equally in the profits prevailed over the fact that they distributed different quantities via Floral’.\textsuperscript{5868}

In Soda-ash - Solvay, ICI (1990), the Commission clearly pointed out that ‘[e]ach producer derived a considerable benefit from the infringement’.\textsuperscript{5869}

In other cases, the Commission took into account the negative effects of the infringement on the market and, more precisely, on prices.\textsuperscript{5870} Although the effects on prices or the cartel overcharges do not exactly correspond to the benefit obtained by the parties,\textsuperscript{5871} there is certainly a direct link between both factors. By taking into account the precise effect on prices, it seems that the Commission paid attention to both the harm as well as the illicit gains.

3.2.7. Limited effects of the agreement (factor 5)

Despite the serious nature of cartel infringements, the Commission did take into account the limited effect of such agreement on the market as a mitigating factor on certain occasions, namely in seven cases.

\textsuperscript{5864} In fact in some cases the Commission considered in the assessment of the gravity of the infringement the open or public character of the infringement. See e.g. Commission Decision of 6 August 1984 (IV/30.350 - zinc producer group) [1984] OJ L 220/27, para 99. In this case the Commission stated that ‘the existence of a zinc producer price was common knowledge, so that it was reasonable for the firms to assume that their behaviour, to the extent that it was publicly known, was not a serious offence’. See for other decision Table 1.

\textsuperscript{5865} The more complex organisation and concealing techniques of cartels led the Commission to develop more sophisticated detection techniques such as the European leniency system.

\textsuperscript{5866} Compare Case IV/30.350 - zinc producer group [1984] OJ L 220/27, para 92. In zinc producer group, the Commission commented that ‘[t]he firms concerned did not decide to end the infringements on a given date. Instead, the ZPG gradually fell apart because one by one the firms stopped observing all the agreements and eventually the cohesion between them broke down’. The Commission accordingly found that ‘[t]he only moderately restrictive effect of this infringement reduces its seriousness’ (para 102).

\textsuperscript{5867} This factor was, however, only mentioned two times explicitly. One may however assume that the factor relating to the effects of the infringement also include the immeasurable gains of the companies.

\textsuperscript{5868} IV/29.672-Floral [1980] OJ L 39/51, para 7(b).


\textsuperscript{5870} This consideration was made in 11 cases.

\textsuperscript{5871} See for a deeper analysis supra Chapter 2, section 5.3.
To cite an example, in *Floral* (1979) the Commission accepted that ‘although the infringement virtually eliminate[d] all the competition between them on that market, on the other hand, the effect of their cooperation was relatively small’. 5872

The Commission’s practice suggested that, even when parties had the intention to restrict competition and raise prices or share markets, the fact that this intention was finally frustrated or did not materialise in the market could lead to lower the fine. Otherwise said, in the Commission’s view, the fact that cartels were unsuccessful could mitigate the gravity of the infringement. 5873 This approach confirms the importance of the effects or harm of the agreement in the market for the calculation of fines in the period preceding the introduction of the 1998 Guidelines. Taking into account this factor may, however, be counterproductive in the sense that a too benevolent approach as regards unsuccessful cartels may have the undesirable effect of encouraging collusion. 5874

3.2.8. Recidivism (factor 11)

The Commission mentioned in nine cases that recidivism constituted an aggravating circumstance. 5875

In *Flat glass* (1984), the Commission noted that two of the parties were guilty of previous infringements. Moreover, the fact that the parties had negotiated an agreement with the Commission and did not observe the spirit of such agreement also led to raising the level of the fine. 5876

The same occurred in *LdPE* (1988), in which the Commission found that the fact that several of the undertakings had previously been the subject of fines for collusion in the chemicals industry enhanced the gravity of the infringement. 5877

In *Soda-ash - Solvay, ICI* (1990), the Commission also underlined that both Solvay and ICI have been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry. 5878 The repeated nature of the infringement led accordingly to a higher fine.

The deliberate nature of the infringement is intrinsically linked to the question whether or not a company is a repeat offender. After a first infringement, undertakings are presumed to be familiar with the competition law regime. As such, the fact that infringements were committed for a second time, clearly shows that the activity was deliberate. Furthermore, if the first decision establishing an infringement imposed fines, the repetition of the anticompetitive activity indicates that the fines imposed did not produce sufficient deterrent effects.

5873 This approach is in stark contrast with the current view of the Commission, as confirmed by the European Courts. See further infra section 5.3 of this Chapter.
5874 See further infra section 5.3 of this Chapter.
5875 See further Table 1.
5878 Case IV/33.133-A - Soda-ash - Solvay, ICI [1991] OJ L 152/1, paras 65-66. The Commission added that ‘the activities of both producers in the soda-ash sector itself were the subject of scrutiny by the Commission between 1980 and 1982. Although at that time the Commission was more particularly concerned with the producers’ exclusive supply agreements with customers, those responsible for the soda-ash activities cannot have been ignorant of the need to comply with Community law’.
3.2.9. Individual role in the infringement and features of a firm (factors 13 and 14)

The individual conduct and characteristics of an undertaking had an important impact on the level of fines. As a general rule, companies which (i) participated in all the aspects of the infringement, (ii) played an important role in the cartel \textit{(i.e.} ringleader or initiator)\textsuperscript{5879} and (iii) held an important position in the market, bore by definition a greater responsibility in the infringement, according to the Commission. As a consequence, a higher fine was imposed.

This approach is illustrated by the \textit{Polypropylene} case (1986), in which the Commission noted that 'in assessing the fines to be imposed on individual undertakings, the Commission has taken into consideration the role played by each in the collusive arrangements, the length of time they participated in the infringement, their respective deliveries of polypropylene to the Community and their individual total turnover'.\textsuperscript{5880}

Conversely, the individual circumstances of a firm could also lead to a reduction in fines on the basis of mitigating factors. This was in particular the case when firms (i) only participated in the infringement to a limited extent, (ii) when firms plays a peripheral role in the agreement and (iii) when they did not occupy a prevalent position in the market.

For example in \textit{LdPE} (1988), the Commission declared that ‘in view of [Monsato’s] peripheral involvement, its minor importance as a producer and the lapse of some seven years between its last participation in United Kingdom local meetings and the opening of proceedings, it would be appropriate to impose only a moderate fine’.\textsuperscript{5881}

There are multiple reasons which justify lowering or raising the fine on the basis of the specific behaviour of a company. For example, it appears reasonable to impose higher fines on the firm(s) which took the initiative to conclude the cartel because without such behaviour cartel formation and thus economic harm can be prevented. In the same line of reasoning, firms which occupy a prevalent market position should not only be aware of the illegality of their conduct. Moreover, firms with a high share of the market are more likely to play an important or even decisive role within the cartel.\textsuperscript{5882} By calibrating the fine on the basis of the role and features of the firms concerned, the Commission probably sought to prevent the damage by discouraging (large) firms to fulfil an important role in the collusive agreement.

\textsuperscript{5879} The Commission’s practice reflects a particularly strict approach towards the “cartel ringleaders” in the calculation of the fine. This is well illustrated by the \textit{Cartonboard} case, in which the Commission considered that the “ringleaders”, clearly constituted the main decision-makers and were the prime movers of the cartel must bear a special responsibility. Case IV/C/33.833 - \textit{artonboard} [1994] OJ L 243/1, para 170; see also e.g. Case IV/34.503 - \textit{Ferry operators - Currency surcharges} [1997] OJ L 26/2, para 66. See further Table 1. Treating cartel ringleaders more strictly makes sense from an effective enforcement perspective because a cartel can only be concluded in the first place and work efficiently if one or more parties take the initiative to form such an agreement and subsequently ensure the general stability of the agreement. If companies are dissuaded from playing such roles, it can be assumed that cartels would not be formed in the first place. See for a further analysis of the creation and stability of cartels \textit{supra} Chapter 2, section 5.1.

\textsuperscript{5880} Case IV/31.149 - Polypropylene [1986] OJ L 230/1, para 109. In \textit{Cartonboard}, the Commission however clarified that although it intended to ‘take into account any substantial change in the nature or the intensity of the role played in the cartel by particular producers […] it is not, however, intended in calculating each fine to employ some precise mathematical formula reflecting the exact number of days, months or years for which that producer adhered to the cartel’. Co Case IV/C/33.833 - \textit{Cartonboard} [1994] OJ L 243/1, para 169.


\textsuperscript{5882} See further explaining this aspect \textit{supra} Chapter 2 section 5.3.
3.2.10. Losses of a firm and difficult market situation (crisis) (factor 15)

Difficult trading conditions at the time of the infringement or the existence of a crisis in the sector were commonly considered mitigating factors before the adoption of the 1998 Guidelines. In fact this circumstance was taken into account in 12 decisions. This factor played such an important role during this period that – even if the Commission always adopted a prohibition decision requiring the termination of the agreement – some undertakings even avoided a fine.

This occurred for instance in *Flat glass* (1984) the Commission was benevolent in the calculation of fines because the flat-glass industry was going through a major recession and was also facing great technological change.\(^{5883}\)

Comparably, in the *Welded mesh* cartel (1989), in which the Commission observed that ‘[t]he welded mesh sector ha[d] also been suffering from a structural decline in demand and the associated problems of excess capacity, which [overrode] the short-term market fluctuations which occurred during the relevant period. In general, therefore, the welded mesh sector [was] not a profitable one’.\(^{5884\ 5885}\)

This factor can be linked to both benefit and harm considerations. On the one hand, the Commission took the view that companies incurring losses should not be heavily fined, even if they participated in a clearly illegal activity. Next, although crisis cartels do also cause harm, such practices are viewed through a more benevolent lens because they pertained to a sector which was already in crisis.\(^{5886}\)

3.2.11. Extent of cooperation (factor 16)

Companies which cooperated with the Commission in the course of its investigation were often rewarded, even before the 1996 Leniency Notice or the Settlement procedure had been published.\(^{5887}\)

In *Cartonboard* (1994), the Commission stated that ‘in assessing the fine to be imposed on each undertaking, the Commission in addition to the above takes account of: any mitigating factors including the degree of cooperation with the Commission after the investigation and the extent to which any such cooperation may have materially contributed to facilitating or expediting the conclusion of the present proceedings’.\(^{5888}\)

This approach is consistent with the idea that cooperation which enables the Commission to detect or establish the existence of an infringement and to save enforcement resources, should be rewarded.\(^{5889}\) Furthermore, a practice that is detected promptly will by definition cause less harm than a collusive agreement of long duration.

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5885 As analysed below the current approach of crisis situations in the industry is currently completely different. (*Infra* section 5.3 of this Chapter). The evolution in the interpretation of this factor is linked to the widespread knowledge that cartels are currently fully prohibited, regardless of the specific circumstances of a given sector. See for a more detailed analysis *supra* Chapters 2 and 4.
5886 See for a more detailed assessment of crisis cartels *supra* Chapter 4.
5887 See also *supra* Chapter 8, section 3.
5888 Case IV/C/33.833 - *Cartonboard* [1994] OJ L 243/1, para 169. See for other cases *supra* Chapter 8, section 3.
5889 See further *supra* Chapter 8, section 1.
3.3. Assessment of the method of calculation prior to 1998

Although the Commission had not adopted any guidance before 1998, it can be concluded based on the discussion above that in determining the amount of fines the Commission commonly used as a starting point for its calculation a percentage of the annual turnover in the product and geographical market concerned by the infringement. This percentage was established with regard to the gravity and the duration of the infringement.

At the same time, the analysis of the Commission’s practice indicates that the gravity of the infringement was determined by reference to the gravity of the infringement as a whole, on the one hand, and by the specific behaviour of each undertaking, on the other hand. The particular conduct of each firm was taken into account in the form of mitigating or aggravating circumstances, which could offset one another. Depending on the specifics of the case, the Commission altered the (aggravating or mitigating) factors taken into account. In essence, the calculation of the fine prior to 1998 can be formulated as follows:

Amount of the fine = relevant turnover x percentage in respect of the gravity (set be reference to the general gravity and the specific behaviour of the firm) x percentage in respect of duration

With respect to the percentage in respect of the gravity, arguably most of the factors brought together under the heading of gravity reflect directly or indirectly the harm caused by the infringement and – to a lesser extent – the benefit deriving from the illegal practice. This is certainly the case of parameters such as the severe nature of the infringement, the deliberate nature of the conduct, the existence of recidivism, the combined market share of the parties, and general considerations as to

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5891 See Table 1.


5893 See also E. L. CAmILLI, “Optimal and Actual” 24. See, however, for a slightly different opinion regarding the formula used by the Commission D. GERADIN AND D. HENRY, “The EC Fining” 6. According to these authors the Commission’s methodology consisted in two main steps. First, it calculated the basic amount. This amount equalled the relevant turnover multiplied by a percentage in respect of the gravity of the infringement, multiplied by a percentage in respect of duration. Subsequently, the basic amount was reduced on the basis of mitigating factors.

5894 As regards the duration, the Commission systematically referred to this factor in all its decision. The analysis of the Commission’s practice does however not elucidate how the duration affected the calculation of the fine as a whole.
the materialisation of the effects of the agreement \textit{(i.e.} whether the cartel was successful or whether monitoring and retaliation measures had been put in place).\textsuperscript{5895} \textsuperscript{5896}

The next question is why the Commission used a very small percentage of the undertakings’ turnover (in the product concerned) as basis. The connection between undertakings’ turnover and the Commission’s fining policy can, arguably, be linked to the limit imposed by the 10% threshold contained in Article 15 of Regulation 17 \textsuperscript{5897} Regulation 17 (and later in Article 23 of Regulation 1/2003).\textsuperscript{5897} In effect, in setting fines the Commission was (and still is) not entitled to exceed the 10% of the firm’s turnover in the preceding business year.\textsuperscript{5898} Nevertheless, this limit refers to the total turnover while the Commission commonly based its calculation of fines on of a percentage of turnover in the products and market concerned.\textsuperscript{5899} There is no need to mention that, in practice, the difference between both turnover figures can be enormous. If the Commission considered that fines had to be proportional to the 10% limitation, arguably it should have always used the total turnover as a benchmark to calculate its fines and not only in certain cases. This reasoning suggests that the 10% threshold was most probably not the reason to use the firm’s turnover as a starting point.\textsuperscript{5900}

Next, it can also be argued that the EU-wide turnover from the products relating to the infringement could be regarded as a proxy for the benefit resulting from the violation, which is as examined above, the correct point of referent to set fines. It can be safely assumed that the expected gain from the violation is positively correlated with the undertakings turnover in the affected market throughout the duration of the infringement.\textsuperscript{5901} \textsuperscript{5902} This argument seems also in line with the case-law according to which, the turnover may provide an indication of the effective economic capacity and

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\item \textsuperscript{5895} The \textit{Cast iron and steel rolls} decision illustrates the Commission’s general endeavours to take into account the harm of the infringement. This decision stated that “[a]s to the gravity and duration of the infringements […] they represented a deliberate effort over a period of at least 12 years in total to frustrate one of the principal aims of the Treaty, namely the creation of a single market, by interfering with the operation of the price mechanism, by restriction of inter-State penetration and by market-sharing. Virtually the whole of the Community cast iron and steel rolls industry, together with the Austrian and Swedish makers, was involved in the IRMA arrangements, which tended to make them more effective. In these circumstances, the Commission considers that the infringements were serious and that fines must be imposed. In determining the amount of those fines, the Commission has first taken into account the economic importance of the industry and of the infringements; the latter has been assessed in the light of the fact that prices were affected throughout the Community for the whole period during which the infringements occurred (although the restrictive practices concerned were less effective in the later years than in the earlier years). Normally, therefore, heavy fines would be justified’. Commission Decision of 17 October 1983 (IV/30.064 - \textit{Cast iron and steel rolls}) \textit{[1983]} OJ L 317/1, paras 69-70.
\item \textsuperscript{5896} In this context W. \textsc{Wils} stated that in its decisions imposing fines, the Commission has never attempted to make a quantitative calculation of the harm produced by the infringement. W. \textsc{Wils}, \textit{“E.C. Competition Fines”} 38. This choice is, however, logical as such calculation would be extremely difficult. In addition, calculating the harm cause by an illegal agreement on an individual basis would be highly costly.
\item \textsuperscript{5897} See also pointing out this connection W. \textsc{Wils}, \textit{“E.C. Competition Fines”} 36-37.
\item \textsuperscript{5898} See further \textit{supra} section 2 of this Chapter 8.
\item \textsuperscript{5899} See also noting the difference between both turnover figures E. L. \textsc{Camilli}, \textit{“Optimal and Actual”} 28. W. \textsc{Wils} also pointed out in this context that ‘making sure that at the end of the calculation the fine does not exceed a percentage if turnover is quite another thing than taking turnover as a starting point for the calculation. The former does not logically compel the latter’. W. \textsc{Wils}, \textit{“E.C. Competition Fines”} 36-37.
\item \textsuperscript{5900} See in this context, M. \textsc{Reynolds}, \textit{“EC Competition Policy”} 263, who commented that in the period preceding the adoption of the first Fining Guidelines fines had never come near the 10 per cent level.
\item \textsuperscript{5901} F. \textsc{Castillo de la Torres}, \textit{“The 2006 Guidelines”} 364. As this author notes ‘[o]n this point, it is important to bear in mind that the approach based on “expected gain” does not imply that undertakings are profitable. It may well be the case that the cartel aims at avoiding losses”.
\item \textsuperscript{5902} The fact indeed remains that, deterrence can only be achieved if fines are set at a level equal to the expected gain from the violation multiplied by the inverse of the probability of being caught. See further \textit{supra} section 1 of this Chapter.
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size of the undertakings.\textsuperscript{5903} The main shortcoming of the Commission’s fining method was that a percentage between 2 and 9 of the turnover used as an estimation or proxy of the expected gain was extremely low.\textsuperscript{5904} There is no need to conduct a deep economic assessment to establish that using such a (small) percentage of the turnover in the EU-wide market as a starting point to calculate fines did certainly not suffice to achieve deterrence.\textsuperscript{5905}

Furthermore, (it is assumed that) in the Commission’s formula the duration was considered as a percentage to be applied to the turnover of the product in the relevant area.\textsuperscript{5906} In contrast, according to the optimal fine formula the duration factor should constitute an essential calculation parameter, instead of only a small percentage.\textsuperscript{5907} This argument is based on the presumption that, in very broad terms, the gain obtained through a violation is proportional to its duration.\textsuperscript{5908} Accordingly, if a certain violation lasts three times longer than other comparable violation, the first would basically produce four times more gains and the fine should be four times higher.\textsuperscript{5909} There is no need to mention that by applying only an additional small percentage, the Commission’s calculation failed to properly consider the duration of the infringement.

Finally, the Commission has never mentioned the probability of detection in its decisions imposing fines on cartels. Given that in practice the Commission frequently referred to the fact that cartel agreements were secret and imposed a higher fine when this occurred, it can be argued that the probability of detection was taken into account in the context of the assessment of the gravity of the infringement. Although it is unclear how this affected the final calculation, keeping in mind the

\textsuperscript{5903} It is true that Court of Justice accepted that the turnover may provide an indication of the effective economic capacity and size of the undertakings, Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, para 121.

\textsuperscript{5904} W. WILS explains this situation with the example of price cartels. In this case ‘the main element of harm is the transfer from consumers to producers which equals the price increased caused by the cartel multiplied by the quantity of products bought. By taking turnover as a basis (which is quantity times price, not quantity times price increase) one fails to take into account the degree to which the price was artificially raised, obviously as essential determinant of harm. A second component of the harm is deadweight welfare loss attributable to a misallocation of resources, which is proportional to the price increase and to the concomitant decrease in production, again turnover which does not capture the changes in price and quantity misses much of the essence. As to measuring other components of harm, such as productive inefficiencies or wasteful efforts to create and continue the cartel turnover does not seem particularly suited either’. W. WILS, “The Commission's New Method” 254-255.

\textsuperscript{5905} This view has in fact been accepted by the Commission itself. Since 1979, the Commission expressed its concerns about the lack of deterrence of its fining policy. In its XIII Report on Competition Policy of 1983 (para 63), it stated that ‘[a]fter about 20 years’ experience of enforcing the competition rules, during which time it had imposed relatively light fines, the Commission found that fines of this size were not proving adequate to deter companies from continuing to commit even quite clear-cut infringements. The Commission therefore indicated, in a decision taken at the end of 1979, that it intended to reinforce the deterrent effect of fines by raising the general level thereof in cases of serious infringements’. In the same line, in its XXIst Competition Policy Report of 1991 (para 139) the Commission announced its intention to ‘make fuller use of the possibility provided by Regulation 17 to impose fines of up to 10% of the annual turnover of the companies involved, in order to reinforce the deterrent effect of penalties under Community competition law. See also stressing the need to achieve deterrence through effective fines e.g. K. VAN MIERT, SPEECH 1994/3 (“The role of Competition Law Today”), delivered at the Second EU/Japan Seminar on competition held on Brussels 16 September 1994, available at http://ec.europa.eu/competition/publications/cpn/cpn1994_3.pdf;

\textsuperscript{5906} This is, however, an assumption made on the limited information concerning the starting amount and the final fine imposed. When the Commission referred to the duration of the infringement in question in its decisions it simply stated whether such infringement was long or not.

\textsuperscript{5907} W. WILS, “The Commission's New Method” 254-255

\textsuperscript{5908} The gain or harm resulting from a cartel depends in practice on many different factors, including for example whether the agreement is successful in raising prices, the intensity of the agreement, etc... See further \textit{supra} Chapter 2, section 5.3. See also infra sections 4.3 and 5.3 of this Chapter.

\textsuperscript{5909} W. WILS, “The Commission's New Method” 254-255
optimal sanction formula, it not unreasonable to observe that not sufficient attention was given to this factor in the Commission’s methodology.

4. The 1998 Fining Guidelines

Over a course of approximately three decades, the Commission fined undertakings without any official guidance on the calculation of fines. The approach adopted by the Commission with respect to the calculation of fines was frequently criticized for being too vague and for lacking transparency. As the analysis of the Commission’s fining practice indicated, its decisions listed the factors that justified the final fine, without explaining the specific role of such factors in the calculation of the fine. The lack of clarify or precision of the Commission’s calculation method was one of the most recurrent arguments for companies which challenged the Commission decisions before the Courts. In fact, undertakings which had been fined by the Commission in competition law proceedings argued before the European Courts that the lack of reasoning constituted a breach of the obligation of the Commission to motivate its decisions. Although this argument was rejected by the (now) General Court in three judgments concerning the Welded steel mesh cartel, the Court recognized that ‘it [was] desirable for undertakings – in order to be able to define their position in full knowledge of the facts – to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed on them, without being obliged, in order to do so, to bring court proceedings against the Commission decision - which would be contrary to the principle of good administration’. The criticism of the Commission’s fining methodology finally led to the adoption of its first Fining Guidelines in 1998, which is further explored in this section.

5910 See e.g. I. VAN BAELE, “Fining a la carte”; D. GERADIN AND D. HENRY, “The EC Fining” 6-7. These authors commented that ‘Commission had the possibility to adjust the fines on an ad hoc basis if the circumstances dictated, and further it was not easy to glean why a party got off without a fine at all’.

5911 However, the fact that companies involved in competition law proceedings challenged the Commission decision’s before the European Courts does not mean that the Commission was not assessing fines correctly. In fact, firms use a whole range of (procedural) arguments when challenging fining decisions. In addition, it should be kept in mind that the Commission has a wide margin of discretion in setting fines. See further discussing this aspect supra section 2 of this Chapter. See for a different opinion L. MCGOWAN, “At the Commission’s Discretion” 651-652. According to this commentator ‘[w]here challenges against the levying of fines are upheld much of the explanation rests not with the Commission’s decision or power to fine, but rather an improper or factually flawed analysis’.

5912 The motivation obligation is embedded in Article 296 TFEU. See e.g. P. M. SPINK, “Recent guidance on fining policy”, 1999 (20-2) ECLR, 101-108, at 103-104 (hereafter: ‘P. M. SPINK, “Recent guidance”’); S. FORRESTER, “A Challenge” 185-186. More precisely, this practitioner commented that ‘[t]he methodology by which fines were determined as well as their absolute size provoked controversy. I recollect being astounded in 1991 by a fine of 2 million for a largely formal textual infringement (textual meaning that the infringement consisted of prohibited words which were never implemented in practice). As a response to these concerns the Commission adopted in 1998 the Guidelines’. See also stressing the need for Guidelines R. RICHARDSON, “Guidance without” 360-361; P. M. SPINK, “Recent guidance” 101.
4.1. Objectives of the Guidelines

The 1998 Guidelines were conceived as a tool to define the Commission’s criteria to exercise its discretion in setting fines for competition law infringements. In particular, the 1998 Guidelines stipulated that its principles ‘should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice 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’. 5915

In this context, the European Courts have further held that the Commission may not depart from such guidelines which it has imposed on itself and which are intended to specify, in accordance with the Treaty, the criteria which it proposes to exercise its discretion in assessing the gravity of an infringement. This means in other words that, ‘in adopting [guidelines] and announcing by publishing them that they will henceforth apply to the cases to which they relate, [the Commission] imposes a limit on the exercise of its discretion and cannot depart from those rules under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations’. 5916 While the Guidelines ‘may not be regarded as rules of law which [the Commission] is always bound to observe, they nevertheless form rules of practice from which [the Commission] may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment’. 5917

Furthermore, the Commission declared in its Twenty-seventh Report that ‘[t]he application of the principles set out in the guidelines will also help to make the Commission’s policy on fines more coherent and to strengthen the deterrence of the financial penalties’. 5918 The Commission Fining Guidelines thus serve a double purpose. On the one hand, they aim at enhancing certainty and

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5915 Fining Guidelines 1998, para 1. In this context the European Courts have ruled that ‘in the interests of ensuring that its actions are predictable and transparent, the Commission has also limited the exercise of its own discretion by rules of conduct which it set for itself in […] the Guidelines on the method of setting fines […] To that end, the notice and the guidelines lay down rules of conduct from which the Commission may not depart without risking being found in breach of general principles of law, such as equal treatment or the protection of legitimate expectations. They also ensure legal certainty for the undertakings concerned by defining the method which the Commission has bound itself to use in setting the fines imposed pursuant to Article 23(2) of Regulation No 1/2003 (see, to that effect, Judgment of the Court of 22 May 2008, Case C-269/06 P, Evonik Degussa v Commission and Council [2008] ECR I-81, paras 52-53; Judgment of the Court of 19 March 2009, C-510/06 P, Archer Daniels Midland v Commission [2009] ECR I-1843, para 60). Moreover, the Commission’s adoption […] the Guidelines, inasmuch as it fell within the statutory limits laid down by Article 15(2) of Regulation No 17 and by Article 23(2) of Regulation No 1/2003, only contributed to defining the limits of the exercise of the discretion which the Commission already had under those provisions, and it cannot be inferred from their adoption that the limits on the Commission’s competence in the area in question were not initially defined sufficiently by the EU legislature’, CFI 8 October 2008, Case T-69/04, Schuunk GmbH and Schuunk Kohlenstoff-Technik GmbH v Commission [2008] ECR II-2567, para 44.

5916 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 Rørindustri and others v Commission [2005] ECR I-5425, para 211.


transparency for undertakings involved in competition law proceedings and, on the other hand, they constitute a key mechanism for the Commission to exercise its discretion and to pursue its competition policy objectives.

Consequently, the Commission fining policy and, more precisely, the Guidelines are not designed or meant to enable undertakings to predict the level of fines with accuracy. In fact, there is no obligation for the Commission, as part of its duty to state reasons, to indicate in its decision the figures relating to the method of calculating the amount of fines.\textsuperscript{5919} This approach is necessary from an enforcement perspective, not only to preserve the flexibility of the Commission’s decision-making processes, but also to preserve the deterrent effect of the fining system.\textsuperscript{5920} Full transparency in this field would allow undertakings to balance the level of profit from the infringement against the level of the fine and the chances of getting caught, and thus to abuse the system.\textsuperscript{5921} A little uncertainty in this respect is necessary and as such a welcome factor.\textsuperscript{5922}

4.2. The calculation of the fine under the 1998 Guidelines

The 1998 Guidelines followed a two-step process to calculate the final amount of the fine. First, a basic amount which was defined by reference to the gravity and duration of the infringement was established as a starting-point. Then, the basic amount was increased to take account of aggravating circumstances or reduced to take into account attenuating circumstances.\textsuperscript{5923} The legality of this method of calculation has been explicitly confirmed by the European Courts. In particular, in \textit{Dansk Rørindustri} the ECJ held, that ‘in setting out in the Guidelines the method which it proposed to apply when calculating fines imposed under Article 15(2) of Regulation No 17, the Commission remained within the legal framework laid down by that provision and did not exceed the discretion conferred on it by the legislature’.\textsuperscript{5924}


\textsuperscript{5920} See in this regard \textit{e.g.} P. M. \textit{Spin}k, “Recent guidance” 108 stating that ‘[g]iven that full transparency would tend to reduce the flexibility of DG IV decision-making processes, and create an environment in which it is easier to manipulate and abuse the enforcement regime, it is easy to understand why the notice is economical with the advice it dispenses’.

\textsuperscript{5921} See in this line, the Commission’s explanation of its policy to the (now) General Court one of the appeals brought against its lysine decision, one of the first appeals against a fine that was imposed under the Guidelines. In particular, the Commission argued that if deterrence was to be effective, undertakings must not be able to calculate whether the benefits of anti-competitive conduct outweigh the risk of a fine. Case T-224/00, \textit{Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission} [2003] ECR II-2597.

\textsuperscript{5922} See for a similar opinion P. M. \textit{Spin}k, “Recent guidance” 103. For a different opinion see J. \textit{Killick}, “Is it now time” 3-4. This author observed that ‘[t]here is no evidence that unpredictability has been successful to date in preventing repeat offenders or of preventing the same offence from being committed by different companies in similar industrial sectors. It is submitted that a much more effective way of ensuring deterrence would be to make the likely fine very clear to the companies concerned, while having the level of the fine at a sufficiently high level to make anyone conducting a cost/benefit analysis think twice before entering a cartel’.

\textsuperscript{5923} In the words of J. \textit{Joshua and P. Camesasca the 1998 Guidelines ‘embod[ied] a sea change in the Commission’s methodology for setting fines and a doctrinal shift of massive proportions’}. J. \textit{Joshua and P. Camesasca “EC fining policy against cartels after the Lysine rulings: the subtle secrets of X”, 2004 (35-5) Global Competition Review, 5-10 (hereafter: “J. \textit{Joshua and P. Camesasca “EC fining policy””). The question whether the Guidelines represented such a radical change is further examined below.

4.2.1. Basic amount depending on the gravity and the duration of the infringement

The 1998 Guidelines stated that in order to determine the gravity of the infringement ‘account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market’. 5925

The Guidelines divided infringements into three categories on the basis of their gravity. First, minor infringements consisting most commonly of trade restrictions of a vertical nature with only limited effects on the market. For this type of infringement the Guidelines foresaw likely fines of EUR 1000 to € 1 m. 5926 Second, serious infringement consisting generally of horizontal or vertical restrictions rigorously applied, with a wide market impact, and causing effects in extensive areas of the market. This could be the abuse of a dominant position, in particular refusal to supply, discrimination, exclusion, loyalty discounts made by dominant firms in order to shut competitors out of the market, etc... For serious infringements likely fines of € 1m to EUR 20m were stipulated. 5927 Third, very serious infringements being essentially horizontal restrictions such as price cartels and market-sharing quotas. This category of infringement would likely lead to fines above € 20m. 5928 5929

According to the 1998 Guidelines, the gravity of the infringement at hand had to be assessed on this basis of its nature, its impact on the market and the size of the relevant geographic market. 5930 In its assessment, the Commission also took account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and had to make sure that the fine was set at a level which ensured that it had sufficient deterrent effect. Furthermore, account could also be taken of the fact that large undertakings usually had a great deal of legal and economic knowledge. Precisely because of their large size and knowledge, such undertakings should have been aware of the fact that their conduct infringed European competition rules, which at the same time justified imposing a fine. 5931

5929 It should be noted that the level of fines specified in the Guidelines were only indicative and thus their level could be exceeded or kept lower in individual cases. In fact, in practice the Commission had also imposed only symbolical fines in certain cases if there was a novel set of circumstances which the Commission has not addressed in previous decisions. See for an example e.g. the Commission decision in Organic Peroxides (Case COMP/E-2/37.857—Organic Peroxides [2005] OJ L 110/44), where AC Treuhand only received a fine of 1000. See also e.g. Case COMP/C.38.238/B.2 — Raw tobacco — Spain [2007] OJ L 102/14; Case COMP.F.1. 36.516, Nathan-Bricolux [2001] OJ L 23/1; Commission Decision of 20 July 1999 (Case IV/36.888 - 1998 Football World Cup) [2000] OJ L 5/55. In this regard the 1998 Fining Guidelines specified that ‘[t]he Commission will also reserve the right, in certain cases, to impose a “symbolic” fine of ECU 1 000, which would not involve any calculation based on the duration of the infringement or any aggravating or attenuating circumstances. The justification for imposing such a fine should be given in the text of the decision’. Fining Guidelines 1998, section 5 (d). See also D. GERADIN AND D. HENRY, “The EC Fining” 25; E. ENGELSSING AND H-H. SCHEIDER, “Article 23” 1795.
5931 Ibid.
When an infringement involved several undertakings, as is the case for cartels, the respective basic amounts for each undertaking could vary in order to take account of ‘the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition’. In particular, in setting the gravity level of the fine, the Commission looked at the ‘disparity between the sizes of the undertakings committing infringements of the same type’. 5932

Following the assessment of the gravity, the duration of the infringement was considered. To assess the duration factor, the Guidelines drew a clear distinction between short, medium and long-term offences. For infringements of short duration (less than one year), there would usually be no increase in the amount calculated on the basis of the gravity criteria. Infringements of medium duration (defined as one to five years) could, however, be increased up to 50%. Infringements lasting more than five years, could lead to a maximum increase of 10% per year (of the amount based on the gravity of the infringement). 5933

The result of the assessment of the gravity of the infringing behaviour plus its duration provided a base sum or basic amount for the fine. Once this basic amount had been calculated, this sum could be increased or decreased depending on the presence of aggravating or attenuating circumstances.

4.2.2. Adjustment of the basic amount on the ground of aggravating and attenuating circumstances

In accordance with sections 2 and 3 of the 1998 Guidelines, the determination of the final amount of the fine consisted in either reducing or increasing the basic amount for reasons of aggravating or mitigating circumstances. The Guidelines provided a non-exhaustive list of aggravating and attenuating factors. Aggravating circumstances included (i) repeated infringement of the same type by the same undertaking(s), (ii) refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations, (iii) role of leader in, or instigator of the infringement, (iv) retaliatory measures against other undertakings with a view to enforcing practices which constituted an infringement or (v) the need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it was objectively possible to estimate that amount. Attenuating circumstances encompassed: (i) exclusively passive or ‘follow-my-leader’ role in the infringement, (ii) non-implementation in practice of the offending agreements or practices, (iii) termination of the infringement as soon as the Commission intervenes, (iv) existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement, (v) infringements committed as a result of negligence, and (vi) effective cooperation in the proceedings, outside the scope of the Leniency Notice.

4.2.3. Final adjustments, application of the turnover limit and application of the Leniency Notice

Section 5 of the Guidelines foresaw a possible additional step in the calculation of the fine. According to point b of this section, a final adjustment up could be made to take into account certain

5932 Ibid. According to the Guidelines, this (different) treatment results from the application of the principle of equal punishment. The application of this principle may, lead to different fines being imposed for the same conduct may on the undertakings concerned without this differentiation being governed by arithmetic calculation.
5933 As is it examined below, the provisions of the 1998 Guidelines as regards the duration were not applied in practice.
objective factors, such as a specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the undertakings in question and their real ability to pay in a specific social context. Once these adjustments had been applied, the Commission had to bear in mind that it still had to stay within the confines of the statutory ceiling of 10% of the world-wide turnover of the undertaking in question.

The last step of the calculation related to the application of the Leniency Notice. In accordance with section 4 of the 1998 Guidelines, the final amount also had to reflect whether any of the entities benefited from the leniency notice, which could lead to a reduction or even a non-imposition of fines.

4.3. The application of the 1998 Fining Guidelines in cartel cases

The 1998 Fining Guidelines formed the basic framework of the Commission’s fining policy. However, the parameters contained in these Guidelines to determine the final level of fines were broadly formulated. By exploring the Commission decisions imposing fines, as interpreted by the European Courts, one may gain a better understanding of the Fining Guidelines and their essential elements.

This section examines the application of the Guidelines by the Commission and Courts and identifies the different parameters taken into account by the Commission in setting fines under the 1998 methodology. This analysis will not only clarify how the Commission interpreted key concepts, such as gravity. Furthermore, the table below provides the results of an extensive analysis of all the decisions of the Commission imposing fines under the 1998 Guidelines. This table contains several columns, which specify: (i) the name and year of the cartel decision, (ii) the classification of the cartel according to its gravity as a minor, severe or very severe infringement; (iii) the application of a deterrence increase; (iv) the classification of the infringement on the basis of its duration as short-term, medium or long-term; (v) the aggravating and mitigating circumstances identified by the Commission in its decisions; (vi) the application of the 10% turnover cap provided first in Regulation 17/62 and subsequently in Regulation 1/2003; (vii) whether the fines were reduced under the (1996 or 2002) Leniency Notice and finally (viii) whether any additional reductions were granted in order to take into account the ability to pay of the undertakings concerned.

The aggravating circumstances include:

1: Repeated infringements
2: Refusal to cooperate with or attempts to obstruct the Commission’s investigation
3: Role of leader in, or instigator of the infringement
4: Retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement
5: Need to increase the penalty in order to exceed the gains of the infringement when it is objectively possible to estimate that amount
6: Other

The mitigating circumstances include:
7: Passive or ‘follow-my-leader’ role in the infringement,
8: Non-implementation in practice of the agreement
9: Termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)
10: Existence of reasonable doubt as to the legality of the infringement
11: Infringements committed as a result of negligence or unintentionally
12: Effective cooperation outside the scope of the Leniency Notice
13: Compensation given to third parties
14: Other
The application of the 1998 Fining Guidelines

<table>
<thead>
<tr>
<th>Commission Decision</th>
<th>Gravity</th>
<th>Deterrence</th>
<th>Aggravating factors</th>
<th>Mitigating factors</th>
<th>LN</th>
<th>Cap</th>
<th>AP</th>
</tr>
</thead>
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<tr>
<td><strong>Gravity</strong></td>
<td><strong>DURATION</strong></td>
<td><strong>AGGRAVATING FACTORS</strong></td>
<td><strong>MITIGATING FACTORS</strong></td>
<td><strong>LN</strong></td>
<td><strong>CAP</strong></td>
<td><strong>AP</strong></td>
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<td>British Sugar (1999)</td>
<td>Se</td>
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<td>x</td>
<td>x</td>
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<td></td>
</tr>
<tr>
<td>Pre-insulated pipe (1999)</td>
<td>V S</td>
<td>2,5</td>
<td>L</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
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<td>V S</td>
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<td>x</td>
<td></td>
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<tr>
<td>FEG &amp; TU (1999)</td>
<td>Se</td>
<td>Me+L</td>
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<tr>
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<td>FETTSCA (2000)</td>
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<td>S</td>
<td>x</td>
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<td></td>
</tr>
<tr>
<td>Vitamins (2001)</td>
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<td>x</td>
<td>Me+L</td>
<td>x</td>
<td>x</td>
<td>I+R</td>
<td></td>
</tr>
<tr>
<td>SAS + Maersk Air (2001)</td>
<td>V S</td>
<td>Me</td>
<td>x</td>
<td></td>
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<td></td>
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<tr>
<td>Carbonless paper (2001)</td>
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<td>Me</td>
<td>x</td>
<td></td>
<td>I+R</td>
<td>x</td>
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<tr>
<td>Luxembourg Brewers (2001)</td>
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<td>3</td>
<td>L</td>
<td>x</td>
<td></td>
<td>I+R</td>
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<tr>
<td>Bancaires-Allemagne (2001)</td>
<td>V S</td>
<td>1</td>
<td>Me</td>
<td></td>
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</table>

5934 In this case the Commission took account of the fact that British Sugar acted in a manner contrary to the clear wording contained in its full comprising compliance programme. This was considered as an aggravating factor for the purpose of the calculation of the fine. See Commission decision in British Sugar (1999), para 208.

5935 The crisis in the industry was considered as a mitigating factor by the Commission in Case IV/E-1/35.860-B seamless steel tubes [2003] OJ L 140/1, paras 168-169.

5936 This decision did not publish the deterrence factor applied.
<table>
<thead>
<tr>
<th>Product Description</th>
<th>V</th>
<th>S</th>
<th>1</th>
<th>1.5</th>
<th>Me</th>
<th>x</th>
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<td>Citric acid (2001)</td>
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<td>S</td>
<td></td>
<td></td>
<td>Me</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>R</td>
<td></td>
</tr>
<tr>
<td>Interbrew + Alken Maes (2001)</td>
<td>Se</td>
<td>5</td>
<td>2</td>
<td></td>
<td>Me+L+S</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td>R</td>
<td></td>
</tr>
<tr>
<td>Graphite electrodes (2001)</td>
<td>V</td>
<td>S</td>
<td>1.25</td>
<td>2.5</td>
<td>Me+L</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>R</td>
<td></td>
<td></td>
</tr>
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<td>Methylglucamine (2002)</td>
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<td></td>
<td>L</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td></td>
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<tr>
<td>Speciality graphite (2002)</td>
<td>V</td>
<td>S</td>
<td></td>
<td></td>
<td>Me</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td></td>
</tr>
<tr>
<td>Industrial and medical gases (2002)</td>
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<td>S</td>
<td></td>
<td></td>
<td>Me</td>
<td>x</td>
<td></td>
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<td></td>
<td>R</td>
<td>x</td>
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<td>Methionine (2002)</td>
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<td>1</td>
<td></td>
<td>L</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td></td>
</tr>
<tr>
<td>Food flavour enhancers (2002)</td>
<td>V</td>
<td>S</td>
<td>1</td>
<td></td>
<td>L</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td></td>
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<tr>
<td>Reinforcing bars (2009)</td>
<td>V</td>
<td>S</td>
<td></td>
<td></td>
<td>L</td>
<td>x</td>
<td></td>
<td></td>
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</table>

5937 The Commission accepted in this case distinguishing circumstances with regard to Gyproc. Namely, the fact that during a substantial period of its involvement in the agreement, Gyproc had difficulties in preventing BPB from obtaining and transmitting information relating to it, as a result of BPB’s being represented on Gyproc’s board of directors. Moreover, according to the Commission, Gyproc was a constant destabilising element and contributed to the limitation of the effects of the agreement on the German market. Finally, Gyproc was absent from the UK market where the agreement most frequently manifested itself. This company was granted a 25 % reduction of the basic amount of the fine on the grounds of attenuating circumstances. Case No COMP/E-1/37.152 — Plasterboard) [2005] OJ L 166/8, paras 570-577.
<table>
<thead>
<tr>
<th>Product Type</th>
<th>VS</th>
<th>L</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th>R</th>
<th>x</th>
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</tr>
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<tbody>
<tr>
<td>Electrical and mechanical carbon and graphite products (2003)</td>
<td>V S</td>
<td>L</td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>French Beef (2003)</td>
<td>V S</td>
<td>S</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
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</tr>
<tr>
<td>Industrial tubes (2003)</td>
<td>V S</td>
<td>L</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td>R</td>
</tr>
<tr>
<td>Organic peroxides (2003)</td>
<td>V S</td>
<td>L</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td>I+R</td>
<td>x</td>
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<tr>
<td>Sorbates (2003)</td>
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<td>I</td>
<td>1,75</td>
<td>1,65</td>
<td>L</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>I+R</td>
<td></td>
</tr>
<tr>
<td>Copper plumbing tubes (2004)</td>
<td>V S</td>
<td>1,5</td>
<td>Me+L</td>
<td></td>
<td>x</td>
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<td></td>
<td></td>
<td>x</td>
<td>I+R</td>
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<tr>
<td>Choline chloride (2004)</td>
<td>V S</td>
<td>1,5</td>
<td>2</td>
<td>L</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
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<td>R</td>
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<tr>
<td>Raw Tobacco (ES) (2004)</td>
<td>V S</td>
<td>1,5</td>
<td>2</td>
<td>L</td>
<td>x</td>
<td></td>
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<tr>
<td>French beer market (2004)</td>
<td>S</td>
<td>S</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Raw Tobacco IT (2005)</td>
<td>V S</td>
<td>x</td>
<td>Me+L</td>
<td></td>
<td>x</td>
<td></td>
<td></td>
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<td>D</td>
<td>x</td>
</tr>
<tr>
<td>Monochloroacetic acid (2005)</td>
<td>V S</td>
<td>1,5</td>
<td>2,5</td>
<td>Me+L</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td>x</td>
</tr>
<tr>
<td>Industrial bags (2005)</td>
<td>V S</td>
<td>2</td>
<td>Me+L</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td>x</td>
</tr>
</tbody>
</table>

In Raw Tobacco (ES) (2004), the specific regulatory context was considered by the Commission as a mitigating factor which led to a reduction of 40% of the basic amount of all the parties involved. Case COMP/C.38.238/B.2 — Raw tobacco — Spain [2007] OJ L 102/14, paras 437-438.
<table>
<thead>
<tr>
<th>Product Description</th>
<th>VS</th>
<th>Value</th>
<th>Properties</th>
<th>Certification</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thread (2005)</td>
<td>VS:2</td>
<td>Me+L</td>
<td>x</td>
<td>1-D 2-D</td>
<td>x</td>
</tr>
<tr>
<td>Rubber chemicals (2005)</td>
<td>V S</td>
<td>2 2,5</td>
<td>L</td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Hydrogen peroxide (2006)</td>
<td>V S</td>
<td>3 1,75 1,5 1,25</td>
<td>Me+L x</td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Methacrylates (2006)</td>
<td>V S</td>
<td>3 1,75 1,5</td>
<td>Me+L x</td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Bitumen NL (2006)</td>
<td>V S</td>
<td>1,1 1,5 1,8 2</td>
<td>Me+L x x x</td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Synthetic rubber (BR/ESBR) (2006)</td>
<td>V S</td>
<td>3 2 1,75 1,5</td>
<td>Sh, Me+ L x</td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Fittings (2006)</td>
<td>V S</td>
<td>1,25</td>
<td>L x x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Fasteners (2007)</td>
<td>VS:4</td>
<td>1,25</td>
<td>Sh, Me+ L</td>
<td>x</td>
<td>R</td>
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<tr>
<td>Elevators and escalators (2007)</td>
<td>V S</td>
<td>2 1,7</td>
<td>Me+ L x</td>
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<td>I+R</td>
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<td>Dutch beer market (2007)</td>
<td>V S</td>
<td>2,5 2,5</td>
<td>Me</td>
<td></td>
<td>I</td>
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<tr>
<td>Gas Insulated Switchgear (2007)</td>
<td>VS</td>
<td>1, 25 1, 5 2 2, 5 2, 5</td>
<td>Sh, Me+ L x x</td>
<td></td>
<td>I</td>
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<tr>
<td>Bitumen Spain (2007)</td>
<td>VS</td>
<td>1, 8 1, 2</td>
<td>Me+ L x</td>
<td></td>
<td>I</td>
</tr>
</tbody>
</table>
4.3.1. Classification of cartel infringements according to their gravity

As the table above illustrates, cartel agreements were as a general rule classified as very serious infringements. Out of the 51 cases in which the Commission applied the 1998 Guidelines up to the end of 2006, the Commission found that 43 cartels constituted very serious infringements, while only 8 cases were regarded as serious infringements.

In order to make such a classification, the Commission assessed the gravity of the agreements by reference to the nature, the impact on the market and the size of the relevant geographic market. 5939

With respect to the nature of the infringement, the Commission stressed when determining fines that cartels always constitute, by their very nature, very serious restrictions.

This approach can be illustrated with some examples. For instance, in Pre-Insulated Pipes (1998) the Commission underlined that ‘[m]arket sharing and price fixing are by their nature a very serious violation of Article [101 TFEU]. With full knowledge of the illegality of their actions the producers combined to set up a secret and institutionalised system designed to restrict competition in an important industrial sector. Progressively, their unlawful cooperation was extended until it covered the whole Community’. 5940

The same reasoning was followed by the Commission in Zinc phosphate (2001). In this case, after reiterating that market-sharing and price-fixing are by their nature very serious violations, the Commission further observed as regards the nature of the violation that ‘[t]he cartel constituted a deliberate infringement […]. With the full knowledge that their actions restrict competition, the producers combined to set up a secret and institutionalised system designed to restrict competition in the zinc phosphate market’. The Commission also added that the arrangements ‘involved all major operators in the EEA and were conceived, directed and encouraged at high levels in each participating company and operated entirely to the benefit of the participating producers and to the detriment of their customers’. 5941

In Austrian Banks (2002), the Commission firmly stated that ‘[b]y their nature, price agreements constitute very serious infringements of Article [101 TFEU]’. The Commission further explained that ‘[t]he infringement consisted mainly of price-fixing and market-sharing practices, which are by their nature the most serious restrictions of competition. The cartel operated entirely for the benefit of the participating producers and to the detriment of their customers and, ultimately, the general public’. 5942

Likewise in Industrial tubes (2003), the Commission strongly stated that ‘[t]he infringement consisted mainly of price-fixing and market-sharing practices, which are by their nature the most serious restrictions of competition. The cartel operated entirely for the benefit of the participating producers and to the detriment of their customers and, ultimately, the general public’. 5943

More recently, in Synthetic rubber (2006), the Commission found that competitors had discussed prices, implemented and monitored the agreements either in the form of price increases or, at least, stabilisation of existing price levels and market sharing agreements, had exchanged confidential information and had participated in regular meetings to facilitate the infringement. The Commission reiterated that ‘[b]y their very nature, horizontal agreements and practices of this type

5939 See Fining Guidelines 1998, section 1A.
5940 Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, paras 164-165.
5941 Case COMP/E-1/37.027 - Zinc phosphate OJ L 153/1, paras 263-265.
are “very serious” infringements […] as the harm to consumers is always very likely and cannot be ignored. 5944

The size of the affected market and the concrete effect of the infringement also played an important role in the classification of the gravity of the infringement. In principle when a cartel had been implemented by the parties and the geographical scope was considerable, the Commission classified the cartel at issue as a very serious infringement.

The decision in Carbonless paper (2001) is very illustrative in this regard. In this case, the Commission not only affirmed that the agreement constituted a very serious infringement by nature. 5945 Moreover, it considered that during the period of the infringement the undertaking concerned accounted for about 85-90 % of the supply of carbonless paper to the EEA and had, thus, an actual impact on the carbonless paper market in the EEA. The Commission added that it had evidence on the implementation of the pricing agreements and that market sharing agreements had been respected to at least a certain extent. According to the decision, this showed that the cartel inevitably had an impact on the behaviour of the market participants and, as a result, on the market. 5946 On the basis of these considerations, the infringement was classified as very serious.

In Pre-Insulated Pipe Cartel (1999), the Commission also stressed the relevance of the effects on the market produced by the agreement. In particular, the Commission took account of the fact that the ‘unlawful scheme was aggressively pursued and implemented, not only with regard to ensuring the compliance of its members but also with a view to eliminating the only competitor of any importance outside the cartel, namely Powerpipe’. 5947

On the other hand, in a number of cases (dating generally from the early years of application of the 1998 Guidelines) the Commission found that due to the limited size of the affected market and/or the lack of concrete effects of the infringement, certain cartels should be considered only as serious infringements instead of very serious infringements.

In British sugar (1998), for example, the Commission concluded that the agreement at issue constituted (only) a serious infringement because there was not sufficient evidence to demonstrate that the prices to be charged to specific customers were jointly fixed. Moreover, the Commission stated that although an actual restrictive effect on competition resulted from the parties' behaviour, it did not rely on the demonstration of such effects. With respect of the size of the affected market, the Commission pointed out that the geographic scope of the relevant market was confined to Great Britain. 5948

The agreement concluded in Greek ferries (1998) was also initially qualified as a very serious breach by nature. 5949 However, the Commission accepted that the infringement had a limited actual impact on the market because the parties did not fully apply all the specific price agreements and

5945 The Commission observed in this context that “It follows from the facts described in Part I that the present infringement consisted of price fixing market sharing practices, which are by their very nature the worst kind of violations of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The cartel arrangements involved all major operators in the EEA and were conceived, directed and encouraged at high levels in each participating company. By its very nature, the implementation of that type of cartel leads automatically to an important distortion of competition, which is of exclusive benefit to the producers participating in the cartel and is highly detrimental to customers and, ultimately, to the general public”. Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, paras 376-378.
5947 Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, paras 164.
that they had engaged in price competition through discounting. Regarding the geographic scope of the cartel, the Commission found that ‘the infringement produced its effects within a limited part of the common market, namely three of the Adriatic Sea routes. Even if all Greece-Italy routes are taken into account, the market is still small compared to other markets within the Community’. Consequently, the Commission concluded that the infringement was only a serious breach of the competition rules.

The same approach was adopted in *FEG & TU* (1999), where the Commission concluded that these cartel agreements were a serious infringement. The Commission recognised that the practices included horizontal price agreements clearly intended to restrict competition by creating or maintaining a stable price level and that there were indications that the price level for electro-technical products on the Dutch market was relatively high. Nevertheless, it pointed out that it was ‘impossible to determine precisely the repercussions of the horizontal price agreements. In general, the FEG and its members were not so concerned to fix uniform prices for all electro-technical products as to keep the degree of price competition which existed under control and within limits, in order not to jeopardise price stability and wholesalers' margins’. As regards the geographical extent of the relevant market, the Commission took the view that this was limited to the Netherlands or to certain regions therein.\(^5950\)

The classification of the agreement on the basis of its gravity in *Luxembourg Brewers* (2001) was also clearly influenced by the actual impact of the cartel in the market and the size of the relevant geographic market. In this case, the Commission observed that the infringement ‘[was] intended to maintain the clientele, and hence the market shares, of the main brewing undertakings established in Luxembourg and to restrict penetration of the Luxembourg on-trade by foreign brewers. It therefore constitutes one of the most serious infringements of Article [101 TFEU]’. However, the Commission also considered that ‘the scope of the infringement [was] limited to the on-trade and only to those outlets tied to the parties by an exclusive purchasing clause. Furthermore, the Commission could not demonstrate that the restriction concerning foreign brewers had been implemented. Finally, the geographical scope of the agreement, which only applied to Luxembourg, was considered in relative terms. In the Commission’s words, ‘[Luxembourg] is the smallest market in the Community in terms of total beer consumption’.\(^5951\) \(^5952\)

Throughout the years, it appears that the Commission abandoned its view that cartels could be considered (only) as serious violations when the size of affected market was small or when the effects of the anticompetitive agreement could not be estimated accurately.

In *Seamless steel tubes* (1999), the Commission indeed accepted that the specific impact of the cartel on the market had been limited since the pipes and tubes which were the subject of the agreement represented only a portion of the seamless pipes and tubes intended for the oil and gas industry.\(^5953\) However, it also found that an agreement designed to protect domestic markets

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\(^5950\) Case IV/33.884 - Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU) ) [2000] OJ L 39/1, paras 138-142.


\(^5952\) The same reasoning was adopted in FETTCSA (2000) and French beer (2004). FETTCSA concerned a horizontal agreement aiming to restrict price competition between undertakings with a high market share. According to the decision '[h]orizontal price agreements will normally be considered very serious infringements. In this case, however, the Commission has not obtained any evidence as to the effects of the infringement on price levels. Any harmful effects are in any event likely to have been short-lived. It is therefore appropriate that the infringement should be considered serious and that the basic level of fine be set at the very lowest end of the scale of fines appropriate for a serious infringement’. Case IV/34.018 - Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) [2000] OJ L 268/1, para 181.

In French beer, the price fixing agreement was simply not implemented. Concerning the scope of the geographic market, the Commission took into account the fact that the agreement covered the whole of mainland France, but that it was confined to the on-trade sector, which accounted for less than one third of the total sales volume in France. Commission Decision of 29 September 2004 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/C.37.750/B2 — Brasseries Kronenbourg — Brasseries Heineken [2005] OJ L 184/57, para 84).

\(^5953\) According to the decision ‘API OCTG and project line pipe sold in the Community by the firms account[ed] for only about 19 % of Community consumption of seamless OCTG and line pipe; the rest of the demand is met from seamless OCTG and line pipe not covered by the agreement (more than 50 %) and imports from non-member countries
constitutes a very serious infringement, as it jeopardises the proper functioning of the single market. The fact that the parties were aware that their actions were unlawful but still agreed to introduce a secret, institutionalised system designed to restrict competition in an important industrial sector also demonstrated the very serious nature of the practices. The size of the affected geographic market in this case was, moreover, extended since the four Member States accounted for most of the consumption of seamless OCTG and line pipe in the Community. On the basis of these considerations, the Commission concluded that the infringement had to be qualified as a very serious one. Still, it clarified that to calculate the fines it would take into account the fact that the sales of the products concerned in the four Member States by the firms amounted only to about 73,000,000 € a year. 5954

In *Flood flavour enhancers* (2002), 5955 the market-sharing and price-fixing arrangements involved major worldwide operators and were encouraged at high levels within the participating firms. The Commission confirmed that the implementation of the agreements ‘[led] by its very nature to an important distortion of competition, which is of exclusive benefit to producers participating in the cartel and is detrimental to customers and, ultimately, to the general public’. 5956 One of the cartel participants, Ajinomoto, argued that the infringement had a limited impact on the market because the European nucleotide sector was of limited size and because the infringement had not been fully implemented. This would have limited any harm to consumers and, thus, the seriousness of the agreement. 5957 The Commission rejected these arguments and observed that ‘it would be erroneous to conclude on the basis of the small size of the market that this infringement was not very serious’. According to the Commission, ‘[w]hat matters is that the normal competitive pattern that would have governed the single market for nucleotides was replaced by a system of collusion concerning the price of the product, the essential component of competition’. Moreover, the Commission stressed that the arrangements were actually implemented and had an actual impact on the EEA nucleotide market. 5958 As regards the argument of the limited size of the market, the Commission drew a distinction between the question of the size of the product market and that of the actual impact of the infringement on this product market. It further held that ‘it is not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity’. Nevertheless, without prejudice to the very serious nature of an infringement, the Commission considered the limited size of the product market to (generally) assess the gravity of the case. 5959

In *SAS Maerk* (2001), 5960 the parties argued that the infringements only had limited negative effects on the markets and that the impact of the infringements had been limited. In this context, the parties relied on the *Greek ferries* decision, in which the Commission had previously found that the price fixing agreement was of (only) serious nature due to the lack of concrete effects and the limited size of the affected market. In contrast, in *SAS Maerk* the Commission found that the impact of the agreement was wider than in *Greek ferries*, in which the parties did not actually implement all the agreements. In addition, in the Commission’s view, SAS and Maersk Air’s horizontal market-sharing agreements restricted competition on a larger number of routes. In particular, the Commission explained that SAS and Maersk Air were the two main airlines in Denmark, and that Copenhagen and Billund were the two main airports in the country. Therefore, the repercussions of

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5957 Ibid, para 222.
5958 Ibid, para 225.
5959 Ibid, para 226.
5960 Case COMP/C.37.671 — *Flood flavour enhancers* [2004] OJ L 75/1, paras 241-242. See for a similar approach Case COMP/36.571/D-1 — *Austrian banks — “Lombard Club”* [2004] OJ L 56/1, para 511. In this case the Commission found in the context of the size of the geographic market that ‘[i]n view of the special circumstances of the present case and the context of the infringement, the comparatively limited size of the territory of Austria does not prevent the infringement being considered a very serious one’.
the market-sharing were felt throughout the EEA and beyond, unlike in the *Greek ferries case*.5961

In *Vitamins* (2001), the Commission concluded as regards the gravity of the infringement that “[t]aking into account the nature of the infringements under scrutiny, their impact on the individual vitamin product markets concerned and the fact that each one covered the whole of the common market […] the Commission consider[ed] that the undertakings concerned committed very serious infringements […]”. The Commission added that for the purposes of determining the starting amount of the fines, it also took into consideration the size of each of the different vitamins markets.5962

In *Zinc Phosphate* (2001), the Commission also explained that although it was not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity, nevertheless – and without prejudice to the very serious nature of an infringement – it took into consideration the limited size of the product market.5963

These decisions show that the Commission avoided analysing the concrete effects of cartels on the market thoroughly in more recent cases, and instead refers to more general assumptions as regards the negative impact on the market. Such negative impact is presumed in certain cases, for example, when the parties held a collective dominant position and implemented the agreement.5964 This limited consideration of the effects of the agreement is, as such, fully in line with the Commission’s Guidelines and the case-law. Pursuant to section 1A of the 1998 Guidelines, the impact on the market is to be taken into consideration only ‘where this can be measured’. Moreover, according to the European Courts, when a global agreement is designed to restrict potential competition and its actual effects are *ex hypothesi* difficult to measure, the Commission is required to demonstrate the actual impact of the cartel on the market and to quantify it, but it could confine itself to estimates of the probability of such an effect.5965 In this regard, the Courts have also stated their view that ‘factors relating to the intentional aspect of the infringement may be more significant in the calculation of the fine, than those relating to its effects, especially when they relate to infringements which are intrinsically serious, such as market sharing’.5966 In the case of cartel agreements, which are very serious by nature, the actual impact of the infringement on the market was only an optional factor under the Guidelines which allowed the Commission to increase the starting amount of the fine beyond the minimum likely amount of 20,000,000 €.5967

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5964 See for a critical view of this practice e.g. E. ENGELSING AND H.-H. SCHIEDER, “Article 23” 1795-1796. Even if the undertakings’ representatives may not be satisfied with this approach, the Guidelines also make clear that the Commission is certainly not obliged to qualify or measure the precise impact of an agreement.
5967 C-534/07 P, *Prym and Prym Consumer v Commission* [2009] ECR I-7415, para 75. On the other hand, it was also apparent from the case-law that, when the Commission considered it appropriate to take the actual impact of the infringement on the market into account, it could not just put forward a mere presumption. In this situation the Commission was required to provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market (T-286/09, *Intel Corp. v Commission*, para 1622; C-534/07 P, *Prym and Prym Consumer v Commission* [2009] ECR I-7415, para 82; see further commenting on this point e.g. C. VELJANOVSKI, “European Commission Cartel Prosecutions”.

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With respect to size of the product market, the decisions of the Commission also seem to indicate that this element has not been decisive when classifying infringements into categories according to their gravity. Still, it appears that the Commission took into account the size of the product market – at least to a certain extent – in the determination of the basic amount of the fine. This has been confirmed by the European Courts in one of the appeals of Vitamins, in which the General Court held that ‘the general starting amount need not necessarily represent, in all cases of very serious infringements, the same percentage of the market size affected, expressed in terms of aggregate turnover. On the contrary, the Guidelines take, as a starting point for calculation of a fine, an amount determined on a tariff basis, albeit

proportionality doctrines’. 

The Court stressed that the main innovation in the Guidelines was that fines were determined on a tariff basis, albeit one that is relative and flexible. That method did not require – but did not preclude either – that the size of the affected market was taken into account for the purposes of determining the starting amount, nor did it require the Commission to set that amount according to a fixed percentage of the total turnover on the market.

4.3.2. Classification of cartel participants in groups

In the assessment of the gravity of the infringement, the Commission has made extensive use of the possibility offered by the 1998 Guidelines to differentiate between the different firms involved in the same cartel, in order to take into account their specific weight and, therefore, the real impact of the conduct of each undertaking on competition. In practice, the Commission grouped the different companies into categories of comparable turnover to make the starting amounts of the fines for each undertaking correlate to their size and capacity. In Pre-isolated pipe (1998), the Commission explained that in setting the basic amount of the fines taking into account the specific weight of each undertaking in the agreement was necessary given the considerable disparity in the sizes of the firms which had participated in the infringement. For this purpose, the undertakings were divided into four categories established according to their relative importance in the relevant market in the Community.

In Citric Acid (2001), the Commission also saw the need to consider the specific weight of each firm. In this case, the Commission clarified that the worldwide product turnover should be the basis for assessing the relative importance of an undertaking in the market concerned.

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5968 See reaching the same conclusion W. WILS, “The European Commission's 2006 Guidelines” 16-17 of the online version of this publication.

5969 In this context the Court referred to the second paragraph of Section 1 A of the Guidelines, which indicates that the range of fines to be imposed for each infringement only refers to ‘likely amounts’.


5972 Fining Guidelines 1998, section 1A.

5973 See further on the point of reference to make this comparison infra sections 4.2.1 and 5.3.1 of this Chapter.

5974 See also elaborating on this point W. WILS, “The European Commission's 2006 Guidelines” 16-17 of the online version of this publication; D. GERADIN AND D. HENRY, “The EC Fining.” According to these last authors ‘[t]his individualisation of companies reflects the general principles of EC law such as the fairness/equitable and proportionality doctrines”.

5975 Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, para 166.

Interestingly, the Commission found in *Methylglucamine* (2002) that there was no need to classify the cartel member in different groups to take account of the effective economic capacity. This finding was based on the fact that this case involved only two undertakings, which by definition were both indispensable for the working of the cartel (being the only actors on the market in question). The Commission determined the basic amount of the fine for each company at 2,500,000€.\(^{5977}\)

In *Methionine* (2002), the practice of making groups was used once again. The comparison in this case was based on shares of the world market for the product in the last full calendar year of the infringement (year 1998). The Commission further noted that Rhône-Poulenc and Degussa were among the three major producers of methionine in the relevant geographic market and that Nippon Soda was a smaller player on the world methionine market. The Commission decided that Rhône-Poulenc and Degussa constituted a first category while Nippon Soda constituted a second category.\(^{5978}\)

According to the Commission decision in *Fittings* (2006), there was considerable disparity between each undertaking’s weighting in terms of turnover in the cartelised industry. The Commission therefore applied differential treatment (groupings) to take account of each undertaking’s weighting. The undertakings involved were divided into six categories on the basis of their market shares in the product concerned. The individual weight of the cartel participants was compared on the basis of their product market shares in the EEA for all the undertakings, in the year 2000, except Aalberts and Advanced Fluid Connections, for which the year 2003 was taken as basis for the differentiation. The Commission chose the year 2000 because it was the most recent year in which all the undertakings, to which this decision was addressed, were active in the cartel, except for the two undertakings just mentioned.\(^{5979}\)

In *Gas Insulated Switchgear* (2007), the General Court upheld the Commission’s finding that Mitsubishi and Toshiba had infringed Article 101 TFEU, but annulled their fines because in setting these fines the Commission had used sales figures for a different reference year than for other cartel members.\(^{5980}\) In this context, the General Court acknowledged the legitimate aim of the different treatment, i.e. to reflect the fact that contrary to other participants Mitsubishi and Toshiba participated in the infringement via a joint venture in the last two years of the cartel.\(^{5981}\) However, the Court ruled that the use of different reference years violated the principle of equal treatment and annulled the fines for the two companies. Following this ruling, the Commission readopted the *Gas Insulated Switchgear* decision in 2012 and re-imposed fines on Mitsubishi and Toshiba for their participation in the GIS cartel, taking full account of the Court’s judgments. The newly imposed fines were calculated on the basis of the same parameters as in the 2007 decision, with the exception of the reference year.\(^{5982}\)

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5979 Case COMP/F-1/38.121 — *Fittings* [2007] OJ L 283/63, paras 756-765. As a result of this “grouping”, Viegener and Aalberts were placed in a first category. IMI and Delta were put in a second category, Advanced Fluid Connections in a third, Legris Industries in a fourth, SANHA Kaimer, Flowflex, Frabo and Mueller in a fifth and Pegler in a sixth category.
5980 See Case COMP/38.899 — *Gas Insulated Switchgear* [2008] OJ C 5/7, paras 480-490. In particular, the applicant argued that the Commission incorrectly placed it in the same group as Alstom and Areva. In its view, assuming that the 2003 turnover was used as the basis for calculating the starting amount of the applicant’s fine, the difference in market shares between the applicant and Alstom or Areva is greater than that between the applicant and the companies in the group below it, which implies that the applicant should have been classified in the latter group. Case T-113/07, *Toshiba Corp. v Commission* [2011] ECR II-3989, para 276.
The European Courts have confirmed (i) that the Commission is entitled to use the method of grouping undertakings and (ii) that under this method, fines are still calculated according to the gravity of the infringement. Likewise, it has been accepted that the division into groups may have the effect of allocating the same basic amount to certain parties which differ in size. In the Courts’ view, such difference in treatment is objectively justified by the importance attached to the nature of the infringement in comparison to the size of the undertakings in the assessment of the gravity of the infringement. The Commission was not required to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure that when fines are imposed on a number of undertakings involved in the same infringement, the final amounts of the fines reflect any distinctions in terms of their overall turnover or their turnover in the relevant product market.

The basis for comparison to divide the companies into different groups, and thus to set one basic amount for each group, has varied considerably depending on (the circumstances of) the case. These factors include: undertakings’ worldwide turnover, turnover in the product market in question.


5986 See e.g. Case COMP/36.545/F3 — Amino Acids [2001] OJ L 152/24, para 304. In this decision the Commission states that ‘[i]n order to take account of the effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA and the need to ensure that the amount of the fine has a sufficiently deterrent effect, the Commission considers it appropriate that larger basic fines should be imposed on Ajinomoto and ADM than on Kyowa, Cheil and Sewon because of the considerable disparity between their sizes. It has therefore divided the parties into two groups according to size and taken this into account in determining the starting point for the fine according to the gravity of the infringements. The comparison is made on the basis of total turnover in the last year of the infringement. It is appropriate to take worldwide turnover as the basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the real resources and importance of the undertakings concerned in the markets affected by their illegal behaviour’.
Case COMP/E-1/37.512 — Vitamins [2003] OJ L 6/1, para 681: ‘[t]he Commission considers it appropriate to appraise the relative importance of an undertaking in each of the vitamin product markets concerned on the basis of their respective worldwide product turnover. This is supported by the fact that each cartel was global in nature, the object of each was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market’. See also Case No COMP/E-1/36 604 — Citric acid [2002] OJ L 239/18, para 236: ‘[a]s the basis for assessing the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the worldwide product turnover. Given the global character of the market, these figures give the most appropriate picture of the participating undertakings’ capacity to cause significant damage to other operators in the common market and/or the EEA’; Case IV/34.018 - Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) [2000] OJ L 268/1, para 182: ‘[i]n order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine has a sufficiently deterrent effect the Commission considers it appropriate that larger fines be imposed on the larger FETTCSA parties than on the smaller ones because of the considerable disparity between their sizes. It has therefore divided the parties into four groups according to size. Table 5 indicates these four groups and relative size of each of the FETTCSA parties in 1994 (the year in which the FETTCSA was abandoned) as compared with Maersk, the largest of the FETTCSA parties. The comparison is made on the basis of turnover in respect of transport services relating to the carriage of containerised cargo where the services supplied included a maritime element. It is appropriate to take worldwide liner shipping turnover as the basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the real resources and importance of the undertakings concerned’.

Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 407: ‘[a]s the basis for the comparison of the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the EEA-wide product turnover. This approach is supported by the fact that this is an EEA-wide cartel, the principal object of which was inter alia to agree concerted price increases throughout the EEA’; Case No C.37.773 — MCAA [2006] OJ L 353/12, para 18: ‘[a]s the basis for comparing the relative importance of an undertaking in the market concerned, the Commission considered it appropriate to take the EEA-wide product turnover. The comparison was made on the basis of the EEA-wide product turnover in the last full year of the infringement: 1998 for all the undertakings except for Hoechst for whom 1996 was the reference year, as it exited the MCAA market in mid-1997. Akzo, Clariant, and Atofina were the major producers of MCAA in the EEA in 1998, with respective approximate market shares of 44 %, 34 % and 17 %. Hoechst had a market share of 28 % in 1996 before it exited the MCAA market in mid-1997. The undertakings were therefore split into three categories. First category: Akzo; second category: Hoechst and Clariant; third category: Atofina’.

For example, Case COMP/37.800/F3 — Luxembourg Brewers [2002] OJ L 253/21, para 95; Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd [1999] OJ L 076/1, para 193 (where the market was the UK excluding Northern Ireland); and Case COMP/E-3/36.700 — Industrial and medical gases [2003] OJ L 84/1, para 430: ‘As the basis for the comparison of the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the products’ turnover in the Netherlands. This approach is supported by the fact that this cartel is limited to the Netherlands, the principal object of which was inter alia to agree concerted price increases, minimum prices and trading conditions for cylinder and liquid gases on that market’.

Case No C.38.359 — Electrical and mechanical carbon and graphite products [2004] OJ L 125/45, para 149; Case No COMP/E-1/36 604 — Citric acid [2002] OJ L 239/18, para 237 (basing the separation of the participants on market share); Case COMP/36.571/D-1 — Austrian banks — "Lombard Club" [2004] OJ L 56/1, para 519: ‘[t]he banks and banking groupings concerned can be divided into five categories on the basis of the available information on market shares’; Case No COMP/E-1/37.152 — Plasterboard [2005] OJ L 166/8, para 546: ‘[f]or the purpose of comparing the relative importance of the undertakings on the market affected by this agreement, the Commission considers it appropriate in this case to take as a starting point the percentage shares of the undertakings’.

Case COMP/E-1/36.212 — Carbonless paper [2004] OJ L 115/1, para 408. In this case EEA market shares were used to separate the infringers into 5 groups.

Case COMP/C.37.671 — Flood flavour enhancers [2004] OJ L 75/1, para 247: ‘[a]s a basis for comparison of the relative importance of the undertakings in the market concerned, the Commission considers it appropriate in this case to take their respective shares of the world market for the product. Given the global character of the market, these figures provide the most suitable picture of the participating undertakings’ capacity to cause significant damage to other operators in the common market and/or the EEA’.

Case COMP/E-1/37.027 - Zinc phosphate OJ L 153/1, paras 306-307: ‘the undertakings can be divided into two categories according to their relative importance in the market concerned. As the basis for comparing the relative importance of an undertaking in the market concerned, the Commission considers it appropriate in the present case to take the EEA-wide product turnover. The comparison is made on the basis of the EEA-wide product turnover in the last year of the infringement’. See for other basis of comparison e.g. Case IV/34466 - Greek Ferries [1999] OJ L 109/24, para 151-152: ‘[t]he comparison is made on the basis of the 1993 turnover in respect of roll-on roll-off services in the Adriatic routes. This is the
In this context, the European Courts have held that ‘[i]t is permissible to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. It follows that it is important not to attribute to any of those figures a significance which is disproportionate in relation to the other factors relevant to an assessment and, consequently, that an appropriate fine cannot be fixed merely by a simple calculation based on the total turnover’. Moreover, in the Courts’ view, the Commission is not obliged to take into account the relationship between the total turnover of an undertaking and the turnover produced by the goods, which are the subject matter of the infringement, when it assesses the gravity of an infringement.

Despite the margin of discretion of the Commission to choose a basis as a point of comparison, as a general rule, the turnover of the undertakings in the relevant geographic area (which could also be larger than the EEA) appeared to have been the key figure in this assessment. The size and power of an undertaking on markets unconnected with anti-competitive activity played only a more peripheral role in the assessment. As such, in cases of global cartels the Commission commonly considered the relative importance or weight of an undertaking in the infringement on the basis of its respective worldwide product turnover.

In Vitamins (2001), for instance, the Commission pointed out that the importance of an undertaking should be assessed on the basis of their respective worldwide product turnover. This was supported by the fact that each cartel was global in nature, and that the object of each member was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market. The Commission added that the worldwide turnover of any given party to a particular cartel also gives an indication of its contribution to the effectiveness of that cartel as a whole or, conversely, of the instability which would have affected that cartel had it not participated.

appropriate basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the specific weight and importance of the undertakings in the relevant market and, therefore, to evaluate the real impact of the offending conduct of each undertaking on competition. Following this grouping, the medium carriers’ fines relating to the gravity of the infringement will amount to 65 % of the large carriers’ fines. For Marlines, the same percentage will be 20 %.

Even though the legality of this practice had been confirmed by the European Courts, it had also been criticised for its lack of predictability and transparency. See J. KILLICK, “Is it now time” 8-9. In the words of this author the practice of classifying cartel participants ‘leads to a very unpredictable outcome. But even when it explains what factors have been taken into account, the Commission only does so in the most general of terms. It gives no reasoning as to why the starting amount of the fine is set at the precise level that it was. […] It is difficult to escape the conclusion that the starting point of the fine is set somewhat arbitrarily, and without precise regard to any scientific criteria’.

See for a critical opinion as regards this approach J. F. BELLIS “La Détermination des Amendes” 379.

This Commission’s practice has been confirmed by the European Courts for worldwide market sharing arrangements and for worldwide price-fixing cartels. In particular, in the appeal proceedings of Graphite electrodes (2002), the (now) General Court explained that ‘the worldwide cartel had damaged consumers in the EEA because SGL and UCAR had been able to increase their prices in the EEA without being threatened by the Japanese applicants or by C/G, which, owing to the principle of reciprocity at global level, were able to do likewise on their home markets, namely Japan and the Far East and in C/G’s case the United States. As one of the objects of the cartel was to prevent the competitive forces of ‘non-home’ producers from being deployed in the EEA, the participation of those producers was necessary for the successful operation of the cartel as a whole, i.e. on the other regional markets in the world. Consequently, the real impact on the EEA of the infringement committed by all the members of the cartel, including those applicants for whom the EEA was not the ‘home market’, consisted in their contribution to the overall effectiveness of the cartel, as each of the three ‘legs’ – the United States, the EEA and the Far East/Japan – was essential to the effective functioning of the cartel on a worldwide level. Furthermore, the fact that the Commission has the power to impose sanctions only within the EEA does not preclude it from taking into consideration worldwide turnover derived from sales of the relevant product in order to evaluate the economic capacity of the members of the cartel to harm competition within the EEA. The Commission may carry out that evaluation in the same way as it takes into account, […] the financial capacity of the undertaking concerned by relying on its total worldwide turnover.

4.3.3. Sufficient deterrence

Furthermore, in its assessment of the gravity the Commission also took into consideration the effective economic capacity of firms to cause significant damage to other operators, in particular consumers. In practice, after dividing the cartel participants in groups, the Commission often applied a multiplier in the calculation of the fine. This initiative, which was not specified in the 1998 Guidelines, was meant to set the fine at a sufficiently deterring level.

For example, in the Pre-insulated pipe cartel (1998), the Commission considered that in the case of ABB, the need for deterrence required that the minimum fine of 20,000,000€ for a very serious infringement had to be multiplied by 2.5 to give a starting point of 50,000,000€. In particular, the Commission observed that, for this firm, the criterion of the relative importance in the relevant market required further upward adjustment to take account of ABB’s position as one of Europe’s

Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, Tokai Carbon Co. Ltd and others v Commission [2004] ECR II-1181, paras 196 to 204.
Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, Tokai Carbon Co. Ltd and others v Commission [2004] ECR II-1181, paras 199-200.

This practice of the Commission was criticised on the ground that ‘[t]he imposition of a multiplier for deterrence is again unpredictable and seems to lack any coherent underlying rationale. The unpredictability is not helped by the fact that the concept of a multiplier for deterrence is nowhere to be found in the Guidelines’. J. KILLICK, “Is it now time” 10.

As it is analysed below, this practice was formally incorporated under the 2006 Fining Guidelines.
largest industrial combines. According to the decision, this adjustment served two objectives: (i) to ensure a sufficiently deterrent effect and (ii) to take account of the fact that large undertakings are more easily aware of the infringement and of the consequences stemming from it.6010

Most frequently, the Commission increased the basic amount by applying multipliers ranging (generally) between 1 and 3 on the basis of the size and overall resources of the corporate group.6011

For example in Carbonless paper (2001), the Commission applied an upward adjustment of 100 %, to take account of their size and their overall resources of these legal entities. Such increase led to fines of 140.000.000 € for AWA, 21.000.000 € for Bolloré and 11.200.000 € for Sappi.6012

In the Citric Acid (2001) cartel, ADM’s and Hoffmann-La-Roche’s fine were subject to a multiplier of 1, in order to allow the Commission to take account of the overall size of the company. Haarmann & Reimer’s fine was subject to a multiplier of 1,5, because it was controlled by Bayer, which was a large company.6013

The fine imposed on Brasserie de Luxembourg was subject to a multiplier of 3 in the Luxembourg Beer cartel (2001) because this company belonged to Interbrew, one of the largest brewing groups in the world. In this case the Commission explicitly stated that ‘[i]n order to ensure that the fine has a sufficient deterrent effect and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission considers that the amount determined for gravity (…) for this undertaking should be increased by a factor of three’.6014

In Graphite Electrodes (2001), Showa Denko KK’s fine was subject to a multiplier of 2,5 on account of the overall size of the company (turnover €7.5bn); VAW Aluminium’s fine was subject to a multiplier of 1.25 in the Graphite Electrodes Cartel on account of the overall size of the company (turnover €3.7bn).6015

The highest multiplier under the 1998 Guidelines was applied in Belgium Brewers (2001). In this case, the fine calculated for Interbrew was multiplied by a factor of 5, while the fine of Alken-Maes’s was subject to a multiplier of 2. The Commission explained that the basic amount of the fine calculated for Interbrew and Alken-Maes should be adjusted to ensure deterrence, and to take account of the fact that Interbrew, in contrast to other firms (namely, Haacht and Martens), was a large international undertaking, and Alken-Maes was a member of an international group. Both firms therefore had easier access to legal and economic knowledge and infrastructures which enabled them to recognise that their conduct constituted an infringement.6016

In ABB (the appeal of Pre-insulated pipe), the (now) General Court supported the Commission’s policy choice of applying a multiplying factor. In this respect, the Court clarified that ‘the fact that, in fixing such a multiplier, the Commission took into account the deterrent effect that fines must have, is wholly consistent with the established principle that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its

6010 Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, paras 168-169. Interestingly, the Commission added in this regard that ‘the organisation of the cartel represented a strategic plan by ABB to control the district heating industry which was conceived, approved and directed at a senior level of group management, as were the measures to deny and conceal its existence and to continue its operation for nine months after the investigation. It is abundantly clear that ABB systematically used its economic power and resources as a major multinational company to reinforce the effectiveness of the cartel and to ensure that other undertakings complied with its wishes’
6011 See for a full overview of the deterrence multiplier applied in each case Table 2.
context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria has been drawn up. In that regard, the Commission’s power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Article [101(1) TFEU] is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. In addition, the Court stated that insofar as the amount of fine ‘was further multiplied by 2.5 in order to take into account the applicant’s position as a European group, that weighting was not applied on the basis of the applicant’s total turnover’ and that ‘the multiplier of 2.5 has no proportional link with the difference between the applicant’s and the other undertakings' total turnover’.

The rationale of applying a multiplier under the European fining policy is thus that a fine imposed on large multi-product undertakings should be increased in order to deter such companies from committing an infringement. The deterrence of a fine without a multiplier may otherwise be too low, compared to the overall ability of the undertaking as a whole to pay it. On the other hand, the application of such multiplier suggests that (the Commission was aware that) the result of the calculation of the basic amount of the fine, which depended upon the gravity classification of the infringement, was not sufficient for deterrence purposes. The multiplier was supposed to correct this deficiency.

4.3.4. Duration

After calculating the basic amount on the basis of the gravity, the next step was to increase this amount in light of the duration of the infringement.

The European Courts have confirmed in this context that the classification of infringements that lasted for more than five years as ‘violations of long duration’ and the fact that such infringements warranted an uplift of up to 10% per annum of the basic amount, did not breach the principle of proportionality as regards the calculation of the duration of the infringement.

6018 Ibid, para 164.
6019 H. DE BROCA, “The Commission revises its Guidelines for setting fines in antitrust Cases”, 2006 (3) Competition Policy Newsletter, 1-6, at 5 (hereafter: ‘H. DE BROCA, “The Commission revises”’). As it is analysed below, this multiplier was also used under the 2006 Fining Guidelines.
6020 The question whether this approach to deterrence is the most appropriate is considered bellow section 4.4 of this Chapter.
6021 In this context, it should be recalled that the Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the starting amount, determined for gravity, should not be increased, infringements of medium duration (in general, one to five years), for which the amount determined for gravity may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount determined for gravity may be increased by 10% per year (first to third indents of the first paragraph of Section 1 B).
6022 CFI 11 December 2003, T-65/99, Strintzis Lines Shipping [2003] ECR II-5433, para 194. Still, fines have been reduced due to an incorrect calculation of duration when the Commission was not able to substantiate with evidence the presumed duration over the whole period of time. See e.g. the CFI 8 July 2004, Case T-48/00, Corus UK Ltd, formerly British Steel plc v Commission [2004] ECR II-2325, paras 122-134. In this case which concerned an appeal, the duration of the infringement found in the Commission’s decision was reduced by one year. See also Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering Corp and others v Commission [2004] ECR II-2501, paras 338 to 352. In this case the duration was reduced, as regards each of the Japanese applicants, from five years to three years and six months.
The decisions imposing fines show that initially the Commission tried to (strictly) apply the rules for the increase of fines on the basis of duration as specified in the 1998 Guidelines.

For example in British Sugar (1998), the fine to be imposed on Tate & Lyle was increased by 43% per year for an infringement of 4 years. The total increase of 172% led thus to adjusting the fine from 10.000.000 € to 17.200.000 €.6023

In Greek Ferries (1998), the Commission found that Strintzis and Minoan had committed an infringement of 7 years (18 July 1987 to July 1994) while Karageorgis had been involved in the cartel during five years and five months (from 18 July 1987 until 27 December 1992). As such, it increased the amount of the fines for these companies by 10% for every year of the infringement. In this same case, Marlines had participated in the infringement for 2 years and 5 months (18 July 1987 up to at least 8 December 1989) and the case of Marlines, the Commission applied an increase of 20% for each year. According to the decision, the fines for other companies (Anek, Ventouris Ferries and Adriatica) which had been involved in the cartel for a period varying from three years and nine months to five years, had been increased with percentages ranging from 35% to 55%.6024

However, it did not take long before the Commission encountered difficulties in the application of the duration rule. Since infringements of medium duration were penalised with an increase of up to 50% per year, while the fine for an infringement of long duration had to be increased by 10% per year, infringements of medium duration were over-penalised compared to infringements of long duration.6025 The unfair character of this rule became especially palpable in situations in which the companies involved in the cartel participated in the illegal agreement for different periods of time (i.e. short, medium and long duration).6026 In these circumstances, the Commission decided to abandon the (more) strict application of the rules of the Guidelines as regards duration, and started to apply a standard increase for duration of 10% for medium and long infringements.

In Seamless steel tubes (1999), even if the cartel had lasted (only) for four years (from 1990 to 1994) and was qualified as a medium-term infringement, an increase of 10% a year was applied to the amount of the fine established on the basis of gravity.6027

In Amino acids (2000), the undertakings concerned committed an infringement of medium duration (between three and five years). The starting amounts of the fines determined for gravity were therefore increased by 10% per year, i.e. for ADM and Cheil by 30% and for Ajinomoto, Kyowa and Sewon by 40%.6028

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6025 J. Killick, “Is it now time” 12. This author correctly wondered ‘[w]hy should a 10-year infringement incur only double (10% increase for 10 years is equivalent to doubling the fine) the fine of an infringement lasting a year? If the cartel remains of uniform intensity one would expect that a 10-year infringement would be ten times as harmful for consumers. If successful, the cartel ought to make ten times as much money for the participants’. 6026 See illustrating the obstacles in classifying infringements on the basis of their duration e.g. Case IV/33.884 - Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied en Technische Unie (FEG and TU)) [2000] OJ L 39/1, paras 145-147. According to this decision ‘As far as the collective exclusive dealing arrangement is concerned, the infringement committed by the FEG and TU can be established at least from 11 March 1986, and lasted in any event until 25 February 1994. As regards the duration of the price agreements, the following observations can be made. The two binding FEG decisions were in force over the periods 1978 to 1993 and 1984 to 1993 respectively. The discussions on prices and discounts began by 6 December 1989 at the latest, and were applied at least until 30 November 1993. The sending of price recommendations by the FEG to its members began at any rate on 21 December 1988 and lasted until at least 24 April 1994. These infringements therefore lasted eight, fifteen, nine, four and six years respectively. For purposes of Commission policy towards fines, the infringements in this case are classed as infringements of medium to long duration’.
6027 Case IV/E-1/35.860-B seamless steel tubes [2003] OJ L 140/1, paras 166-167. This decision was however partially annulled on the ground of duration.
In *Carbonless paper* (2001), the Commission concluded that the infringement was of medium duration (one to five years) for every undertaking involved. Seven firms (namely, AWA, Copigraph, Koehler, Sappi, MHTP, Torraspapel and Zanders) committed an infringement of three years and nine months. The starting amounts of the fines determined for gravity were increased for each of them by 35% in total. In the case of Mougeot, Carrs, Divipa and Zicuñaga, the duration of the infringement ranged between one year and four months and three years and five months. The starting amounts of the fines were therefore increased by 30% for Mougeot, by 25% for Carrs, by 25% for Divipa and by 10% for Zicuñaga.  

In *Citric acid* (2001), the Commission considered that a number of cartel participants, (ADM, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer) engaged in a medium duration infringement which lasted for four years and two months (from March 1991 until May 1995). The starting amounts of the fines determined for gravity were increased by 40% for these firms. Another company, Cerestar Bioproducts participated in the cartel for 3 years (from May 1992 until May 1995) and the basic amount of its fine was increased by 30%.  

The maximum increase for duration was applied in *Organic Peroxides* (2003). In respect of the duration of the cartel, the Commission established the following. Certain parties (Akzo, Atofina and Peroxid-Chemie) committed an infringement for a period of 29 years. For Peroxid-Chemie, the Commission divided the duration of its participation in two sub-periods: when it was solely responsible (21 years 8 months) and when it was responsible together with its parent company Degussa UK Holdings (7 years and 4 months). Perorsa participated in the cartel for 24 years. The Commission applied the following duration increases: 245% on Akzo and Atofina, 207.5% on Peroxid-Chemie; 70% on Peroxid-Chemie/Degussa UK Holdings and 220% on Perorsa. According to the decision, these percentages were derived from an increase of 10% per year for the last twenty years of the infringement (1980 to 1999), and an increase of 5% per year for the part of the infringement which took place from 21 to 29 years ago (1971 to 1979). The Commission justified this less strict approach by the fact that competition policy was less vehemently pursued in the 1970s, when companies were less aware that their behaviour infringed competition law, and when fines were lower.  

With regard to medium and long term infringements, in order to take into account periods shorter than one year, but longer than six months, the Commission developed a practice according to which a 5% increase was applied for infringements of a short duration period, instead of the full 10% increase.  

In the price-fixing *Methionine* cartel (2002), Aventis, Degussa and Nippon Soda had committed the infringement for 12 years and 10 months. The starting amounts for gravity were therefore increased by 10% per year and 5% per six months, *i.e.* by 125%.  

In *Reinforcing bars* (2002), the infringement lasted for more than ten years and six months for all the firms, with the exception of Ferriere Nord SpA, for which the infringement had lasted for more than seven years. The basic amount of the fine was thus increased by 105% for all the firms, with the exception of Ferriere Nord, which was handed a 70% increase.  

The same approach was adopted in *Flood flavour enhancers* (2002). In this case the Commission concluded that Takeda, Ajinomoto, Daesang and Cheil had committed the infringement for resp. nine years and six months (Takeda), eight years and nine months (Ajinomoto), nine years (Daesang) and nine years and two months (Cheil); all of which corresponded to an infringement of long duration (more than five years). The starting amounts of the fines determined for gravity were increased by 10% per year and 5% per six months, *i.e.* by 125%.  

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therefore increased by 10% per year and 5% per six months, \(i.e.\) by 95% for Takeda, 90% for Cheil and Daesang and 85% for Ajinomoto.  

In contrast, the Commission followed the wording of the 1998 Guidelines strictly with regard to the duration increase of short-term infringements (less than one year), which were not penalised on the basis of their duration under the 1998 methodology.

In \textit{FETTCSA} (2000) the Commission observed that the agreement had been concluded by the companies on 9 June 1992. The last meeting of the FETTCSA parties was held on 8 September 1992, shortly before the letter dated 28 September 1992 sent by the Commission's Directorate-General for Competition. For the purposes of fixing the amount of the fine, the Commission considered it appropriate to view the duration of the infringement as having ended on 28 September 1992, meaning that the duration of the infringement was three months. No increase for the (short) duration of this infringement was imposed at all.  

The decision in \textit{Belgian beer} (2001) concerned two cartels: the Interbrew/Alken-Maes and the private-label cartel with lasted during nine months. For this last cartel, the Commission clearly stated that it did not warrant an increase in the fine.

Finally, the fining practice indicates that the Commission was in certain cases willing to adopt a flexible approach of the increase for duration in order to take into account the period during which the infringement was less strictly implemented and thereby caused more limited harm.

In \textit{Pre-Insulated Pipe} (1998), even if ABB did not contest that the infringement lasted over five years, the Commission, took into account the fact that ‘while there was throughout the whole period a continuing objective of restricting competition, (i) in the early period the arrangements were incomplete and of limited effect outside the Danish market (ii) the arrangements were effectively in abeyance from late 1993 to early 1994 (iii) they reached their most developed form only with the Europe-wide cartel set up in 1994 to 95 (although from 1991 to 1993 the Danish cartel was fully effective)’.  

Likewise, in \textit{Belgian beer} (2001), the Commission established for Interbrew and Alken-Maes that the duration of the infringement was five years and one day and that, consequently, the infringement had to be qualified as one of medium to long duration. Instead of applying a minimum of 50% increase in the fine on the basis of the duration of the infringement, the Commission stated that ‘[b]earing in mind that the intensity of the cooperation decreased considerably at the end of the cartel, it [was] considered appropriate to increase the fine by 45% for both Interbrew and Danone’.  

6039 See for a similar approach (in vertical cases) Commission Decision of 21 December 2000 (Case COMP.F.1/35.918 — JCB) [2002] OJ L 69/1, para 253, the Commission found that ‘[t]he 11-year period in which at least one element of these agreements [by which JCB prevented parallel trade] has been in force is therefore, of long duration. However, all the elements have been simultaneously implemented only from 1992 to 1996; in 1991, three elements are apparent; two elements are apparent from 1989 to 1990; in 1988, 1997 and 1998, only one element is apparent. In the light of the above, the increase for the duration is 55%’. See also Case COMP.F.1.36.516, Nathan-Bricolux [2001] OJ L 23/1, para 132, in this case Nathan received an increase of 20% for duration for agreements, which restricted parallel trade, and which ran from 1993 to 1998, because there was evidence only that the agreements were implemented and enforced as from 1995; Commission Decision of 28 January 1998 (IV/35.733, Volkswagen) [1998] OJ L 124/60, para 217. In Volkswagen the Commission imposed a 5% for the parts of the infringement during which the infringement was of a lesser intensity (1988-1992), while imposing 10% for those years when the infringement was intensified (1993-1997).
This approach may arguably be seen as a reaction to the criticism that ‘the quasi-automatic 10% increase in the fine for each year of the infringement was too inflexible and not take sufficient regard of the intensity of the infringement. Generally, the same annual increase is applied regardless of the intensity of the infringement during that year’. However, it does not seem appropriate to take into account a variation in the intensity of the infringement during the period concerned in the assessment of the duration. As examined above under the 1998 Guidelines, the increase for duration was calculated by applying a certain percentage to the starting amount, which was determined according to the gravity of the infringement as a whole. As such, the different levels of intensity of the infringement can be properly reflected in the starting amount. Considering the intensity of the illegal cartel with regard to both elements (i.e. the gravity and the duration of the agreement) would not only render fines disproportionate to the (damage caused by the infringement), but would also inevitably weaken the fine and would thereby undermine its effectiveness.

4.3.5. The application of aggravating and mitigating factors

In a next phase, increases for aggravating reasons and decreases for mitigating circumstances are added to the basic amount. The European Courts have explained that the assessment of aggravating or mitigating circumstances makes it possible to examine the individual conduct of each undertaking. Such assessment, which reflects the individuality of penalties and sanctions, allows the Commission to examine the relative severity of the undertaking's individual involvement in the infringement. In addition, taking into account aggravating circumstances when setting the fine is consistent with the Commission's task of ensuring compliance with the competition rules.

The list of aggravating and mitigating factors contained in the 1998 Guidelines is non-exhaustive. As discussed above, although the Commission is bound by its own guidelines, it still retains considerable discretion. This margin of appreciation implies that, in the absence of a mandatory indication in the Guidelines as regards the attenuating or aggravating circumstances, the Commission retains certain discretion (i) to decide whether or not a certain mitigating or aggravating factor should be applied and (ii) to estimate the size of the reduction or increment resulting from the application of such factors. Furthermore, according to settled case law, the fact that the...
Commission has found in its previous decisions that certain factors did not constitute aggravating circumstances for the purpose of calculating the amount of the fine, does not mean that it is obliged to do so also in a different decision.\textsuperscript{6045}

Under a next heading, the application of the most frequent aggravating and mitigating factors by the Commission and the European Courts will be discussed in more detail.

4.3.5.1. Aggravating factors

\textbf{a. Repeated infringement}

According to settled case law, the analysis of the gravity of the infringement must take into account any repeated infringements.\textsuperscript{6046} The ‘repeated infringement’ factor was the first aggravating circumstance listed in the 1998 Guidelines.\textsuperscript{6047} As Table 2 above shows, the factor of repeated infringement was one of the most frequently considered aggravating circumstances under the 1998 Fining Guidelines. Out of the 51 cases in which the Commission applied the 1998 Guidelines up to the end of 2006, 17 cases involved a finding of repeated infringement by at least one undertaking.\textsuperscript{6048} In addition, in a considerable number of cases, the same undertaking had been involved in more than one earlier infringement.

In order to establish recidivism under the 1998 Guidelines, the Commission must had itself adopted an earlier decision\textsuperscript{6049} finding a violation of (now) Article 101 [or 102] TFEU. Decisions of European national competition authorities concerning the same undertaking were not sufficient under the 1998 methodology to establish recidivism.\textsuperscript{6050}

Furthermore, recidivism could only be established in accordance with the 1998 Guidelines when the repeated infringement had been committed by the same undertaking for the same type of infringement. It was therefore necessary that the undertaking itself, or a part thereof, had committed an infringement of Article 101 [or 102] TFEU.

The application of the concept of undertaking in the context of recidivism can be illustrated by the \textit{Plasterboard} case (2002).\textsuperscript{6051} In this case, BPB and Lafarge had already been subject to previous Commission fining decisions in cartel cases in, respectively, \textit{Cartonboard} (1994) and \textit{Cement} (1994). The Commission stressed that the fact that these undertakings repeated the same kind of behaviour in a different sector showed that the sanctions imposed in the first case did not lead the undertakings to modify their conduct and, therefore, constituted an aggravating circumstance.

\textsuperscript{6045} See also commenting on this point e.g. F. ARBAULT AND B. SAKERS, “Cartels” 1062.
\textsuperscript{6047} Joined cases C-204/00 P, C-205/00 P, etc, \textit{Aalborg Portland A/S and others} [2004] ECR I-123, para 91.
\textsuperscript{6048} Also before the 1998 Guidelines, the Commission took repeated infringement into account as an aggravating factor in several decisions, see further supra section 3 of this Chapter.
\textsuperscript{6049} For the concrete overview of cases see Table 2.
\textsuperscript{6051} This situation changed under the 2006 Fining Guidelines, as a consequence of the modernization reforms.
Moreover, the Commission specified that with respect to BPB, the fact that the first decision had been addressed to a subsidiary of BPB (BPB De Eendracht), did not prevent the Commission from treating it as an aggravating circumstance. BPB De Eendracht was also a subsidiary of BPB PLC at the time of the earlier decision and, therefore, they formed part of the same undertaking. In this case, the Commission also underlined the responsibility of an undertaking (i) to bring to an end the anti-competitive conduct identified in the decision and (ii) to bring its commercial policy in line with the competition principles. According to the decision, BPB did quite the opposite. Based on the considerations made above, this behaviour led to an increase of 50% of the basic amount of the fine for BPB and Lafarge.\footnote{Ibid, paras 559-564.}

This interpretation of the concept of undertaking to establish a repeated infringement has indeed been confirmed by the (now) General Court in Michelin, where the Court explained that recidivism could also apply to an entity which was fully-owned by a (parent) company in control of another entity which had been censured for a previous offence.\footnote{Case T-203/01 Michelin v Commission [2003] ECR-II 4071, para 290. In effect, the notion of “undertaking” includes all legal entities within the same group not determining independently their own market conduct (supra).} More recently, in 2015 the ECJ indeed confirmed that ‘in order to establish the aggravating circumstance of repeated infringement on the part of the parent company, it is not necessary for that company to have been the subject of previous legal proceedings giving rise to a statement of objections and a decision. For that purpose, what matters is an earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement formed, already at the time of the first infringement, a single undertaking for the purpose of Article [101 TFEU]’.\footnote{Michelin v Commission [2008] OJ C 7/11, paras 487-489. Referring to Case T-203/01 Michelin v Commission [2003] ECR-II 4071, para 284. See also Case T-38/02, Groupe Danone v Commission [2005] ECR II-4407, paras 353 to 355.}

As regards the condition concerning the same type of infringement, the Commission’s practice indicates that in order to establish repeated conduct, an undertaking should infringe the same provision (i.e. Article 101 TFEU or 102 TFEU) two times or more.

In Hydrogen peroxide (2006), at the time of the infringement Atofina, Degussa, Edison and Solvay had been subject to previous Commission decisions concerning cartel activities.\footnote{Such decisions include as regards Degussa: Case IV/30.907 - Peroxygen products [1985] OJ L 35/1, Case IV/31.149 - Polypropylene [1986] OJ L 230/1. As regards Edison: Case IV/31865 - PVC II [1994] OJ L 239/14. As regards Solvay: Case IV/30.907 - Peroxygen products [1985] OJ L 35/1; Case IV/31.149 - Polypropylene [1986] OJ L 230/1; Case IV/31865 - PVC II [1994] OJ L 239/14.} Atofina argued that the Commission was not entitled to increase the starting amount of the fine on account of recidivism because, according to it, the kind of infringement as well as the features established by the “peroxigen” decision of 1984 were of a different nature. The Commission, on the other hand, found that the conduct established by the decision of 1984 infringed (former) Article 85, the same provision that was violated in the case at hand. There was, therefore, no difference between the two different kinds of infringement. This aggravating factor led to an increase of 50% of the basic amount.\footnote{Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate [2006] OJ L 353/54, paras 469-471.}

In Synthetic rubber (2006),\footnote{Case COMP/F/C.38.638 — BR/ESBR [2008] OJ C 7/11, paras 487-489.} the Commission emphasised that for recidivism it is irrelevant whether the infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been penalised for similar infringements.\footnote{Referring to Case T-203/01 Michelin v Commission [2003] ECR-II 4071, para 284. See also Case T-38/02, Groupe Danone v Commission [2005] ECR II-4407, paras 353 to 355.} The requirement that the infringements must be “similar” is satisfied by the fact that the previous decisions and the new decision concern collusion on prices. As for the requirement that the “person” must be the same, this requirement is fulfilled when the same undertaking
commits the infringements. There is no requirement that the legal entities within the undertaking, products and personnel should be the same in all cases.\textsuperscript{6059} In any event, internal reorganisations cannot have any effect on the assessment of the existence of this aggravating circumstance. All the previous justified an increase of 50\% of the basic amount of the fine.

It is also important to take into account that, as the Court of Justice held in \textit{Danone v. Commission (Belgian Beer)}, the finding of a repeated infringement, where such repetition is separated by a relatively brief lapse of time between infringements (10 years in the case at hand), comes within the Commission’s discretion and cannot be bound by any limitation period. The purpose of establishing and penalising repeated infringements allows the Commission to induce undertakings that have demonstrated a tendency towards infringing the competition rules to change their behaviour. The Commission may therefore, in each individual case, take into consideration the indicia that confirm such a tendency, including, for example, the time that has elapsed between the infringements in question.\textsuperscript{6060}

In practice, the Commission has indeed established that one undertaking engaged in recidivism even when the first infringement had been established 20 or 30 years earlier.

For instance, in \textit{Organic peroxides} (2003),\textsuperscript{6061} Atofina had been fined previously for its involvement in four cartels agreements from 1984 to 1988,\textsuperscript{6062} while Peroxid-Chemie/Degussa UK Holdings had been punished for its participation in a cartel dating of 1984.\textsuperscript{6063} The Commission considered that the basic amount of the fine to be imposed should be increased by 50\% in the case of Atofina to reflect the fact that it had already been an addressee of Commission decisions in a considerable number of previous cartel cases, and by 50\% in the cases of Degussa UK Holdings and Peroxid-Chemie, to reflect the fact that they had been the addressee of one previous Commission cartel decision, either directly (Degussa UK Holdings) or through the undertaking to which it belonged (Peroxid-Chemie).

With regard to the increase imposed for the finding of a repeated infringement, the Commission’s practice shows that this factor generally led the Commission to increase the basic amount of the fine by 50\%. This can certainly be corroborated by the most recent cases. Furthermore, the cartel decisions of the Commission illustrate that the number of previous infringements was not relevant for the determination of the increase.

For example, in \textit{Choline chloride} (2004), BASF had already been subject to two previous decisions of the Commission for cartel activities which dated from 1969 and 1994 at the time the new infringement took place.\textsuperscript{6064} The Commission stressed that the repetition of the infringement, even if this occurred in different sectors, showed the lack of effect of the first penalties on the firm’s behaviour. This aggravating circumstance justified an increase of 50\% in the basic amount of the fine to be imposed on BASF.\textsuperscript{6065}

\begin{footnotesize}
\textsuperscript{6059} Case T-203/01 \textit{Michelin v Commission} [2003] ECR-II 4071, para 290.

\textsuperscript{6060} Judgment of the European Court of Justice of 8 February 2007, C-3/06 P, \textit{Groupe Danone v Commission} [2007] ECR I-1331, paras 36-40. (It is interesting to mention that in this case Danone claimed that the lack of a limitation to take a repeated infringement into account was a ‘perpetual’ threat for undertakings which of is contrary to the general principles common to the laws of the Member States). See also in this context e.g. CFI 30 September 2009, Case T-161/05, \textit{Hoechst v Commission} [2009] ECR II-3555, para 141).


\textsuperscript{6063} More precisely in Case IV/30.907 - Peroxygen products [1985] OJ L 35/1.


\textsuperscript{6065} Case No C.37.533 — \textit{Choline Chloride} [2005] OJ L 190/22, para 208.
\end{footnotesize}
In *Synthetic rubber* (2006), Eni, Shell and Bayer received a fine increase of 50% each because all three had already been condemned by the Commission for three previous cartels in the polypropylene (1986), PVC (1994) and citric acid sectors (2001). In its decision, the Commission explicitly stated that ‘the argument that the previous decisions are too old to constitute precedents for recidivism is not accepted either. The Commission’s PVC-II Decision was taken in 1994, two years before Shell started participating in the cartel which is the object of this Decision. As for the 1986 Decision (Polypropylene), this was only ten years before the start of the current infringement in 1996’.

In *Bitumen NL* (2006), at the time the infringement took place, Shell had already been subject to decisions for cartel activities in polypropylene (1986) and PVC II (1994), which justified an increase of 50% in the basic amount of the fine to be imposed on Shell.

In *Elevators and escalators* (2007), ThyssenKrupp was considered to have committed a repeated infringement, since two entities controlled by Krupp and/or Thyssen (before these two undertakings merged in 1999) had already been addressees of a previous Commission decision concerning cartel activities in *Alloy Surcharge* (1998). The Commission (once again) specifically stressed that the fact that the undertakings had repeated the same type of conduct in the same or in different business fields showed that the initial penalties did not prompt them to change their conduct. The basic amount of the fine was therefore increased by 50% in order to direct conduct towards compliance.

In *Gas Insulated Switchgear* (2007), at the time this infringement took place, ABB had already been held liable for a similar infringement in *Pre-Insulated Pipe* (1998). Given the need to promote deterrence, a 50% increase in the basic amount was also imposed in this case.

In early cases where aggravating circumstances were found, the Commission did not always specify the specific increase imposed for repeated conduct. Instead, it imposed a total increase for all the aggravating factors which it had identified with respect to a specific undertaking.

In the decision in *British sugar* (1998), British Sugar was found to have repeatedly infringed the European competition rules by engaging in collusive behaviour. The Commission commented that the repeated infringement commenced two years before the end of the Napier Brown procedure and it went on for another two years after the adoption of the Napier Brown Decision. The decision established that both infringements occurred on the same relevant market, both as regards the product and as to the geographical extent of the market, namely the market for retail and industrial white granulated sugar in Great Britain. This circumstance, combined with other aggravating factors – namely the fact that British Sugar was considered the instigator of the cartels and acted in a manner contrary to the clear wording contained in its compliance programme – justified, in the view of the Commission, a total increase of 75%.

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6067 See, in particular, IV/31.149 - Polypropylene [1986] OJ L 230/1, where ENI and Shell were involved; IV/31865 - PVC II [1994] OJ L 239/14, where ENI and Shell were involved and Case No COMP/E-1/36 604 — Citric acid [2002] OJ L 239/18, where Bayer was involved).
6068 As commented above, in *Danone v. Commission*, the (now) European Courts ruled the finding of a repeated infringement comes within the Commission’s discretion and that the Commission cannot be bound by any limitation period when making such a finding (see Case T-38/02, *Groupe Danone v Commission* [2005] ECR II-4407, para 38, confirmed in C-3/06 P, *Groupe Danone v Commission* [2007] ECR I-1331, paras 36-40.
6071 Case COMP/E-1/38.823 — *Elevators and Escalators* [2008] OJ C 75/19, see paras 697-715.
In *Belgian beer* (2001), Danone had committed a further infringement after having been punished for similar breaches. This conduct was logically qualified as a repeated infringement. The fact that Danone operated under a different name at the time could not alter that finding. The Commission pointed out that during the period in which the three infringements were committed by Danone, the same person occupied the post of chairman and chief executive officer. In addition, at least two of Danone's directors who were responsible for food operations during the bilateral cartel were employed in the company's plate glass division at the time of the earlier infringement(s). The Commission penalised the behaviour of Danone with an increase of 50 %, for the repeated infringement and the retaliatory measures adopted by this company in the context of the cartel. On appeal, Danone argued that the Commission applied only a single percentage increase of 50%, without indicating the extent to which each relevant aggravating circumstance gave rise to. The (now) General Court agreed with Danone in this respect and found that the Commission had departed from the method which it had established in its Fining Guidelines without providing any justification for doing so. In these circumstances, the Court lowered the overall increase of the basic amount in respect of aggravating circumstances and set it at 40%.\(^6075\)

Finally, the practice of the Commission shows that the fact that a given company did not discontinue its illegal behaviour after the Commission had started its investigation and/or established the violation and punished the undertaking was also considered as a repeated infringement.

In *Pre-insulated Pipe* (1998), ABB continued a clear-cut and indisputable infringement after the investigations started, despite having been warned at high level by the Directorate-General for Competition of the consequences of such conduct. This conduct added to other aggravating circumstances, namely the role of leader and the orchestration of retaliatory measures and led the Commission to impose a 50% increase on the basic amount of ABB.

The same consideration was made in *Graphite electrodes* (2001) with regard to SGL. In this case, the fine was increased by 60% due to the continuation of the infringement, the role of leader and its attempts to obstruct the Commission proceedings.\(^6077\)

In *Fittings* (2006), the decision established that Oystertec/Advanced Fluid Connections, Comap, Frabo and to a lesser extent Delta, did not terminate the infringement immediately after the inspections. These undertakings continued the operation of the cartel after the inspections had taken place. As far as Aalberts was concerned, the Commission established that it participated in the infringement after the inspections that took place between June 2003 and April 2004. This behaviour was seen by the Commission as a blatant disregard of the competition rules. The Commission further explained that when it conducts an inspection in a cartel case, it officially warns the undertakings in question that competition rules may have been infringed. In the overwhelming majority of cases, experience has shown that the inspections spur the undertakings to immediately put an end to the infringement, providing thereby immediate relief for the consumers, while awaiting the Commission’s decision in the case. In this sense, the inspections have the function to deter the undertakings involved from continuing the infringement. Therefore, undertakings should immediately stop any infringing behaviour after the inspections. Nonetheless, these undertakings disregarded the inspections and certain of them continued as much as three years longer. This behaviour led to an increase of 60% of the basic amount of the fine to be imposed on Aalberts, Advanced Fluid Connections, Comap, Frabo and Delta.

\(^6075\) Case T-38/02, Groupe Danone v Commission [2005] ECR II-4407, paras 312-313. The Commission stated in the hearing as to the percentage increases applied in relation to each of the two aggravating circumstances that the aggravating circumstance of repeated infringement played a predominant role and that the aggravating circumstance found in respect of the pressure put on Interbrew therefore played a lesser role. This judgment was confirmed by the ECJ.
\(^6076\) Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, para 171-172.
As to the justification for imposing higher fines in case of repeated infringement, the (now) General Court has held that ‘for the purpose of determining the amount of the fine, the Commission must ensure that its action has the necessary deterrent effect […]’. The circumstance of repeated infringement is one of the factors to be taken into account when assessing the gravity of the infringement in question’.\footnote{Joined cases C-204/00 P, C-205/00 P, etc. Aalborg Portland A/S and others [2004] ECR I-123, para 91; C-3/06 P, Groupe Danone v Commission [2007] ECR I-1331, para 26.} In fact, recidivism constitutes the most painful evidence that the fine imposed to punish a previous infringement did not have a sufficient deterrent effect\footnote{Case T-203/01 Michelin v Commission [2003] ECR-II-4071, para 293.} and that the profits deriving from illegal conduct may likely exceed the amount of fines.\footnote{This finding is certainly in line with economic considerations (supra section 1 of this Chapter). See more generally, C. VELJANOVIK, “Deterrence, Recidivism and European Cartel Fines”, July 2011, available at www.ssrn.com (hereafter: ‘C. VELJANOVIK, “Deterrence, Recidivism”’); J. J. PIERNAS LÓPEZ, “The aggravating circumstance of recidivism and the principle of legality in the EC fining policy: Nulla poena sine lege?”, 2006 (29-3)World Competition, 441-457; C. VELJANOVIK, “European Commission Cartel Prosecutions”.} An increase in the penalty when this aggravating circumstance is present is – also in the view of the European Courts – necessary and thus justified to curb repeated infringements of the competition rules committed by the same undertaking.\footnote{Joined cases C-204/00 P, C-205/00 P, etc. Aalborg Portland A/S and others [2004] ECR I-123, PARA 91, C-3/06 P, Groupe Danone v Commission [2007] ECR I-1331, para 26; CFI 17 December 1991, Case T-6/89, Enichem Anic v Commission [1991] ECR II-1707, para 295.} The importance of the deterrence consideration is well illustrated by the high level of recidivism under the 1998 Fining Guidelines.\footnote{See supra Table 2.} Borrowing the words of C. HARDING AND A. GIBBS, the frequency of repeated infringements indicates an ‘awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels. In short, this suggests a confirmed culture of business delinquency’.\footnote{C. HARDING AND A. GIBBS, “Why go to court in Europe? An analysis of cartel appeals 1995-2004”, 2005 (30-3) ELRev, 349-370, at 369. See for further statistics on cartels discovered around the world in the period 1990-2005, with rankings of top cartel recidivists (mostly European) J. M. CONNOR AND C. G. HELMERS, “Statistics on Modern Private International Cartels, 1990-2005”, AAI Working Paper No. 07-01, available at http://www.antitrustinstitute.org/files/567_020920070047.pdf.} It appears reasonable to assume that when an undertaking continues or repeats an infringement when it has already been fined for a similar infringement, the first fine was simply not sufficiently deterrent. One may, however, wonder whether the solution to this problem should be to raise the second fine specifically for the repeat offender, or rather to generally increase the level of fines for cartel activity.\footnote{W. WILS indeed asked the following question: ‘[i]f the first fine was insufficient to deter the specific undertaking, could one not assume a general problem of insufficient deterrence for all undertakings?’ W. WILS, “The European Commission’s 2006 Guidelines” 23-24 of the online version of this publication. This specific issue, and more generally, the application of aggravating and mitigating factors, is analysed below in the context of the (economic) analysis of the 1998 Guidelines.} After all, according to settled case law, the Commission can at any time raise the level of fines so as to reinforce their deterrent effect, when it finds that practices that have long been established as being unlawful are still relatively frequent.\footnote{Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, paras 108-109.}
b. Refusal to cooperate

The second example of aggravating circumstance under the 1998 Guidelines was refusal to cooperate with or attempts to obstruct the Commission’s investigations. This factor should be understood in the light of settled case law, according to which undertakings being subject to an investigation have ‘an obligation to cooperate actively, which means that they must submit to the Commission all the information relating to the subject-matter of the investigation’. That obligation to cooperate implies that the undertaking may not evade requests for information on the ground that by complying with them, it is asked and forced to give evidence against itself. Moreover, the Commission is also ‘entitled to compel an undertaking, if necessary by adopting a decision, to provide all necessary information concerning such facts as may be known to it’.

In light of this obligation, the European Courts have accepted the use of refusal to cooperate with or obstruction of the Commission's investigations as an aggravating circumstance in the context of the calculation of the fine.

Out of the 51 cases in which the Commission applied the 1998 Guidelines up to the end of 2006, it established the existence of this aggravating factor in only four cases. As these cases show, the Commission commonly increased the basic amount on the basis of this circumstance by 10%.

In Greek Ferries (1998), the Commission put the emphasis on the fact that ‘after the parties had received requests for information from the Commission, Minoan proposed that each company

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6088 Ibid, para 48. The legal privilege in the context of Commission’s inspection has been further analysed above Chapter 7.
6089 Ibid, para 41.
6090 The aggravating circumstance of refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations cannot, however, not be applied when the undertaking concerned is merely exercising its rights of defence. In this regard the European Courts have held that, given that the Commission must guarantee the protection of the rights of defense during preliminary inquiry procedures, it is not entitled to ‘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’. Joined cases C-204/00 P, C-205/00 P, etc, Aalborg Portland A/S and others [2004] ECR I-123, paras 63-65; Case C-301/04 P, Commission of v SGL Carbon AG [2006] ECR I-5915, para 42. Furthermore, respect for the rights of defense requires that the undertaking must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of [Articles 101 or 102 TFEU]’. Joined cases C-204/00 P, C-205/00 P, etc, Aalborg Portland A/S and others [2004] ECR I-123, para 66. For a more detailed analysis of this issue from the perspective of the rights of defence see W. WILS, “The European Commission's 2006 Guidelines” 28-29 of the online version of this publication; W. VAN OVERBEKE, “The Right to Remain Silent in Competition Investigations: The Funke Decision of the Court of Human Rights Makes Revision of the ECI's Case Law Necessary”, 1994 (3) ECLR, 127-133; K. P. E. LASOK, “The Privilege against Self-incrimination in Competition Cases”, 1990 (11-2) ECLR, 90-91; J. SHAW, “Recent Developments in the Field of Competition Procedure”, 1990 ELRev, 326-334; W. WILS, “Powers of Investigation”.
6091 For certain types of refusal to cooperate, the Commission is entitled to impose (separate) procedural fines (see former Article 15(1) of Regulation 17 and Article 23(1) of Regulation 1/2003. The Commission has however discretion to decide whether to make use of this power. In addition, the possibility to impose procedural fines is without prejudice to the possibility to consider the refusal to cooperate or the obstruction as an aggravating factor in the context of the calculation of the fines for material infringements. See in this regard T-9/99, HFB et al. v Commission [2002] ECR II-1487, paras 474-564; 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 [2005] ECR I-5425, paras 348-362. For a Commission decision illustrating this aspect Case COMP/38354 — Industrial bags [2007] OJ L 282/41, para 792. An undertaking which limits its cooperation to that it is required to provide under Regulation No 17 or Regulation 1/2003 will not have an increased fine imposed on it on the ground of this aggravating factor. Case C-294/98 P Metsä-Serla and others v Commission [2000] ECR I-65, para 58.
6092 See also commenting on the Commission’s practice e.g. E. ENGELSGING AND H-H. SCHEIDER, “Article 23” 1786 et seq; F. ARBAULT AND B. SAKKERS, “Cartels” 1800; D. GERADIN AND D. HENRY, “The EC Fining” 37.  
should differentiate its prices by 1% for four cabin categories. Each company would differentiate four different categories of price’. According to the Commission, this fact not only demonstrated Minoan's role as the instigator of the cartel but also amounted to an attempt to obstruct the Commission in carrying out its investigation. Both considerations led to an increase of the fine by 10% for Minoan.

In *Industrial bags* (2005), one manager of Bischof + Klein destroyed a document selected by the Commission officials during the inspection. The Commission found that, irrespective of its effects, such behaviour necessarily disrupted the Commission’s investigation and hindered its inspectors in the exercise of their investigative powers. Such deliberate obstruction was penalised by an increase of 10% of the basic amount of the fine.

In *Bitumen (NL)* (2006), KWS refused to submit to the investigation during the inspection, prompting the inspectors to invoke the assistance of the national competition authority and the police. The Commission considered that this obstruction constituted an aggravating circumstance that justified an increase of 10% of the basic amount.

The Commission only imposed an increase higher than 10% in one case. However, such increase was imposed for a combination of aggravating factors.

In *Graphite electrodes* (2001), SGL attempted to obstruct the Commission proceedings by giving warnings to other companies of the forthcoming investigations. This action combined with other aggravating factors (i.e. the role of leader and the continuation of the infringement) led to an increase of 85% of the basic amount of the fine.

The obstruction of the Commission’s investigation by undertakings may have a great impact on the final result of the proceedings. In fact, companies may destroy valuable evidence that is of essential value to prove the illegal behaviour. In addition, this type of behaviour is also relevant in terms of resources. When undertakings hinder the Commission’s activity, valuable resources are lost and time is unnecessarily spent. Just like effective cooperation which exceeds the companies’ obligation is rewarded – generally in the context of the Leniency Notice or as a mitigating factor –, it is equally appropriate and even necessary to penalise obstructions by considering this conduct an aggravating factor.

c. The role of leader or instigator

According to settled case law, ‘where an infringement has been committed by a number of undertakings, it is necessary, in determining the amount of the fines, to establish their respective roles in the infringement throughout the duration of their participation in it […]. It follows, in particular, that the role of “ringleader” played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the amount of the fine, in so far as the undertakings which played such a role must therefore bear special responsibility in comparison with other undertakings’. As such, the 1998 Fining Guidelines listed the ‘role of leader in, or instigator of, the infringement’ as a third example of an aggravating circumstance. In practice, the leading role

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6097 Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, *Tokai Carbon Co. Ltd and others v Commission* [2004] ECR II-1181, para 301. On the notions of ‘leader’ and ‘instigator’, see further infra.
in the cartel or being the instigator of the anti-competitive agreement was one of the most common aggravating factors.\footnote{See supra Table 2.}

The European Courts have established that, in order to be classified as a ‘leader’ in a cartel, an undertaking must have been a significant driving force for the cartel\footnote{Case T-15/02, \textit{BASF AG v Commission} [2006] II-497, para 374; CFI 18 June 2008, Case T-410/03, \textit{Hoechst v Commission} [2008] ECR II-881, para 423.} and have borne individual and specific liability for the operation of the cartel\footnote{Case T-15/02, \textit{BASF AG v Commission} [2006] II-497, para 300.} at\footnote{\textit{Ibid}, para 299 and 373.} and in particular, a member of a cartel can be classified as ‘leader’ when the undertaking in question has carried out the duties of coordinator within the cartel and organised and staffed the secretariat responsible for the actual implementation of the agreement.\footnote{Case T-224/00, \textit{Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission} [2003] ECR II-2597, paras 246-247.} The same applies when the undertaking concerned played a central role in the actual operation of the cartel, for example, by organising numerous meetings, by collecting and distributing information within the cartel, by taking responsibility to represent certain members within the cartel or by most often formulating proposals relating to the operation of the cartel.\footnote{Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, \textit{IAZ and others v Commission} [1983] ECR 3369, paras 57-58; Case T-15/02, \textit{BASF AG v Commission} [2006] II-497, paras 404, 439 and 461.}

Nevertheless, the fact that price increases were decided jointly at meetings between the cartel members, including their amount, timing and the implementation mechanism, does not remove the special responsibility assumed by a particular firm when it decided to be the first to implement the price increase. By taking such an initiative, the undertaking in question voluntarily gave a major boost to the functioning of that agreement by ensuring that, instead of remaining unimplemented, it had an effect on the market.\footnote{Case T-15/02, \textit{BASF AG v Commission} [2006] II-497, para 348.}

The European Courts have in effect confirmed that an increase of 50\% of the basic amount of the fine appropriately reflected the additional harmful effect of the infringement that stemmed from the role of leader of the cartel.\footnote{According to the case-law, it is possible that two or more undertakings play the role of cartel leader. See \textit{e.g.} Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, \textit{Bolloré v Commission} [2007] ECR II-947, para 561.}

In \textit{Amino acids} (2000),\footnote{See supra Table 2. See also commenting on the application of this factor D. GERADIN AND D. HENRY, “The EC Fining” 33.} the Commission considered that ADM and Ajinomoto were the leaders of the cartel and increased both their fines by 50\%. In particular, the Commission found that both ADM and Ajinomoto were the driving forces behind the global cartel. First, Ajinomoto established the lysine prices, which the other Asian producers agreed to follow, and was also the “first to act”. Moreover, on multiple occasions, Ajinomoto and ADM envisaged economic sanctions and other
retaliatory measures against Sewon and other lysine producers. This firm had also agreed with ADM that it would get the other Asian producers to agree to the allocation scheme. Ajinomoto had organised the secretariat of the quantity monitoring system. On the other hand, ADM used the price of lysine to force other lysine producers to conclude the cartel.

In *Gas Insulated Switchgear* (2007), the Commission found that Siemens, Alstom and Areva assumed the role of secretary of the European cartel members in different periods. According to the Commission, this role was substantial and, in fact, necessary for the functioning of the cartel. By taking the initiative, those undertakings rendered a continuous service to the cartel without which the latter would not have functioned as well as it did. Consequently, the undertakings that assumed that role, dedicating significant resources to it, must bear a special responsibility in terms of their contribution to the functioning of the cartel. The Commission increased the basic amount of the fines of Siemens, Alstom and Areva by 50% for their leadership in the cartel. 6111

In *Vitamins* (2001), 6112 the Commission considered that Roche and BASF were joint leaders and instigators of the collusive arrangements. A key objective of the anti-competitive agreements in each of the vitamin product markets was to combine the market power that the participants, mostly Roche and BASF, held in each of the individual markets. 6113 The Commission observed that both European producers formed a common front in conceiving and implementing the arrangements with the Japanese and other European producers. Roche conceived the implementation of a strategic plan to control the world market for all the vitamin products it produced, which constituted a very substantial part of all commercially available vitamins. Roche and BASF jointly sought to eliminate all effective competition between them across a whole range of important vitamins. 6114 6115 Special importance was attached by the Commission to Roche’s key role as first mover and the fact that it was the main beneficiary of these collusive arrangements. On the basis of this aggravating circumstance, an increase of 50% was imposed on Roche while BASF was punished with a 35% increase of the basic amount of its fine. 6116

In *Speciality Graphite* (2002), 6117 SGL was considered by the Commission as the leader and instigator which led to a 50% increase of the basic amount of the fine. According to the decision, this undertaking took the initiative to initiate the cartel and had the responsibility to steer its development. These findings were not contested by SGL. 6118 On appeal, the (now) General Court

6111 Case COMP/38.899 — *Gas Insulated Switchgear* [2008] OJ C 5/7, paras 511-514. Following an appeal to the General Court this decision was readopted in 2012. The 2012 decision imposed fines which are calculated on the basis of the same parameters as in the 2007 decision with the exception of the reference year.


6113 This decision further specified, in the context of the ringleader factor, that ‘[a]s suppliers of a wide range of vitamin products these companies enjoyed a number of advantages. In particular their position in relation to their customers was stronger than companies selling a single or limited number of products, since they were able to provide a range of products and accounted for a greater proportion of their business. […] As a result of possessing a broad range of products in separate but closely related product markets, the overall ability of these companies to implement and maintain the anti-competitive agreements into which they entered increased considerably [by participating in the cartel].’ Case COMP/E-1/37.512 — *Vitamins* [2003] OJ L 6/1, paras 714-716.


6115 In this regard it should be noted that by contrast, the fact that an undertaking exerted pressure, or even dictated the conduct of other members of the cartel is not a necessary precondition for that undertaking to be described as a leader in the cartel (Case T-15/02, *BASF AG v Commission* [2006] II-497, para 374). The market position enjoyed by an undertaking and the resources at its disposal also cannot constitute evidence of a role of leader in the infringement, even though they form part of the context in which such evidence must be assessed (see Case T-224/00, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission* [2003] ECR II-2597, para 241).


6118 This decision added that the Commission had also found initially (in its S.O.) that LCL had played a specific leading role in the isostatic specialty cartel. In its reply to the S.O., LCL contested the interpretation of facts that led Commission to raise this allegation. After evaluation of the arguments put forward by LCL, the Commission concluded that had not been sufficiently established that LCL played a clear leading role in the context of the European meetings. *Ibid*, paras 485-487.
found that SGL’s role was not so easily distinguishable from the role of other cartel members. As a result, the initial 50% increase was reduced to a 35% increase.\footnote{6119}

In *Graphite Electrodes* (2001),\footnote{6120} SGL and UCAR were both qualified as the ringleaders of the cartel. In particular, SGL was called “the European leg of the cartel”. SGL together with UCAR took the main decisions with regard to target prices and market allocation in the Member States, and had regular contacts with VAW Carbon and C/G. Moreover, the Commission noted that these undertakings were by far the most powerful cartel members and had the same ambition, namely to be the leader in the world graphite market. SGL’s fine was increased by 85% while UCAR’s was increased by 60%. Both increases reflected, however, a variety of aggravating factors. More precisely, SGL’s fine was increased due to its role of ringleader, the obstruction of, and the continuation of the cartel after the inspection. UCAR’s, on the other hand, was considered a ringleader while it also obstructed the investigation.

Additional increases of 50% were also applied among other cases in *Carbonless Paper* (2001),\footnote{6121} *Raw Tobacco* Spain (2004),\footnote{6122} and *Bitumen NL* (2006).\footnote{6123}

Lower increases of approximately 30%\footnote{6124} (or less) were imposed for this aggravating factor in *Pre-Insulated Pipes* (1998),\footnote{6125} *Greek Ferries* (1998),\footnote{6126} *Citric Acid* (2002),\footnote{6127} *French Beef* (2003),\footnote{6128} *Sorbates* (2003)\footnote{6129} and *Bitumen Spain* (2007).\footnote{6130}

\footnote{6119} Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10. In this case, the General Court largely confirmed the Commission's decision, whilst limiting the joint and several liability of Intech EDM AG, and reducing the fine imposed on SGL Carbon AG on account of the infringement committed in the isostatic graphite market to €9,641,970. SGL’s reduction was not only due to the wrong assessment of the ringleader factor. Furthermore, the Commission had not correctly determined the basic amount of the fine when using turnover figures supplied by SGL, which included other products than isostatic graphite.

\footnote{6120} Case COMP/E-1/36.490 — *Graphite electrodes* [2001] OJ L 100/1, paras 162-163.

\footnote{6121} In *Carbonless Paper*, strong evidence demonstrated that AWA was the principal leader of the cartel. This firm organised and conducted several cartel meetings and took the leadership to implement price increases. In fact, AWA was often the first to announce the price increases to the market, and that other competitors "followed" those announcements. Case COMP/E-1/36.212 — *Carbonless paper* [2004] OJ L 115/1, paras 418-419.

\footnote{6122} According to this decision, the documents in the Commission’s file actually proved that Deltafina took the lead in designing, implementing, enforcing and arbitrating the agreements on (maximum) average delivery prices and quantities concluded between the processors after 1996. It also acted as the repository of the processors’ anticompetitive agreements. Case COMP/C.38.238/B.2 — *Raw tobacco — Spain* [2007] OJ L 102/14, para 435.

\footnote{6123} In this case Shell, within the group of bitumen suppliers, and KWS, within the group of the bitumen purchasers, had a special responsibility for their role in instigating and leading the cartel. Among other specific tasks, Shell was often the first to approach KWS for a price change. Those_bitumen consultation meetings, as well as the preceding W5 meetings, were often organised by KWS and took place at its premises. The facilitating role of KWS in setting up cartel meetings also appears, for example, from the invitations for the bitumen consultation of 28 March 2000 sent out by KWS. Both companies were thus considered as the driving forces in the operation of the cartel. Case COMP/C.38.456 – *Bitumen* (NL) [2007] OJ L 196/40, paras 343-346.

\footnote{6124} These Commission’s decisions do, however, not reveal many details about these cases.

\footnote{6125} In this case Henss/Isoplus received a 30% increase for being a ringleader and misleading the Commission. Case No IV/35.691/E-4: - *Pre-Insulated Pipe Cartel* [1999] OJ L 24/1, para 179.

\footnote{6126} In *Greek Ferries* Minoan Lines received a 25% increase for being a ringleader. Case IV/34466 - *Greek Ferries* [1999] OJ L 109/24, para 159.

\footnote{6127} In *Citric Acid*, ADM and Hoffman-La Roche received a 35% increase each for being the ringleaders. Case No COMP/E-1/36 604 — *Citric acid* [2002] OJ L 239/18, paras 255-273.

\footnote{6128} FBN played a preponderant role in *French Beef* and the basic amount of its fine was increased by 30 %. In particular, the federation of livestock farmers prepared and implemented the infringement took the initiative for a price scale and 'was especially emphatic in support of an oral agreement'. Case COMP/C.38.279/F3 — *French beef* [2003] OJ L 209/12, para 175.

\footnote{6129} Hoechst’s leading role in the *Sorbates* cartel combined with its recidivist behaviour justified, in the Commission’s view an increase of 30 %. With respect to its role of leader, the Commission (only) commented that ‘[i]t was clear that Hoechst, along with Daicel, was a driving force in the cartel, leading the others’. Still, the Commission accepted that other members of the cartel took certain initiatives in order to realise their common anti-competitive goals. Case COMP/E-1/37.370 — *Sorbates* [2005] OJ L 182/20, para 358.

\footnote{6130} In this cartel the Commission concluded that both Repsol and Proas fulfilled several essential tasks. More precisely, they allocated market shares to new cartel members, took decisions on the total size of the market, agreed on any remaining market allocation issues, collected data on sales volumes, convened and chaired cartel meetings and paid for
The decisions imposing fines do not always contain sufficient information to draw accurate conclusions. Still, the discussion above shows that the Commission used its margin of discretion to determine the precise increase that was to be applied when the role of ringleader of the cartel was established. In effect, there seems to be a certain degree of inconsistency between the different cases, with companies being penalised more in some cases than in other instance’s for the same aggravating factor. Although, arguably, this could be due to the fact that certain cartel leaders had higher number of responsibilities, fulfilled more important tasks or were more effective in the context of the initiation and functioning of the agreement, this assumption cannot be made (only) on the basis that were published in the decisions. Moreover, answering the question whether a given company was a ringleader or not, was not always a straight forward task for the Commission as, at times, the roles held by the different members of a cartel were quite similar and, therefore, not easily distinguishable from the (key) role of ringleader. In any event, the Commission decisions suggest that when a particular company took the initiative to conclude the illegal agreement (that is, the initiator of the cartel), this firm was commonly labelled as cartel ringleader.

With regard to the justification or the need to punish cartel ringleaders more severely than the rest of the cartel members, there is a firm argument to support this approach. First, cartel ringleaders play an essential role not only in the functioning but also in the conclusion of the illegal agreement. As shown by the Commission’s practice, cartel ringleaders often take the initiative and contact the rest of the participants with the objective of colluding. Punishing this behaviour more heavily may reduce the number of firms willing to take over this role, and thereby diminish the general forming of cartels. In this sense, setting higher fines on cartel ringleaders may have a preventive effect.\footnote{In this regard, W. \textsc{blackstone} made a correlated observation centuries ago: ‘[i]f a distinction were constantly to be made between the punishment of principals and accessories […] it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment’. \textsc{w. blackstone}, “Commentaries on the Laws of England”, Oxford 1830, Book 4, at 25-26.}

On the other hand, setting higher fines on cartel ringleaders has specific implications in term of deterrence. If the fine to be imposed on the leader is higher, then the expected gains of this company should exceed this (larger) penalty in order for it to be willing to play this role. It can be assumed that, in this situation, there will be fewer volunteers to take on active roles in the context of a cartel. The firms which, despite the higher penalties, are still willing to accept this role will likely demand some compensation in the form of a larger part of the gain, which is likely difficult to agree on. This may weaken the sense of solidarity and mutual trust, which constitute crucial elements of the agreement and, thereby, have a destabilising effect.\footnote{See further on the stability of cartel \textit{supra} Chapter 2, section 5.}

\footnotetext[6131]{most of them, and agreed on price variations and subsequently communicated the agreements to other operators. The Commission concluded that ‘[t]aking into account the many elements that define the roles of Repsol and Proas as leaders of the cartel, the basic amount each fine should be increased by 30%’. Case COMP/38710 — Biurem Spain [2009] OJ C 321/15, paras 527-536. Such increase does, however, not appear (too) high or excessive considering the essential role of these companies.}

\footnotetext[6132]{See for a similar view \textsc{w. wils}, “The European Commission's 2006 Guidelines” 30 of the online version of this publication. See also in this context \textsc{n. katyal}, “Conspiracy Theory”, 2003 (112-6) \textit{Yale Law Journal}, 1307-1398, at 1341-1346 and 1363-1367 (available at \url{http://www.yalelawjournal.org/pdf/231_5ccpbf.pdf}). This last author indeed points out that ‘[t]he disagreements about risk and payment streams […] persist at every level of the conspiracy—leaders may feel their risks are higher, so too might subordinates—leading everyone to overstate their risks in exchange for higher pay and furthering cost deterrence’.

\footnotetext[6133]{See further on the stability of cartel \textit{supra} Chapter 2, section 5.}
d. Retaliatory measures

The next aggravating factor specified in the 1998 Fining Guidelines concerned the implementation of retaliatory measures against other undertakings with a view to enforcing practices that constitute an infringement.

This circumstance is closely connected to the role of leader or instigator, in the sense that it requires a high commitment and responsibility from the undertaking to make the cartel work. Still, in contrast to the role of ringleader, threatening other undertakings with retaliatory measures or exercising pressure or coercion to ensure that the agreement is followed, also shows a significant criminal tendency.\textsuperscript{6134} This circumstance was therefore considered especially serious by the Commission. This view has also been endorsed by the European Courts, according to which the fact that ‘an undertaking which is a member of a cartel forces another member of that cartel to extend its scope by threatening that member with reprisals if it does not cooperate may represent an aggravating circumstance. Such conduct has the direct effect of aggravating the damage caused by the cartel and an undertaking which conducts itself in that way must bear a special responsibility’.\textsuperscript{6135}

This aggravating factor has not been established frequently in Commission’s decisions. In fact, the existence of retaliatory measures was only identified as a separate aggravating circumstance in three decisions. In addition, despite the serious nature of this conduct, the Commission increased the basic amount by 20% to 50% in case of retaliation or pressure.\textsuperscript{6136}

In Pre-insulated pipes (1998),\textsuperscript{6137} retaliatory measures were taken not only against members of the cartel. According to this decision, ABB orchestrated systematic efforts and retaliatory measures against Powerpipe to drive this non-cartel member out of the market. The Commission increased the basic amount of this firm’s fine by 50% for a combination of aggravating factors, namely: the role of ringleader, the adoption of retaliatory initiatives and the continuation of the infringement.

Danone’s fine in Belgian beer (2001)\textsuperscript{6138} was also increased on the basis of this aggravating factor. The Commission found in particular that Danone had threatened to destroy Interbrew on the French market if 500 000 [hectolitres] of beer were not transferred to Alken-Maes. As a result, the cooperation between Interbrew and Alken-Maes was prolonged.\textsuperscript{6139} These threats combined with the repeated conduct of Danone, led the Commission to increase the basic fine for this firm by 50%. On appeal, however, the (now) General Court found that the Commission had not sufficiently established the causal link between the threats made by Danone, on the one hand, and the extension of the cooperation between Danone and Interbrew, on the other hand. The Court, therefore, adjusted the fine and fixed the overall increase of the basic amount of the fine in respect of aggravating circumstances at 40%.\textsuperscript{6140}

In the French Beef case (2003),\textsuperscript{6141} the Commission firmly underlined in regard to the aggravating circumstances that ‘account should be taken of the fact that the farmers who were members of the

\textsuperscript{6134} See illustrating this aspect Case COMP/C.38.279/F3 — French beef [2003] OJ L 209/12, para 173.


\textsuperscript{6136} See commenting on this point D. GERADIN AND D. HENRY, “The EC Fining” 35; E. ENGELSING AND H-H. SCHEIDER, “Article 23” 1801.

\textsuperscript{6137} Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel [1999] OJ L 24/1, para 171.

\textsuperscript{6138} Case IV/37.614/F3 PO/Interbrew and Alken-Maes [2003] OJ L 200/1, paras 315-316.

\textsuperscript{6139} See more specifically, Case IV/37.614/F3 PO/Interbrew and Alken-Maes [2003] OJ L 200/1, paras 232 to 234 and 236.


\textsuperscript{6141} Case COMP/C.38.279/F3 — French beef [2003] OJ L 209/12, para 173.
farmers’ federations in question used violence in order to compel the slaughterers’ federations to accept the agreement of 24 October 2001. They also used physical force to set up mechanisms to verify that the agreement was being applied, such as the illegal “inspections” to establish the place of origin of meat. The fines were increased by 30% on three farmers’ federations for this conduct.

Finally, in Amino acids (2000), the fact that Ajinomoto repeatedly attempted to bring Sewon into a comprehensive volume agreement was taken into account by the Commission when assessing Ajinomoto’s ringleader role. In the Commission’s view ‘these actions demonstrate[d] again the active role played by Ajinomoto in the infringement and contribute to the overall assessment that it was a leader’.

As discussed in Chapter 2, in the context of a cartel, the risk of free ridding can only be minimised if other cartel participants monitor the implementation of the agreement and are willing to (illegally) enforce it by punishing the deviators. In line with economic theory, the unstable nature of cartels will prevail without credible retaliatory measures. Penalising (powerful) companies that adopt retaliatory measures makes sense because these particular participants are capable of ensuring that the illegal agreement is effectively followed by all the parties, even against their own will. There is no need to mention that firms adopting retaliatory measures against deviators bear a greater responsibility not only in the context of the functioning of the cartel but also in terms of the damage caused by the collusive activity.

e. Improper gains

The 1998 Guidelines also included the possibility to increase the fine in order to exceed the gains that improperly made as a result of the infringement as an aggravating circumstance. In order to consider such improper gains in the context of the aggravating factors, such gains should however be quantifiable.

In practice, the gains resulting from the infringement were never considered an aggravating circumstance. It may be presumed that such gains were simply impossible or too difficult to calculate. However, as discussed above, the Commission used an alternative option in order to take account of the need for fines to be deterrent, by applying a multiplier in the assessment of the gravity. This multiplier was commonly used for large companies with a significant economic capacity.

Although the improper gains deriving from a cartel were never considered in the decisions imposing fines under the 1998 Guidelines, the existence of such provision allowed the Commission to avoid situations where it was known that the fine imposed did not surpass all the gains achieved by the parties. As such, this possibility was certainly welcomed. On the other hand, since (the consideration of) aggravating and mitigating circumstances (was) were meant to reflect the individual conduct of

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6143 Ibid, para 354. This approach is, at least, remarkable taking into account Sewon’s statement. According to Sewon “despite threats and intimidation from the large producers, it resisted the allocations agreed upon between the large producers and obstructed their activities. For fear of retaliatory measures by the large producers. For fear of retaliatory measures by the large producers, Sewon tried to avoid open conflict with these producers and, as a result, at times gave the impression of being willing to cooperate on the issue of volume allocation. Sewon states that open confrontation with the large producers was nevertheless unavoidable as from the meeting of 19 May 1994 in Paris, where Sewon revealed its major increase in production capacity, causing substantial retaliatory threats from the large producers’ (para 360).
6144 See further supra section 4.3 of this Chapter.
each undertaking, the assessment of the improper gains – which is related to the question whether or not the cartel was successful – as an aggravating factor is more questionable.\footnote{As discussed below, this situation was modified under the 2006 Fining Guidelines.}

4.3.5.2. Attenuating factors

a. Passive or ‘follow-my-leader’ role

Under the 1998 Guidelines, the parties of a cartel could merit a reduction of the fine due to a passive role or “follow-my-leader”-role in the context of the cartel.

The case law shows that the Courts interpreted the passive role element in a strict manner. In order to be eligible for this attenuating circumstance, the European Courts held that the undertaking in question must have adopted a ‘low profile’, characterised by no active participation in the creation of any anti-competitive agreement or agreements.\footnote{See also for a strict interpretation of this mitigating factor, for example, Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10, paras 295-296; CFI 8 October 2008, Case T-73/04, Le Carbone-Lorraine v Commission, [2008] ECR II-2661, para 179. According to some authors, this attenuating factor was interpreted too strictly. D. GERADIN AND D. HENRY, “The EC Fining” 40.}

Moreover, the Courts clarified that the question whether such circumstance is taken into account is assessed exclusively on the basis of the individual conduct of the undertaking. The more active participation of other undertakings in the single cartel does not necessarily imply that the latter had an exclusively passive or follow-my-leader role.\footnote{Case T-220/00, Cheil Jedang Corp v Commission [2003] ECR II-2473, para 167; Case T-48/02, Brouwerij Haacht NV v Commission [2005] ECR II-5259, para 74.}

There are various factors that may indicate that a company only played a passive role in a cartel, such as, in particular, a very sporadic participation in cartel meetings compared to that of the ordinary cartel members, entering the market affected by the cartel at a late stage (regardless of the length of its involvement), or when a representative of another (active) participant makes an express declaration to that effect.\footnote{For example, Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10, paras 295-296; CFI 8 October 2008, Case T-73/04, Le Carbone-Lorraine v Commission, [2008] ECR II-2661, para 179. According to some authors, this attenuating factor was interpreted too strictly. D. GERADIN AND D. HENRY, “The EC Fining” 40.}

In practice, this factor was one the most frequently established mitigating circumstances. In particular, fines were reduced in 10 cases (out of 53) under the 1998 Guidelines. The reductions granted on the basis of this factor ranged between 10% and 50%.

In Vitamins (2001),\footnote{Case T-220/00, Cheil Jedang Corp v Commission [2003] ECR II-2473, para 168; Case T-48/02, Brouwerij Haacht NV v Commission [2005] ECR II-5259, para 75.} the Commission accepted this mitigating factor with respect to Rhône-Poulenc because this undertaking did not attend any of the cartel meetings and was not allocated an individual market share. This attenuating circumstance led to a decrease of 50 % in the basic amount of the fines of Rhône-Poulenc. In contrast, a stricter (and correct) interpretation of this circumstance was adopted in the case of Merck. Merck argued that its role was limited to following the instructions issued by Roche and Takeda and that it generally played only a subsidiary role in the...
vitamin C talks. The Commission, however, did not accept this argument and stated that Merck was 'as an active member of the cartel in the vitamin C market. Its representatives were present at several meetings of the cartel. It was involved in discussions on prices and the monitoring of sales volumes'. Eisai made the same submission with regard to the vitamin E market, which was again rejected by the Commission. This firm was seen by the Commission as an active member, which conducted most of its contacts with the European producers through Roche. The fact that independent distributors handled most of their sales in the EEA did not make it less of an active player in the cartel.6152

In *Graphite electrodes* (2001),6153 Commission noted that C/G did not attend any "Top Guy" or "Working Level" meetings, thereby taking the position of a "price follower". These mitigating circumstances merited a reduction of 40% of the basic amount of the fine. In the same case, the Commission dismissed the passive player arguments of VAW Carbon. In the Commission’s view, this firm was an active member of the cartel because its representatives were present at several "Working Level" meetings in Europe and at separate European group meetings. Furthermore, this firm was involved in discussions on prices and the monitoring of sales volumes. The Commission also rejected VAW Carbon’s arguments that it had acted under economic pressure from the other conspirators. In this regard, the Commission further observed that this fact did not relieve VAW of its own responsibility as the case could have been reported to the Commission.6154

In *Rubber chemicals* (2005),6155 the Commission concluded that the fine of General Química should be reduced by 50% due to its passive and minor role in the infringement, compared to other participants in the cartel. Elaborating on this aspect, the Commission found that General Química’s involvement was not comparable to that of the active members Flexsys, Bayer and Crompton. Not only was there no evidence of any active participation in the creation of the cartel. On the contrary, the evidence showed that its involvement was limited to being informed about and accepting the decisions reached by the others. GQ’s participation in the collusive contacts was thus significantly more sporadic, by comparison to the ordinary members of the cartel.6156

In *Speciality graphite* (2002), the Commission considered that Intech was only following the instructions of Ibiden to implement the decision taken at a higher level at the European and local meetings (in which Ibiden participated, but not Intech). In the Commission’s view, those specific circumstances justified a reduction of 40% of the basic amount of the fine of Intech for its participation in the isostatic cartel.6157

The *French beef* (2003)6158 case illustrates that, on certain occasions, the Commission applied this mitigating factor when it had no evidence of any special active involvement. In this particular case, the amount of the fine imposed on that federation was reduced by 30% because '[t]he Commission ha[d] no evidence to show that the federation representing milk producers, the FNPL, played any special part in the conclusion or the application of the agreement at issue. It would appear that the FNPL played a passive or "follow-my-leader" role in the agreement'.6159

A number of undertakings claimed in *Fittings* (2006)6160 that some attenuating circumstances (including early termination of the infringement, a minor/passive role, the absence of an effective implementation of the practices, the implementation of compliance programs, absence of benefit, difficulties in the Fittings industry) should be taken into account. These claims were all rejected, except for the minor/passive role claimed by Flowflex. In the Commission’s view, Flowflex’s involvement was not comparable to that of the active members such as IMI and Delta. The evidence showed that its involvement was limited to accepting and implementing the agreements reached by

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6159 Commission Decision in French beef, para 178.
the others. In addition, this firm was a small player, which did not take an upfront role in the agreements. The basic amount for Flowflex was therefore reduced by 10%.6161

The same reasoning was followed in Methacrylates (2006)6162 as regards Quinn Barlo. According to the decision, Barlo’s participation ‘comprised sporadic attendance of meetings which were mainly limited to Barlo being informed about the anticompetitive agreements or practices for PMMA-solid sheet. It also seem[ed] that Barlo did not participate in many of the significant multilateral meetings in which key aspects of the price agreements and anticompetitive practices were agreed’. The basic amount for Quinn Barlo was reduced by 50 %.6163

In Hydrogen peroxide (2006),6164 the fine of Caffaro was reduced by 50 % due to its passive and minor role, as compared to the other participants in the cartel. This decision only clarified that ‘Caffaro’s participation in the collusive contacts was significantly more sporadic by comparison with the other members of the cartel and limited to only two meetings relating to PBS’.6165

At first sight, it may appear logical that the limited or passive role of a cartel member is taken into account in the calculation of the fine. It is indeed true that, after all, these companies did not take the initiative to form the cartel and could thus be seen as less responsible. This reasoning is in line with the approach of the Commission which had the tendency to identify passive companies by comparing them to more active companies or to cartel ringleaders. However, it should be taken into account that even if an undertaking only adopts a passive or only follows the instructions of the ringleader, it still takes part in the collusive agreement. This not only means that it obtains gains form the infringement and causes harm to the economy and society. In addition, a cartel can only be successful when an important part of the sector is involved in the agreement. From this perspective, all cartel participants - even passive members - are essential. From this point of view, while punishing cartel leaders more strictly certainly makes sense in terms of deterrence, an undertaking that takes a passive role should not be rewarded in the form of a reduction in the applicable fine.

b. Non-implementation of the agreement

The 1998 Guidelines listed as an attenuating circumstance ‘non-implementation in practice of the offending agreements or practices’. This mitigating circumstance should be understood against the background of the settled case law concerning the evidentiary standard to establish the participation of an undertaking in an infringement. In the view of the European Courts, it is sufficient for the Commission to demonstrate that the undertaking concerned participated in meetings at which the illegal agreements were concluded, without manifestly opposing them. The fact that an undertaking does not act on the outcome of such a meeting does not relieve it of the responsibility for its participation, unless it has publicly distanced itself from the decisions taken in the meeting.6166

The Amino Acids case (2000)6167 shows that certain difficulties may arise in the interpretation of this mitigating circumstance. In this case, all the parties to the agreements argued that they systematically charged lower prices than those agreed upon and that the allocations were also substantially exceeded each year.6168 The Commission, in contrast, found that ‘an agreement restricting competition is implemented where the cartel members determine their conduct on the

6162 Case No COMP/F/38.645 — Methacrylates [2006] OJ L 322/20
6165 Ibid, paras 476-477.
6166 Joined cases C-204/00 P, C-205/00 P, etc, Aalborg Portland A/S and others [2004] ECR I-123, paras 81-86.
6168 Ibid, paras 366-375.
market according to the joint intentions expressed'. On appeal, the Court did not follow the Commission’s reasoning and stated that it was ‘clearly wrong to interpret [the non-implementation factor] as referring only to cases where a cartel as a whole is not implemented and not to the individual conduct of each undertaking’. Despite the Commission’s error in the interpretation of this mitigating factor, the Court found after a detailed examination of the case that the applicants did not demonstrate that they did not in practice implement the sales volume agreements.

Against this background, the European Courts accept that a cartel participant can be eligible for mitigation of its fine on account of non-implementation when it shows that, ‘during the period in which [it] was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, […] it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation’. In other words, it must demonstrate that it did not apply the agreements in question by adopting conduct on the market that could impede the anti-competitive effects of the infringement that were found to have occurred.

It is, however, important to bear in mind that not behaving on the market in the manner agreed upon with the competitors is not necessarily a mitigating circumstance. In fact, as the European Courts have pointed out, a firm that follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit. When a cartel participant shows that it had attempted to circumvent the terms of the agreement, it does not demonstrate that this conduct impeded the anti-competitive effects of the infringement. A different level of implementation of price fixing agreements may not be mistaken for non-implementation. In order for this mitigating factor to apply, a clear and consistent defying conduct is necessary. This view is systematically mirrored in the Commission’s practice.

For example, in the Belgian Beer cartel (2001), the Commission acknowledged ‘the evidence that the parties did not fully apply each specific agreement of the cartel. This does not mean, however, that such as cartel was not actually applied. The fact that some parts of the infringement were not put into effect is in itself not sufficient to be able to say that there is an attenuating circumstance in the above sense’. Likewise, in Zinc phosphate (2001) the Commission stated that ‘even if in the hypothesis that the parties to the cartel did not always charge the minimum prices they had agreed, it cannot be considered by the Commission as an attenuating circumstance. It is inherent in a cartel that its participants do not fully trust each other and, assuming for the sake of argument that some

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6169 Ibid, paras 380.


6174 Case T-308/94 Cascades v Commission [1998] ECR II-925, para 230. In this regard, the fact, that an undertaking has not gained any advantage from the infringement does not constitute an attenuating circumstance. CFI 16 June 2011, Case T-192/06, Caffaro Srl v Commission [2011] ECR II-3063, para 60; Case T-52/02, SNCZ v Commission [2005] ECR II-5005, para 91. The same applies when a given undertaking took part in an agreement which as such was contrary to its economic interests (Case T-192/06, Caffaro Srl v Commission [2011] ECR II-3063, para 61).

6175 Case T-224/00, Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission [2003] ECR II-2597, para 199.


companies sold under the recommended price, it simply illustrates a willingness to maximise individually the gain obtained from the unlawful agreement.\footnote{Commission Decision in Zinc phosphate, para 327.}

In Industrial and medical gases (2002),\footnote{Case COMP/E-3/36.700 — Industrial and medical gases [2003] OJ L 84/1.} Air Liquide argued that it followed an autonomous commercial policy on the market and was not influenced by agreements with its competitors, to which it never made any commitments. Furthermore, it claimed that it had often applied different prices/conditions than those agreed upon and that it had not respected the moratorium periods. The Commission, on the other hand, noted that the implementation of agreements on price increases or minimum prices/trade conditions does not necessarily require that these exact prices/conditions be applied. Undertakings that, despite colluding with their competitors, follow a more or less independent policy on the market, may simply be trying to exploit the cartel for their own benefits.\footnote{Ibid, para 443-447.}

Taking into account the (logically) strict criteria to apply this mitigating factor, the Commission only accepted its use in 2 out of 53 cases.

In particular, in Graphite electrodes (2001),\footnote{Case COMP/E-1/36.490 — Graphite electrodes [2001] OJ L 100/1, p. 1–42.} the Commission granted a reduction of 40% to C/G on the basis of its partial non-implementation of the offending agreements. According to this decision “between 1993 and 1996 C/G actually increased its sales in Europe, thereby not respecting the basic principle of the cartel of restricting sales in “non-home” markets”.\footnote{Ibid, paras 334-336.}

In Sorbates (2003),\footnote{Case COMP/E-1/37.370 – Sorbates [2005] OJ L 182/20} the Commission acknowledged that Ueno substantially exceeded the volume quotas awarded to it in the cartel meetings. In particular, it had sold each year more than the double of the volume agreed in Europe ever since 1991. In addition, Ueno developed its production capacity, which had a destabilizing effect on the cartel and caused some tensions and distrust among the cartel members. The Commission considered this behaviour an attenuating circumstance.\footnote{Ibid, para 406. The reduction granted on the basis of this factor was not specifically mentioned in the decision.}

As the European Courts and the Commission have pointed out, it is important to adopt a strict approach with regard to this mitigating factor. Firstly, the fact a cartel member has not fully followed the agreement, does not necessarily imply that the agreement in question will have a negative impact on the market. Secondly, applying this mitigating factor to the so-called cartel cheaters may have the opposite effect of promoting the adoption of collusive practices, even if such practices end up being unstable given the risk of free ridding. On the other hand, if a company can demonstrate that its behaviour was fully pro-competitive and that its behaviour made the cartel unsuccessful, the consideration of this mitigating factor may be justified.

c. Termination of the infringement as soon as the Commission intervenes

According to the 1998 Guidelines, the Commission may also have regard to the termination of the infringement as soon as the Commission intervenes. In cartel cases, this factor had little influence in the Commission’ assessment and only led to reduction of the fine (of 10% and 20%) in two decisions.

The Commission decision in Amino acids (2000)\footnote{Case COMP/36.545/F3 — Amino Acids [2001] OJ L 152/24.} shows a benevolent approach concerning the application of this mitigating factor. In this case, the undertakings had already ended the cartel at
the time of the first investigation on 11 and 12 June. The Commission explained that, if firms had not voluntarily ended the infringement before the Commission’s inspection, but only as a result of the intervention of another authority, this conduct could only constitute an attenuating circumstance if the undertaking had terminated the infringement as soon as the other authority intervened. In this case, the FBI searched the offices of ADM, Ajinomoto and Sewon in the USA on 27 June 1995. The Commission took the view that it had ‘no reason to believe that the undertakings continued the infringement beyond that date’ and for those reasons reduced the basic amounts by 10 % each. 6187

In FETTSCA (2000), 6188 the Commission assumed that the infringement ended upon the parties’ receipt of the letter dated 28 September 1992 and sent by the Commission's Directorate-General for Competition. This (presumed) termination of the agreement justified in this case a reduction of the basic amount of the fine for each of the parties by 20 %. 6189

The reasoning of the Commission to reduce fines for a clear termination of the infringement seemed to be based on the fact the harm caused to consumers by restrictive agreements is mitigated when the parties terminate their agreement earlier than they had initially planned to. 6190 However, the case law has clarified the circumstances in which this factor should (not) be taken into account. In particular, in Tokai Carbon, 6191 the (now) General Court held that this attenuating circumstance can only exist when the undertakings in question are encouraged to cease their anti-competitive conduct by the interventions in question. The purpose of that provision is to encourage undertakings to terminate their anti-competitive conduct as soon as the Commission launches an investigation. Therefore, the fine cannot be reduced on that basis when the infringement has already come to an end before the date on which the Commission first intervened. A reduction in such circumstances would duplicate the reduction for duration in calculating the fine. 6192 Even if, in the past, the Commission regarded the voluntary termination of the infringement as an attenuating circumstance, the very serious character and illegal nature of cartel infringements indicates that this lenient practice should be abandoned. 6193

This stricter, but more adequate approach is for instance reflected in Plasterboard 2002. 6194 In this case, Gyproc claimed that it had ended the infringement the moment the Commission intervened and that it had terminated all information exchanges with Mr [D, BPB] and all collusive practices on the German market upon the Commission’s first intervention. The Commission, however, rejected this claim and pointed out that given the flagrant character of the conduct, the conduct was simply expected to cease immediately after the inspections. 6195

6187 Ibid, paras 381-384.
6189 Ibid, para 188.
6190 Ibid.
6191 Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, SGL Carbon v Commission [2005] ECR II-10. This case concerned the appeal of the Commission decision in Speciality Graphite. In this case a number of companies (LCL, Toyo Tanso, Tokai, Ibiden and Intech) claimed that the cartel in the isostatic market came to an end prior to the intervention of the Commission and that this should be regarded as an attenuating circumstance when setting the fines. The Commission rejected this claim because this factor had already been taken into account in the assessment of the duration of the infringement. Case C.37.667 — Speciality Graphite [2006] OJ L 180/20, para 502.
6192 Referring to Case T-50/00, Dalmine SpA v Commission [2004] ECR II-2395, paras 328-330. In this regard the Court added that ‘[i]n any event the Commission is under no obligation in the exercise of its discretion to reduce a fine for the termination of a manifest infringement, whether that termination occurred before or after its investigation. In the present case, since the fixing of prices in the isostatic graphite sector was unquestionably a manifest infringement, rightly described by the Commission as ‘very serious’, Intech is therefore wrong to criticise the Commission for not reducing its fine because it terminated its involvement in that infringement before the investigation began.
6195 Ibid, paras 568-569.
Similarly, in *Sorbrates* (2003)\(^{6196}\) the Commission rejected Daicelis’ argument that its fine should be reduced for early termination. The Commission explicitly stated that the unilateral finalisation of the infringement by the undertakings before the Commission intervened could not be construed as constituting an attenuating circumstance.\(^{6197}\)

The reasoning of the Court – as followed by the Commission – is more coherent with harm considerations. There is no reason to reduce fines in case of unsuccessful or shorter (but still successful) cartels. Qualifying the early termination of a falling cartel as a mitigating factor may have the opposite effect of encouraging firms to “try and see” whether or not the cartel works. On the other hand, it may also be counterproductive to reduce fines for secret cartels that are terminated (only) when they have been discovered. In this regard, it should be taken into account that the Commission has to invest an extremely high amount of resources to detect cartels. The fact that cartel members put an end to their conduct once discovered is therefore only logical. It can thus be concluded that applying a mitigating factor in case of termination of the cartel is at least controversial from a deterrence perspective. Undertakings should not have the opportunity to form secret arrangements knowing that they could get the benefit of a mitigating circumstance if they stop their conduct once discovered.

On the other hand, it makes sense to consider the continuation of the infringement after the intervention of the Commission as an aggravating factor.\(^{6198}\) The fact that certain companies decide not to terminate the infringement after the Commission’ inspections show that even if they know that they will be fined, the (gains from the) infringement may most likely compensate this punishment. By penalising such reckless companies with heavier fines, this type of behaviour is discouraged from the very outset, which, at the same time, allows preventing important damage produced by the continued infringement.

d. Existence of reasonable doubt

Before the adoption of the 1998 Guidelines, the fact that companies were unaware of the unlawful nature of their restrictive conduct sufficed to avoid a sanction. Under the 1998 Guidelines, the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct did indeed constitute an infringement was regarded as a mitigating circumstance.

In practice, this factor has been accepted in only two decisions, and led to the reduction of the basic amount of the fine by between 15% and 20%.

In *Greek Ferries* (1999),\(^{6199}\) the Commission accepted that the usual practice of fixing fares in Greece through a consultation of all domestic operators (whereby they were expected to submit a


\(^{6197}\)Ibid, para 381.

\(^{6198}\)This possibility has in fact also been confirmed by European Courts which explained that ‘the fact that terminating an infringement after the Commission has first intervened may be regarded as a mitigating circumstance does not mean that continuing an infringement in such a situation cannot be regarded as an aggravating circumstance. An undertaking’s reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case. Since the Commission cannot therefore be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance, the fact that it may classify such termination as a mitigating circumstance in one particular case cannot deprive it of its power to find that such continuation constitutes an aggravating circumstance in another case. T-23/99, *LR af 1998 v Commission* [2002] ERC II-1705, para 324.

common proposal) and the ex post decision of the Ministry for the Merchant Navy, may have created some doubt among the Greek companies as to whether the price fixing consultation did indeed constitute an infringement. Based on these considerations, the Commission reduced the fines by 15% for each undertaking.

A similar situation occurred in *Luxembourg Brewers* (2001). In this case, the Commission took the view that possibly Luxembourg case law, which raised questions about the validity of certain beer ties, created doubts during a certain period (i.e. since the agreement was concluded, until the date when the case law was overturned in March 1996), about whether the restrictions relating to the mutual observance of beer ties constituted an infringement. Considering this circumstance, the Commission reduced the fine imposed on each undertaking by 20%.

Lowering fines on the basis of this factor proved, however, very exceptional. From the very outset of the Commission’s fining practice, it underlined the illegal nature of cartel agreements. Companies that took part in this type of agreement were, as a general rule, well aware of their illicit conduct. Such awareness is, furthermore, absolutely clear when parties engage in secret agreements and adopt other measures to avoid detection.

For example in *Amino acids* (2001), all the members of the cartel concluded agreements to fix prices, share markets and to exchange information. In its decision, the Commission underlined that “all participants in the cartel were aware of the illegality of their conduct. For example, on 8 December 1993, regarding the submission of monthly sales figures, ADM told the others that they had “to watch their telephones and to be very careful”. The cartel members also took precautions to disguise the fact that they met and the purpose of their meetings.”

Taking into account the long standing practice of the Commission, which systematically underlines the illegal and very serious nature of cartel agreements, lowering fines on the basis of this factor would undermine the effectiveness of not only the Commissions fining practice, but also of its whole anti-cartel enforcement policy. Nevertheless, it can be argued that the existence of national legislation encouraging (or even imposing) competition restriction may at time induce certain doubts. In these circumstances, the specific measures should be carefully evaluated in order to prevent that companies (mis)use such provisions to justify their illegal behaviour.

### e. Negligence

Infringements committed by negligence or unintentionally could justify a reduction under the 1998 Guidelines.

This mitigating factor was closely linked to the existence of doubts as to the illegality of the conduct in question. Just like the factor regarding the existence of a reasonable doubt, the mitigating circumstance concerning negligence only played a marginal role in practice as it was never considered by the Commission to lower fines. On the contrary, practically all the Commission decisions strongly underline the intention of cartel members to commit deliberate infringements. In line with the considerations made above, a very restricted approach as with regard to this factor is necessary to preserve the effectiveness of the Commission’s (fining) policy.

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6200 *Ibid*, para 163.
6204 See also further Chapter 2.
f. Cooperation outside the scope of the Leniency Notice

Cartel members could also obtain a reduction of the basic amount of their fine when they provided effective cooperation (beyond their legal obligation to do so) in the Commission’s investigation, but such cooperation fell outside the scope of the leniency system. 6205

Under the 1998 Guidelines, this mitigation factor was accepted in eight cases. This factor was commonly applied when a company provided compelling evidence that enabled the Commission to establish new or additional facts liable to extend the gravity or the duration of the infringement. 6206

For instance, in *Industrial tubes* (2003), 6207 the Commission applied an attenuating factor to Outokumpu for cooperation outside the 1996 Leniency Notice. This firm was the first to disclose the whole duration of the cartel in the industrial tubes sector. Based on the evidence obtained prior to Outokumpu's leniency application, the Commission was only able to establish a continuous infringement of four years. The information provided by Outokumpu's allowed the Commission to prove the existence of a long-term infringement of twelve years and ten months. Therefore, the basic amount of Outokumpu’s fine was reduced by a lump sum so that it was the same as the hypothetical amount of the fine that would have been imposed on Outokumpu for a four year-infringement. 6208

Likewise in *Choline chloride* (2004), 6209 UCB was the first undertaking to voluntarily inform the Commission of the fact that – in addition to the global meetings – the European producers had held a number of meetings at the European level. The evidence provided by UCB on these meetings allowed the Commission to determine the duration of the infringement as five years and eleven months. Without the information provided by UCB, the Commission could have only established the duration of the infringement for a period of one year and six months. In order to reward UCB for this increase in the duration, the Commission granted this firm a reduction for attenuating circumstances. 6210

Granting a reduction of the basis of this type of cooperation is as such in line with the rationale behind the leniency programme, according to which effective and useful cooperation should be rewarded. Cooperation and information on the basis of which the gravity or the duration of the infringement can be extended is extremely valuable as it enables the Commission to punish other undertakings more in accordance with the infringement. By reducing the fine on the basis of this mitigating factor, the Commission ensured that applicants remained motivated to provide effective cooperation even if the leniency system could not be applied. 6211

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6205 See for a detailed analysis of the Commission’s leniency policy *supra* Chapter 8.
6206 In this regard it should be noted that the so-called “partial immunity provision” was only introduced in point 23 the 2002 Leniency Notice. The 1996 Leniency Notice did thus not provide for any specific reward to a leniency applicant that discloses facts previously unknown to the Commission and affecting the gravity or duration of the cartel. In order to avoid that companies offering the Commission effective cooperation would be punished more severely than in a situation where they had not provided their cooperation, the Commission rewarded such cooperative behaviour in the form of a mitigating factor. See further *supra* Chapter 8, section 4.3.
6208 Ibid, paras 384-387.
6210 Ibid, para 218.
6211 After the adoption of the 2006 Leniency Notice, companies could benefit in this regard of the application of the so called "partial immunity" provision. The purpose of this provision is to reassure applicants that they will not suffer from their own submissions (meaning that their fines will not increase), but it also aims at encouraging them to provide all conclusive evidence as early as possible in the procedure in order to benefit from any extra reduction before others do. See further *supra* Chapter --.
4.3.6. The application of the turnover cup

Article 23(2) of Regulation 1/2003 provides that ‘[f]or 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’.

In the Commission’s decisions applying the 1998 Fining Guidelines, this requirement led to a limitation of the fine for one or more undertakings in 19 cartel cases. The frequent application of the 10% cap inevitably brings us to the obvious question whether there is a risk that European competition law imposes ceilings on the level of sanctions that limit the ability of the Commission to impose deterrent sanctions. In all the cases in which the 10% maximum was applied, it was in effect possible that the final fines imposed were considerably below an optimal deterrent level.

4.3.7. The application of the (1996 and 2002) Leniency Notice

After the amount of the fine has been calculated, and eventually reduced below the 10% threshold, the Commission applied its leniency policy. As has been held by the European Courts, the application of the Leniency Notice after capping the fine (when this was necessary) ensured that the leniency programme is fully effective. If the amount of the fine surpassed substantially the 10% limit before the application of leniency and that limit could not be applied immediately, undertakings would be less motivated to cooperate under programme since the final fine would be reduced to 10% in any event, with or without the undertaking’s cooperation.

As the Table illustrates, immunity or reductions in fines were granted under the European leniency system in a great majority of cases.

There is no need to mention that granting such important discounts in fines had a significant (negative) impact on the final level of the penalty and thus on deterrence. However, the use of leniency also clearly has major advantages, the most important one being the facilitation of the collection of evidence through targeted inspections in undertakings’ premises. In addition, a well-designed leniency system makes it more difficult for companies to reach an agreement and to develop a stable organizational structure for their agreement to succeed. Leniency also increases uncertainty and makes it more difficult for cartel participants to reach an agreement. In line with the conclusions drawn in Chapter 8, it can be affirmed that the advantages of leniency clearly exceed the negative effect of the regime on penalties.

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6212 In this regard the decisions imposing fines simply mention that the fines on the undertakings concerned will be set so as not to exceed the permissible limit.
6213 This question is further assessed below.
6214 It should be noted that this approach is also followed under the 2006 Fining Guidelines (infra).
6216 For a more detailed assessment of the application of the Commission’s leniency programme see Chapter 8.
6217 See further in this context Chapter 8 and W. WILS, “Leniency” 26-27, of the online version of this contribution; W. WILS, “The Commission Notice” 130; M. MOTTA AND M. POLO, “Leniency programs and cartel prosecution”, 2003 (21) International Journal of Industrial Organization, 347-379; C. MARVÃO “The EU Leniency Programme and Recidivism”, 2016 (48-1) Review of Industrial Organization, 1-27. This last author even comments that ‘there is some evidence that firms can “learn how to play the leniency game”, either learning how to cheat or how to report, as the reductions given to multiple offenders (and their cartel partners) are substantially higher’.
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4.3.8. Ability to pay considerations

According to the 1998 Guidelines, the fine could be reduced to take into account the undertaking’s real ability to pay in a specific social context.

The European Courts have clarified that the Commission is not required, when determining the amount of the fine, to take account of an undertaking’s financial losses. The recognition of such an obligation would in fact amount to conferring an unfair competitive advantage on undertakings that are less adapted to the conditions of the market. Furthermore, it is important to keep in mind that the possibility to take into account an undertaking’s real ability to pay, within the meaning of point 5(b) of the 1998 Guidelines, only applied in a ‘specific social context’ consisting of the consequences that payment of the fine would have, in particular, by leading to increase in unemployment or deterioration in the economic sectors upstream and downstream from the undertaking concerned. The exceptional consideration of the inability to pay policy was reflected in practice, as the Commission only accepted this claim in one case.

In French beef (2003) the Commission observed that beef consumption had been falling for some ten years. In addition, certain measures had been adopted to regulate the beef market and restore balance. Finally, at the time the agreement was concluded, the slaughterhouse entry prices farmers were receiving for cattle had fallen again by some 15% to 20% – despite the adjustment measures. Taking account of the specific economic context of this case, which went beyond a straightforward collapse in prices or the presence of a well-known disease, the fines were to be reduced by 60%.

In the context of ‘inability to pay’, the Commission decision in Electrical and mechanical carbon and graphite (2003) also deserves some attention. In this case, SGL made detailed submissions to the Commission in an attempt to establish its inability to pay. In the view of the Commission, the financial situation of SGL was, however, not so critical as to justify, by itself, an adjustment of the fine. Furthermore, while SGL mentioned a number of redundancies in the last couple of

6219 As it is examined below, the requirements to grant a reduction in fines on the basis of the inability to pay of a given undertaking were refined by the European Courts under the 2006 Fining Guidelines.
6221 Ibid, para 182. The Commission added in its decision that ‘the fall quickened after the first “mad cow” crisis, in 1996, and again after the second crisis, in 2000. Over the whole of 2001 consumption fell by 7% as compared with 2000. The difficulties in France in the second half of 2001 came at a time when the sector was already weakened by several hard years’.
6222 Ibid, para 183. See also paras 23-27. The decision specified that ‘the intervention measures provided for in the CMO were adapted in the course of 2001, widening their scope in order to deal with a market that was still “disrupted” and “unstable”, a special scheme applied in the period from July 2001 to March 2002, under Article 38(1) of the CMO. The French authorities made extensive use of these mechanisms. They were the first to take advantage of the special scheme in force from July 2001 to March 2002; two thirds of the purchases made under that arrangement took place in the period covered by the agreement at issue. In 2001 and 2002 the Commission also authorised France to grant aid to the farmers most seriously affected. […] The authorising decisions emphasised in particular that what the beef sector was facing was not merely a short-term fall in prices or the presence of a well-known disease. Factors such as the loss of consumer confidence linked to the fear of Creutzfeld-Jakob disease, which affected human beings, had created a specific context; that context ought to be taken into account in this case too’.
6225 Ibid, para 353. In coming to this conclusion, the Commission took particular account of certain recent figures publicised by SGL itself, according to which ‘SGL’s profit from operations rose to EUR 18 million in the first half of 2003, up from EUR 8.1 million in the first half of 2002. SGL reduced its net financial liabilities by EUR 22 million in the first half of 2003 and is expecting additional cost savings of around EUR 10 million by the end of 2003. Those figures, achieved in a difficult business climate, show that SGL has good operational prospects’. This finding was held
years, it had not shown that those redundancies did not occur as part of the company’s normal efforts at achieving greater efficiencies. The Commission concluded in this regard that this firm had not presented any arguments to claim that its alleged inability to pay had to be seen in a specific social context. Still, and rather remarkably, the Commission did admit (under the heading “other factors”) that SGL was ‘both undergoing serious financial constraints and had relatively recently been subject to two significant fines by the Commission for participation in [simultaneous] cartel activities’ and reduced the fine by 33%. This approach may arguably be qualified as incoherent. Although the inability to pay of the company was correctly rejected, the final fine was reduced by reference to the financial difficulties of the firm combined with the imposition of a different fine. This ambiguous approach is undesirable for two main reasons. First, as commented below, ability to pay considerations should only have been admitted in very specific and exceptional circumstances. Second, when a company has been involved in multiple infringements, it may obtain benefits from each infringement. Therefore, imposing separate fines for separate infringements is necessary to deter companies from forming cartels.

This strict interpretation of the inability to pay doctrine is fully in line with the whole rationale behind competition law. In particular, the concept of effective competition implies, *inter alia*, that less efficient market players will eventually have to leave the market. When companies take part in cartels, such inefficient market players may be able to survive longer in the market. On the other hand – as illustrated in the *French Beef* decision – taking into account the ‘inability to pay’ consideration could be justified under special and exceptional circumstances. Indeed, a fine that exceeds a company’s ability to pay in a specific economic context, resulting in default and finally in bankruptcy, becomes ineffective.

### 4.4. Assessment of the 1998 calculation method

The calculation of fines according to the 1998 Guidelines essentially involved three key steps. First, the basic amount was determined by reference to the classification of the infringement as minor, serious, or very serious. Such classification was made on the basis of the assessment of the nature of the agreement, its actual impact on the market – where this could be measured – and the size of the relevant geographic market. For infringements involving several undertakings, such as cartels, the Commission grouped the companies on the basis of their turnover in order to reflect their size and weight in the infringement. Next, an increase was applied in order to take account of the duration of the illegal behaviour. Such an increase amounted generally up to 10% per year, except for infringements of short duration (*i.e.* infringements lasting less than one year). Second, a negative or positive percentage was applied to the basic amount to reflect the existence of aggravating and/or mitigating factors. Finally, the 10% turnover cap was applied, leniency reductions were granted if applicable, and inability to pay considerations were assessed. This calculation method can be expressed with the following formula:
Amount of the fine = amount determined in respect of the gravity (above € 20 million + percentage in respect of duration (10% x year) + percentage figure reflecting any aggravating circumstances – percentage figure reflecting any mitigating circumstance.6229 6230

As this formula shows, under the 1998 Guidelines the Commission abandoned the earlier practice of calculating fines at a very low percentage of the relevant turnover and opted for a more straightforward approach.6231 Although the 1998 Guidelines could be compared to the practice of the Commission throughout the 1990s, in the sense that fines were set by reference to the general gravity of the agreement as well as to the specific weight of each company,6232 the new methodology is far more precise and structured. Moreover, and most importantly, the Commission no longer used a small percentage of the turnover of the undertaking in question as a starting point. Instead, the starting amount was entirely based on the classification of the infringement on the basis of its gravity. From this perspective, the 1998 Guidelines could indeed be described as a qualitative approach based on legal categories.6233

With respect to the classification of the agreement, the Commission’s practice showed that not all the factors mentioned in the Guidelines (i.e. the nature of the agreement, its actual impact on the market in which it could be measured, and the size of the relevant geographic market) had the same weight in the assessment that it conducted to classify the infringement. The analysis of the Commission decisions imposing fines showed that the factor regarding the nature of the infringement became decisive to qualify restrictions as minor, serious or very serious.6234 This finding is not only supported by case law6235 but also by the fact that the Commission’s 1998 Guidelines were quite specific in listing the types of infringements that could be included in each of the three categories, even if such list was not exhaustive.6236 According to the Guidelines, ‘[very serious infringements] generally involve[d] horizontal restrictions, particularly ‘price cartels and market-sharing quotas, or other practices which jeopardized the proper functioning of the single market, such as the partitioning of national markets’.6237 The different categories of infringements

6229 The final adjustments (namely, the reductions granted on the basis of the leniency programme, the application of the 10% turnover cap and ability to pay consideration) do, however, not form part of the essence of the Commission’s fining methodology and are therefore not considered in this formula.
6230 See also establishing a similar or comparable formula: P. MANZINI, “European Antitrust in Search” 10; W. WILS, “The Commission’s New Method” 257; D. GERADIN AND D. HENRY, “The EC Fining” 11.
6231 W. WILS, “The Commission’s New Method” 256-258. See also commenting on this modification e.g. L. MCGOWAN, “At the Commission’s Discretion” 651-652; D. GERADIN AND D. HENRY, “The EC Fining” 8. According to these last authors ‘the 1998 Guidelines are a manifestation of the fact that the Commission has uncoupled its reliance on turnover figures in order to set the fine’. 6233 Some have indeed argued that the 1998 calculation formula could be seen as a codification of the Commission’s fining practice in the early 1990’s. See e.g. L. MCGOWAN, “At the Commission’s Discretion” 652; J. CONNOR, “Cartel Fine Severity and the European Commission: 2007-2011”, 2013 (34) ECLR, 58-77, at 5-6 of the online version of this article available at http://ssrn.com/abstract=2249010 (hereafter: J. CONNOR, “Cartel Fine Severity”’); C. HARDING AND J. JOSHUA, Regulating 240-252; E. L. CAMILLI, “Optimal and Actual” 29. As pointed out below, such comparison is however not fully accurate.
6234 E. L. CAMILLI, “Optimal and Actual” 29. This method has also been intensely criticised. See e.g. J. JOSHUA AND P. CAMESASCA “EC fining policy”. These authors criticise this qualitative approach by arguing that the guidelines essentially grant unfettered discretion to the Commission in setting cartel fines and that it was virtually impossible to ascertain the starting point for cartel fines.
6235 See further supra section 4.3 of this Chapter.
6236 Ibid.
6237 See also stressing this point E. L. CAMILLI, “Optimal and Actual” 29.
6238 These classification of restrictions has been criticised by some. See e.g. R. RICHARDSON, “Guidance without” 371. According to this author, the Commission ‘maintained a high degree of discretion in the Guidelines by its use of fluid language and ill-defined categories’. However, and more surprisingly, he suggested that the Commission should have provided ‘clearer examples and more concrete tests in the Guidelines’. It is however, difficult to see how the examples
could, in principle, be linked to a presumption of their potential or likely impact on the market. Violations which were classified as minor (commonly on the basis of their nature), were presumed not to be very harmful, those defined as serious were more damaging, and those qualified as very serious were detrimental to the market. In the case of cartels, it appears that both Commission and Courts share(d) the view that, by their very nature, cartels produce(d) the most damaging effects on the economy and had to be almost by definition classified as very serious infringements under the 1998 Guidelines. This statement is reinforced by the fact that the Commission was only required to take account of the impact or the effects of the agreement when it (they) was (were) measurable. The examination of the decisions imposing fines in cartel cases demonstrated that the Commission avoided thoroughly analysing the concrete negative effects of cartel on the market and instead referred to more general assumptions.

Following the reasoning above, one may argue that the 1998 calculation method, according to which the infringement was classified on the basis of its gravity, was meant to reflect the (presumed) economic harm caused by the infringement or its economic importance. In practice, once an infringement had been categorised as very serious according to its gravity, the start amount could be set at (at least) the lowest level of the lump sum figure. The methodology of presumptions of likely harm does, in principle, seem appropriate as the harm of the agreement constitutes a proper starting point for calculating fines. However, this calculation method based (mainly) on the categorisation of the restrictions according to their nature entails an important shortcoming from a more economic point of view. In particular, this approach is not necessarily economically linked to any kind of proxy or quantitative measure, which may better reflect the harm resulting from the infringement (such as the undertakings’ turnover in the relevant market to which the infringement related). Taking this aspect into account, it is indeed difficult to see – at least at first sight – how a calculation method based on a flat rate approach or a specific range of fines which were assigned to specific categories of agreements, could enhance deterrence. In this regard, it has even been argued that

specified in the Guidelines could be more concrete. Providing an exhaustive list of categories of infringements is in addition an unfeasible task.

This interpretation is also in line with the concept of object restriction as examined in Chapter 4.

This aspect was also recognised when the 1998 Guidelines were replaced by the 2006 methodology. In fact, in its Competition Policy Newsletter, (a representative of the Commission) affirmed that since cartels must be classified as very serious by their very nature in line with the case-law, the classification system of the 1998 Guidelines was thus largely unnecessary. H. DE BROCA, “The Commission revises” 1.

Fining Guidelines 1998, Section 1 A, first indent. See also pointing out this aspect e.g. E. L. CAMILLI, “Optimal and Actual” 29; R. RICHARDSON, “Guidance without” 366. This last author also criticised this approach by (simply) stressing the need for the Commission ‘to conduct a full economic analysis of infringing behaviour and its effects, and to adjust fines according to the infringement's economic effects’. The practical implications of such an approach are however not further considered by this author. Conducting an individual full assessment of the effects of an agreement is not only extremely costly but often not viable in practice. See further infra section 5.4 of this Chapter.

See further supra section 4.3 of this Chapter. See also P. MANZINI, “European Antitrust in Search” 10-11.

In this context it should be recalled that the optimal sanction formula can be expressed in the following terms: Harm/gain x duration x (1/probability of detection).

See also stressing this limitation E. L. CAMILLI, “Optimal and Actual” 29.


E. L. CAMILLI, “Optimal and Actual” 29. According to E. L. CAMILLI ‘[t]he reference to the nature of the infringement, rather than clearly to the impact, makes the achievement of the deterrent effect a matter of chance’. See also in this context M. VAN OERS AND B. VAN DER MEULEN, “The Netherlands Competition Authority and its Policy on Fines and Leniency”, 2003 (26-1) World Competition, 25-52, at 30 (hereafter: ‘M. VAN OERS AND B. VAN DER MEULEN, “The Netherlands Competition Authority“’). These authors comment that the categorisation approach was inappropriate according to the Dutch Competition Authority, which even refused to base its Fining Guidelines on the Commission system given its shortcomings.
– depending on the circumstances of the case – an infringement classified as minor on the basis of its nature, may produce more harm in the market than a very serious infringement. This idea can be illustrated with the following example: a vertical (minor) restriction between parties that occupy a very important position in the market can potentially cause more damage than a horizontal cartel when its participants only have a very small market share. Arguably, fines calculated based on a lump sum system for each category could lead to heavier fines for antitrust infringements with a limited real impact on the market, while infringements with a very broad negative impact would remain mildly punished.\(^6^2\)\(^{46}\) In other words, the (mere) lump sum system failed to take into account (even in a mere approximate or imperfect manner) the economic importance of the infringement as a whole as well as the relative weight of each undertaking that had participated in it.\(^6^2\)\(^{47}\)

The Commission appeared to be aware of this shortcoming and attempted to correct it by developing a number of techniques.\(^6^2\)\(^{48}\) First, in a few decisions, cartels were qualified only as serious infringements – instead of being seen as very serious infringements – due to the limited size of the affected market and/or the lack of concrete effects of the infringement.\(^6^2\)\(^{49}\) As a result, the Commission was able to fix the starting amounts below the €20 million stipulated for very serious infringements.\(^6^2\)\(^{50}\) This approach was, however, abandoned in the last years of application of the 1998 Guidelines.\(^6^2\)\(^{51}\) Next, the Commission’s decisions show that although the size of the relevant geographical market was not relevant to classify restrictions, these factors were nonetheless taken into account in the calculation of the fine.\(^6^2\)\(^{52}\) Finally, the Commission also grouped the different companies into categories of comparable turnover to match the starting amounts for each undertaking with their size and financial capacity. However, the Commission had a wide margin of discretion to choose a basis as a point of comparison.\(^6^2\)\(^{53}\) Although most commonly, the turnover of the undertakings in the relevant geographic area was the key figure in this assessment, this was not

\(^{62}\)\(^{46}\) See also P. MANZINI, “European Antitrust in Search” 11. In the view of this author the 1998 method also demonstrated the difficulty of using he harm based approach. C. VELJANOFSKI, “Cartel Fines in Europe–Law, Practice and Deterrence”, 2007 (1-30) World Competition, 65–86, at 79 also available at http://www.emmanuelcombe.org/velja.pdf (hereafter: “C. VELJANOFSKI, “Cartel Fines”). This commentator strongly criticised the Commission’s fining policy on the basis that ‘EU antitrust fines were not based on the economic gain of violator or the economic losses imposed on those harmed. According to him, they were “an arbitrary administrative figure based on the gravity of the offence with adjustments”

\(^{62}\)\(^{47}\) This shortcoming was in fact acknowledged by a Commission staff member in 2006 when the new Fining Guidelines had already been adopted. H. DE BROCA, “The Commission revises” 1; See also e.g. E. ENGELSGING AND H-H. SCHIEDER, “Article 23” paras 4-23-104). The Commission’s tariff system with its categories and absolute upper and lower limits has the advantage of simplicity; however it is isolated from the effects of the infringement on the market and the position of the infringing undertaking on this market.

\(^{62}\)\(^{48}\) See also accepting this approach E. ENGELSGING AND H-H. SCHIEDER, “Article 23” paras 4-23-105 to 4-23-107.

\(^{62}\)\(^{49}\) See further Table 2 and section 4.3 of this Chapter. In this context, it has been rightly commented that this approach emphasised the difficulties of a (pure) classification system. See E. L. CAMILLI, “Optimal and Actual” 30. This author also commented in this regard that ‘the strict application of the Guidelines would have brought about excessive fines compared with the dimension of the firms involved, thus the Commission needed to overrule the qualitative criteria that itself puts’. This statement is, however, not sufficiently accurate since, according to the Guidelines the Commission could have regard to different factors to classify an agreement on the basis of its gravity. By categorising cartels as serious agreements the Commission was thus not overruling its own Guidelines.

\(^{62}\)\(^{50}\) See also commenting on this “correcting” mechanism H. DE BROCA, “The Commission revises” 1; E. L. CAMILLI, “Optimal and Actual” 30. This commentator observed that without such tool ‘the Guidelines would have brought about excessive fines compared with the dimension of the firms involved’.

\(^{62}\)\(^{51}\) This was, inter alia the result of the view of the European Courts that cartels should be classified as very serious infringements by their very nature. See supra section 4.3 of this Chapter.

\(^{62}\)\(^{52}\) Ibid.

\(^{62}\)\(^{53}\) In fact, the basis for comparison to divide the companies into different groups, and thus to set one basic amount for each group, varied considerably depending on (the circumstances of) the case. These factors include: undertakings’ worldwide turnover, turnover in the product market in question (worldwide, or in the EEA) market share (national, worldwide or EEA), and total market size (worldwide or EEA). See further supra section 4.3 of this Chapter.
always the case. At times the Commission also grouped undertakings based on their absolute size. Arguably, differentiating the fine among groups of cartel participants without using a point of comparison that bears a link with the role of the company in the infringement, isolated the fine from the actual economic impact of the participation of each company in the infringement. As a consequence, an insufficient level of fines was imposed on the undertakings that had caused a large part of the harm leading to under-deterrence.

In practice, after grouping companies, the Commission applied a multiplier to take account of the effective economic capacity of firms to cause significant damage to other operators, in particular consumers. There is no need to mention that such multiplier had the effect of enhancing the deterrence of fines. However, the application of a deterrence multiplier also suggests that – the

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6254 See for instance the Case COMP/E-2/37.978 — Methylglucamine [2004] OJ L 38/18 in which it found that there was no need to classify the cartel member in different groups to take account of the effective economic capacity. This finding was based on the fact that this case involved only two undertakings, which by definition were both indispensable for the working of the cartel.

6255 See criticising this practice e.g. R. RICHARDSON, “Guidance without” 366-367. This author commented that the grouping method [‘gave’ discretion to the Commission without clearly setting out the circumstances in which it will be used, and exactly what tests it will employ. The Commission should make it clear whether it intends to look at market share of undertakings and/or turnover, or on what other basis it will look at “economic capacity”. The Commission, in preserving its discretion, is almost inviting appeals from undertakings, once fined, to argue against the level of their fine on various economic grounds’. Despite this critique, as commented above, this practice was approved by the European Courts. In fact, according to the case-law, the Commission was not required to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure that when fines are imposed on a number of undertakings involved in the same infringement, the final amounts of the fines reflect any distinctions in terms of their overall turnover or their turnover in the relevant product market. In this context, the European Courts have held that ‘[i]t is permissible to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. It follows that it is important not to attribute to any of those figures a significance which is disproportionate in relation to the other factors relevant to an assessment and, consequently, that an appropriate fine cannot be fixed merely by a simple calculation based on the total turnover’. Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, para 121; Case 183/83, Krupp v Commission [1985] ECR 3609, para 37; T-77/92, Parker Pen v EC Commission ECR [1994] II-549, para 94. Moreover, in the Courts’ view, the Commission is not obliged to take into account the relationship between the total turnover of an undertaking and the turnover produced by the goods, which are the subject matter of the infringement, when it assesses the gravity of an infringement.

6256 This point of reference has been qualified as ‘is misleading, since it has not direct link with the role in the infringement’. E. L. CAMILLI, “Optimal and Actual” 30. On the other hand, it is important to highlight that although the 1998 Guidelines did not provide that fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover in the relevant market. However, nor do they preclude the Commission from taking either

6257 This view was accepted by the Commission by the time of the reform of the Guidelines. See H. DE BROCA, “The Commission revises” I. See criticising the grouping practice e.g. C. VELJANOVSKI, “Cartel Fines” 22 of the online version of this article. C. VELJANOVSKI even comments that ‘[t]he 1998 Penalty Guidelines [was] an attempt to adjust the arbitrary initial fine based on the gravity of offence for factors which suggest that the harm an individual cartelists imposes is higher because it is a relatively large undertaking’.

6258 This practice of the Commission was criticised on the ground that it had not been established in the 1998 Guidelines. More precisely, it has been argued that ‘[t]he imposition of a multiplier for deterrence is again unpredictable and seems to lack any coherent underlying rationale. The unpredictability is not helped by the fact that the concept of a multiplier for deterrence is nowhere to be found in the Guidelines’. J. KILLICK, “Is it now time” 10. See also in the same line, E. L. CAMILLI, “Optimal and Actual” 30; This view is however not fully justified as Section 1A of the Guidelines stated that ‘generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law’. Still, it should be accepted that it was desirable to formally incorporate this calculation step in the fining methodology. As it is analysed below, this practice was formally incorporated under the 2006 Fining Guidelines. See further commenting on this practice F. ARBAULT, “La politique” 4.
Commission presumed that – the basic amount calculated without the multiplier did not suffice to attain deterrence. This tool was thus meant to correct this deficiency.

The 1998 Guidelines also elaborated on the concept of duration. The Commission distinguished between infringements of (i) short duration (in general less than a year, with no amount increase); (ii) medium duration (in general 1-5 years) which increased the amount determined for gravity by up to 50% and (iii) long duration (in general more than 5 years) which involved an increase of up to 10% per year.

Compared to the situation preceding the adoption of the Guidelines, specifying the clear impact that the duration of an infringement had on the calculation of fines was certainly an improvement (at least in term of transparency). However, the duration factor was arguably not directly proportional or correlated to the potential negative impact of the restriction on the market and was, therefore, insufficient from an economic point of view. Assuming that the intensity of the infringement remains stable, an infringement lasting two years will cause approximately double the harm of an infringement lasting merely one year. An increase of the basic amount by up to 50% for infringements of medium duration does not properly reflect the potential harm caused. Following the same logic, applying a duration factor of 10% per year for long-term infringements is even less effective. In addition, there is no need to point out that according to the 1998 rule for duration, medium infringements were more heavily fined (on the basis of their duration) than long infringement. Or, in other words, the longer the infringement lasted, the lesser the fine was increased. This approach was not only ineffective but also unfair for the undertakings involved. In order to avoid this (discriminatory) situation, the Commission decided to disregard its own Guidelines and apply a 10% duration increase per year for all types of infringements, regardless of their classification according to their duration. Compared to the optimal fine formula in which duration implies a 100% increase per year of the amount established on the basis of harm/gains, an increase of 10% per year – although logically welcomed by undertakings – seriously undermined the effectiveness of the Commission’s fining system.

6259 See highlighting this aspect J. KILICK, “Is it now time” 12.
6260 It is interesting to comment that the Commission commented in a press release that ‘[g]enerally speaking, the increase in the fine for long-term infringements represents a considerable strengthening of the previous practice with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period’. This observation clearly indicates that under the previous method a percentage lower than 10% was imposed for infringements of long duration. See COMMISSION, PRESS RELEASE/97/1075, (“Karel van Miert submits to the Commission clear guidelines on the method for setting of fines in the context of European "anti-trust" legislation”). The enhanced importance of the duration criterion compared to the previous practice is, however, difficult to assess given that the Commission simply stated in its decisions that the duration of the infringement was taken into account in the calculation of fines without giving any further details as to the specific impact of this factor. See also stressing the enhanced importance of the duration factor e.g. D. GERADIN AND D. HENRY, “The EC Fining” 10-11. According to these authors “this novel emphasis on duration [was] intimately intertwined with the leniency notice, increasing incentives to “fink” on cartel coconspirators and to co-operate with the Commission. As potential fines steadily increase the longer the illegal conduct occurs, cartel operators stand more to lose if they are not the first to apply for leniency. The Commission’s increased emphasis on the duration criterion therefore serves to bolster the incentive to take advantage of the leniency programme”. See for a similar opinion W. WILS, “The Commission’s New Method” 258. This reasoning is, however, not fully coherent since longer infringement were really mildly punished with a 10% increase per year. Although the 1998 Notice seemed to improve the previous practice, it is questionable that the 1998 (duration) methodology had the effect of motivating cartel members to apply for leniency. See for a different (but certainly questionable) opinion L. MCGOWAN, “At the Commission’s Discretion” 653, who comments that “[u]nder the new arrangement the duration of an infringement greatly increases the size of the fine eventually levied by the Commission”.
6261 P. MANZINI, “European Antitrust in Search” 11-12; H. DE BROCA, “The Commission revises” 1; P. M. SPINK, “Recent guidance” 102. This last author even submitted that the duration system ‘may foster an opportunity-cost environment in which it is worthwhile for an undertaking to sustain an infringement through its full period of maturity,
In addition to these remarks, when comparing the Commission’s method to the optimal fining formula, it can be observed that no explicit importance is given to the probability of detection, which according to economics is an essential parameter to calculate fines. Nevertheless, it is likely that the probabilities of being caught and sanctioned were implicitly considered in the calculation of the basic amount of the fine. First, cartels that are secret by nature and difficult to detect were generally qualified as “very serious infringements” under the 1998 Guidelines. This implied that the Commission could set the fine at the highest level, namely above 20.000 €, without being subject to any other maximum limit except for the 10% maximum. In addition, in a great majority of cases the Commission also applied a deterrence multiplier. Although the multiplier was designed to take account of the economic capacity of firms to cause damage to other operators, the fact that such multiplier was commonly imposed in cartel cases may also reflect the lower probability of detection for collusive agreements. The view that the probability of detection is considered in the calculation of the basic amount is also consistent with the assessment of gravity set out in the European case law and the Guidelines according to which a fine must be set at ‘a level which ensures that it has a sufficiently deterrent effect’. Ensuring a deterrent effect of fines implies by definition that the probability of actually imposing the fine has been taken into account.

Once the basic amount of the fine was set, the result could be adjusted on the basis of attenuating and aggravating circumstances. At first sight, it may look like the application of reductions or increases for attenuating or aggravating circumstances was one of the key differences between the Commission’s policy and the optimal sanction formula. While the optimal sanction formula determines the fine only using objective factors such as gain or harm, the Commission’s fining policy in line with the case law, requires that these kind of factors are taken into account so that the fine reflects the specific and individual behaviour of the offenders. Nevertheless, taking a closer look at the rationale or the justification of almost each aggravating circumstance, all these factors seem (more or less) directly connected to the harmful effects caused by the agreement or to the illegal benefits deriving from the collusive activity, i.e. the correct parameters to calculate fines according to economic theory. On the one hand, the factors of (i) repeated infringement and (ii) the need to exceed the amount of improper gains are clearly linked to the profit resulting the infringement. As was constantly stressed by the Commission in its fining decisions, the repetition of the conduct clearly indicates that the previous infringement had been beneficial for the

or to allow an infringement to evolve naturally rather than chop and change between species of offending conduct’. See in the same line E. L. CAMILLI, “Optimal and Actual” 30; M. VAN OERS AND B. VAN DER MEULEN, “The Netherlands Competition Authority” 31, who also stressed that the 10% duration increase could motivate companies to continue the infringement.

6262 See further supra Chapter 2, section 5.
6263 See also P. MANZINI, “European Antitrust in Search” 10-11.
6264 Fining Guidelines 1998, section 1 A. Furthermore, the Musique case confirmed that the Commission has the duty ‘to pursue a general policy designed to apply in competition matters, the principles laid down by the treaty and to guide the conduct of undertakings in the light of those principles’. Based on this observation the ECJ concluded that ‘the Commission must ensure that its action has the necessary deterrent effect, especially as regards those types of infringements which are particularly harmful to the attainment of the objectives of the Community. Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825, para 121
6265 According to P. MANZINI, “[t]he real motivation behind this choice is that the optimal sanction formula determines the fine only using objective factors such as gain or harm. In this sense, a potential evaluation of individualising factors seems either superfluous because the optimal fine amount is already met, or it seems contradictory because optimally does not require changes. Consequently, the only solution consistent with the optimal sanction formula is the exclusion of individualising factors”. P. MANZINI, “European Antitrust in Search” 16-17. However, this author indeed recognises that this approach is incompatible with both Article 23 and the ECJ case law.
6266 See further as regards this justification supra section 4.3 of this Chapter.
undertakings involved and that the fine imposed did not deter them from committing new violations. As a result, there is a clear need to exceed the amount of the improper gains. On the other hand, the circumstances concerning (i) the role of leader or instigator and (ii) the adoption of retaliatory measures are connected to the potential harm produced by the violation.\footnote{With respect to the factor regarding the obstruction of the Commission’s investigation it should be recalled that the Commission also has the possibility of penalising such behaviour under Article 23(2) of Regulation 1/2003 with a “so-called” procedural fine. This possibility is, however, not commonly used when the Commission opens proceedings to impose fines for substantive infringements. Still, in this last scenario, the Commission is (and should be) entitled to take into account obstructive behaviour in the calculation of the sanction in order to promote compliance. Therefore, the possibility to take into account obstructive behaviour as aggravating factor is indeed not related to the harm or the benefits of the cartel, but is simply provided as an alternative to the possibility provided under Article 23(2) of Regulation 1/2003.}\footnote{Successful cartels cannot function properly without one or multiple leaders which take the initiative to form the agreement and, subsequently, take care of the whole implementation of the practice including retaliation measures. See further supra Chapter 2, section 5.3.} By imposing a higher sanction based on these aggravating circumstances, the Commission was able to consider the questions (i) whether the behaviour of certain companies (such as leaders or retaliators) led to more damage and (ii) whether certain firms (such as recidivists) obtained (more) profits from it.\footnote{See for a different opinion E. L. CAMILLI, “Optimal and Actual” 24-25. In the view of this commentator aggravating factors are not linked to any harm considerations. Instead, ‘the behaviour of the undertaking is taken into account, in order to accomplish with the punitive aim of the sanction, on the basis of a retributive setting’.} The same reasoning is valid with regard to certain mitigation factors. For example, under the 1998 Guidelines the fact that a company only played a passive role within the cartel and the fact that it did not implement the agreement, were considered mitigating factors.\footnote{See, however, the reservations about the view that a passive role in the cartel should be considered a mitigating factor supra section 4.3.5.2(a) of this Chapter.} Arguably, undertakings that played the ‘follow-my-leader’ role and did not implement the agreement in practice, contributed to the overall harm caused by the cartel to a lesser extent than active companies and companies that strictly implemented the agreement. However, as commented above, such circumstances should be interpreted and applied in a strict manner. Although such companies may indeed contribute to a lesser extent to the effectiveness of the cartel, their participation in the cartel is essential for the functioning of the agreement. Therefore, granting a reduction on the basis of these mitigating factors may be counterproductive.\footnote{The rest of mitigating factor regarding (i) the termination of the infringement as soon as the Commission intervenes, (ii) the existence of reasonable doubt as to whether the restrictive conduct does indeed constitute an infringement, and (iii) the commission of the infringements as a result of negligence or unintentionally, were considered in practice only rarely. See further supra section 4.3 of this Chapter.}\footnote{It should be noted that, generally the mitigating and aggravating factors contained in the 1998 Guidelines were maintained under the 2006 Fining Guidelines. See further infra section 5.3 of this Chapter.}

Taken as a whole, the possibility to individualise the sanction based on mitigating and aggravating circumstances, was (and still is)\footnote{Case T-224/00, Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission [2003] ECR II-2597, para 265. See also confirming this aspect e.g. Case T-18/03, CD-Contact Data GmbH v Commission [2009] ECR II-1021, paras 95-98; Judgment of the General Court, 14 May 2014, Case T-406/09, Donau Chemie AG v Commission, para 92.} appropriate. First of all, this possibility allows the Commission to punish behaviour that can be seen as more severe and harmful. This approach is also fully in line with the case law according to which the assessment of aggravating or mitigating circumstances makes it possible to examine the individual conduct of each undertaking.\footnote{By imposing a higher sanction based on these aggravating circumstances, the Commission was able to consider the (i) the role of leader or instigator and (ii) the adoption of retaliatory measures are connected to the potential harm produced by the violation.} Furthermore, by taking into account such factors, the Commission may discourage companies to adopt certain kinds of behaviour that also serve general deterrence purposes.
In this regard, one important observation should be made. While all the aggravating factors listed in the 1998 Guidelines were subjective factors in the sense that they were connected to the individual behaviour of undertakings, this cannot be said about the factor concerning the ‘need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement’.\footnote{Fining Guidelines 1998, section 2.} The gains obtained through the participation in the cartel constitute the (possible) result of the infringement but one must bear in mind that such result is at the same time the objective of all cartels. Whether an objective factor, which does not depend on the conduct or on the intention of an undertaking, should be considered aggravating circumstance is at least questionable. In addition, and most importantly, the factor concerning the gains deriving from the cartel should be according to economic theory the crucial parameter to calculate fines. Taking this economic insight into account, it seems that by assessing the gains of the cartel as an aggravating factor the Commission used the gain-based theory under the 1998 Guidelines as a subsidiary calculation approach.

From a general perspective, it appears that the 1998 methodology (just like the preceding fining practice) was based on rough approximations of harm and that the (more precise) gains of the agreement could be taken into account as an aggravating circumstance, only when such gains could be more precisely measured.\footnote{Compare supra section 3.3 of this Chapter.} Or, said differently: the purpose of this aggravating circumstance was not to force the Commission into entering into a systematic estimate of the gains. Instead, the 1998 Guidelines were designed to avoid the undesirable situation in which the fine would not even correspond to the gains achieved by the parties. In such a scenario, the Commission would otherwise knowingly set the fine at a level that is obviously under-deterrent. The fact that the possibility to take into account the real gains of the cartel was considered an aggravating factor, is simply a structural or formalistic issue.

In terms of overall assessment, it can be concluded that the 1998 Guidelines were not explicitly based on the illicit profit made by the offenders or on consumer harm. Instead, under the first official fining methodology, the starting amount was fixed mainly based on presumptions of harm that were not really substantiated by any proxy of or connection to the real harm caused by the infringement. Although the Commission attempted to correct this purely qualitative approach by grouping undertakings according to their turnover figures, the not so uncommon use of turnover figures that were not representative for the impact of the infringement, did not help to fully amend the deficiencies of the 1998 policy. The insufficient impact of the duration of the infringement on the calculation of the fine ensured that the basic amount of fines was far below a deterrent level. The adjustments of the basic amount with reference to aggravating and mitigating factors were appropriate although, at times, the mitigating factors were interpreted and applied too broadly. Finally, the possibility to increase the fine to exceed any gain to the offender, was never used in practice. Although the 1998 methodology represented a positive step forward, at least in terms of certainty for undertakings,\footnote{See e.g. L. McGOWAN, “At the Commission’s Discretion” 653. See for a different opinion R. RICHARDSON, “Guidance without” 371; P. M. SPINK, “Recent guidance” 108; see also W. WILS, “The Commission’s New Method” 262-263. This last author qualifies the increased transparency of the 1998 Fining guidelines as the main virtue of the system.} there is no need to mention that the 1998 Guidelines were in stark contrast with the insights provided by economic theory.\footnote{See also e.g. E. L. CAMILLI, “Optimal and Actual” 3.}
5. The 2006 Fining Guidelines

Compared to the fining policy prior to the introduction of the first Fining Guidelines, the 1998 calculation method enabled the Commission to enhance the overall effectiveness of its fining policy and impose relatively more appropriate sanctioned on cartels. Nevertheless, the Commission recognised that certain provisions of the 1998 methodology were not appropriate to achieve its objectives of producing sufficient deterrence and should, therefore, be improved.\textsuperscript{6278} After more than eight years applying the 1998 fining method, the Commission considered that it had acquired sufficient experience to further develop its policy on fines and adopted its revised Guidelines on the method of fines setting in June 2006.\textsuperscript{6279} The 2006 Guidelines refine the previous fining methodology and update it in order to better reflect the Commission’s application of the fining regime in practice, on the one hand, and the relevant case law of the European Courts, on the other hand. Furthermore, the 2006 Guidelines also introduce a number of significant changes designed to enhance the deterrent effect of the Commission’s fining policy. This section focuses on the main modifications included in the 2006 Guidelines from both a conceptual and a practical point of view.

5.1. Objectives of the Guidelines

The 1998 and 2006 Guidelines logically pursue common objectives.\textsuperscript{6280} It appears, however, that the 2006 Guidelines put some extra emphasis on the need for the (methodology of the) Commission to ‘ensure that its action has the necessary deterrent effect’.\textsuperscript{6281} In contrast to the 1998 fining system, the 2006 Guidelines clearly state that ‘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 [101 and 101 TFEU] (general deterrence)’.\textsuperscript{6282} This additional emphasis on the need for deterrence seemed to be the main motivation for the Commission to modify the weakest aspects of the 1998 Guidelines. As it is analysed in more detail below, the new accent on deterrence is clearly reflected in both the content of the 2006 Guidelines as well as in the application and interpretation of this method by the Commission.

\textsuperscript{6278} It is however, remarkable, that such recognition was made in the same year as their adoption. See European Commission, XXVIIIth Report on Competition Policy, 1998, Brussels, para. 344.


\textsuperscript{6280} As commented above, in essence, the Fining Guidelines publicly set the methodology which the Commission will apply in its future decisions imposing fines and therefore to enhance transparency. By doing so, the Commission simultaneously ensures the consistency of its fining policy and provides undertakings with some degree of legal certainty and or predictability. In this regard, the European Courts have indeed confirmed that the 2006 Guidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria which the Commission intends to apply when exercising the discretion conferred on it by Article 23(2) of Regulation No 1/2003 for the purpose of setting fines. The Guidelines do not constitute the legal basis of a decision imposing fines, which is based on Regulation No 1/2003, but they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by such decision and, consequently, ensure legal certainty on the part of the undertakings (see CFI 14 December 2006, Joined Cases T-259/02 to T-264/02 and T-271/02, Raiffeisen Zentralbank Österreich and others v Commission [2006] ECR II-5169, paras 219 and 223). See further supra section 4.1 of this Chapter.


\textsuperscript{6282} Fining Guidelines 2006, point 4. See also pointing out this new emphasis on deterrence P. MANZINI, “European Antitrust in Search” 12.
5.2. The content of the 2006 Guidelines

Just like the 1998 Guidelines, the method of calculation of the 2006 Guidelines is based on two main steps. First, the 2006 Guidelines maintain the concept of a “basic amount”, but now define it to include (i) a new value of sales calculation, (ii) a very different duration multiplier, and (iii) a new “entry fee” for hard-core cartels. The second step consists in adjusting the basic amount on the basis of mitigating and aggravating factors in order to take into account elements that are specific to each undertaking. In essence, the first step rather corresponds to the assessment of the infringement as a whole, while the second rather reflects all possible elements that are specific to each undertaking. 6283

5.2.1. The basic amount

The main changes in the fining method clearly concern the setting of the basic amount of the fine, which replaced the 1998 system of tariffs. Under the 2006 Guidelines, the basic amount is the result of the sum of two components. First, a proportion of the value of the sales of the relevant product made by each undertaking in the relevant geographic area during the last full business year of the infringement (‘variable amount’) is multiplied by the number of years the infringement took place. Second, an additional amount (“entry fee”), also calculated as a proportion of the value of sales, which is meant to enhance deterrence in respect of horizontal cartels.6284 Since both amounts are based on the “value of sales” of each undertaking, this notion will be assessed first.

5.2.1.1. The (calculation of the) value of sales

According to the 2006 Guidelines, in order to establish the basic amount of the fine, the Commission will have regard to ‘the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA’. 6285 Point 14 of the Guidelines clarifies that when the infringement of an association relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members. 6286 6287

As mentioned above, the relevant sales are those achieved in the territory in which the infringement took place. The relevant sales may thus relate to the whole EEA or one or more Member States. It is equally possible that the geographic scope of a given infringement extends beyond the territory of the EEA (e.g. worldwide cartels). In this situation, the Commission takes the view that relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in

6283 H. DE BROCA, “The Commission revises” 2. However, as this author observed this distinction should not be exaggerated. In fact the duration of the infringement is assessed individually for each undertaking. Moreover, some adjustment factors (which are part of step 2) could equally be valid for all the cartel members.

6284 See further infra sections 5.3 and 5.4 of this Chapter.


6286 This rule in effect reflects the wording of Article 23(2), last paragraph, of Regulation 1/2003. It should also be noted that the value of sales is assessed before VAT and other taxes directly related to the sales (Fining Guidelines 2006, point 17).

6287 Although in principle, the basic amount is tailored to the particular situation of each undertaking, point 26 of the Guidelines make two nuances in this regard. First, when the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount the Commission may set an identical basic amount for two undertakings, even though they only have similar, and not identical, values of sales. Second, rounded figures are used for the basic amount.
the infringement. This is specifically the case in worldwide market-sharing arrangements. In this situation, the Guidelines provide the possibility for the Commission to assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), determine the share of the sales of each undertaking on that market and then apply this share to the aggregate sales within the EEA of the companies. Or, to put it simply, the Commission may in such cases apply the worldwide market shares of each player to the total EEA sales. This result – which reflects more adequately the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement – is taken as the value of sales for the purpose of the calculation of the basic amount of the fine.

The Commission normally takes the sales made by the undertaking during the last full business year of its participation in the infringement. It is assumed that such year is in principle sufficiently representative of each undertaking’s sales. In determining the value of sales by an undertaking, the Commission uses the best available figures of that undertaking. If the figures provided by an undertaking are incomplete or not reliable – and thus not representative – the Commission may determine the value of its sales on the basis of the partial figures and/or information that is considered appropriate.

5.2.1.2. The variable amount

The variable amount is calculated on the basis of a percentage of the value of sales. As a general rule, the proportion of the value of sales taken into account is set at a level of up to 30%. In determining whether such percentage must be set at the lower end or at the higher end of that scale, the Commission considers a number of factors which are comparable to those used in the assessment of gravity under the previous Guidelines. Under the 2006 methodology, such elements specifically include (i) the nature of the infringement, (ii) the geographic scope of the violation, (iii) the combined market share of all the parties involved and (iv) whether or not the infringement has been implemented. The first two elements (i.e. the nature and geographic scope of the infringement) are similar to those mentioned in the 1998 Guidelines. The other two factors (combined market share of the parties and implementation) have been added to the 2006 method.

The 2006 Guidelines stress that ‘[h]orizontal price-fixing, market-sharing and output-limitation agreements which are usually secret, are, by their very nature, among the most harmful restrictions

6288 Fining Guidelines 2006, point 18.
6289 Ibid.
6290 Ibid, point 13. A member staff of the Commission clarified in the Competition Policy Newsletter, that the figures used by the Commission are provided by the undertaking itself. Whenever possible, the figures appearing in official accounts will be used. However, the Commission should be able to check the reliability and completeness of figures provided by the firms. H. DE BROCA, “The Commission revises” 3.
6291 Fining Guidelines 2006, points 15-16. In its Competition Policy Newsletter, the Commission recognized that although sales fluctuate from one year to the other during the normal business life, each of these fluctuations should not be reflected in the value of sales. The value of sales only provides a proxy of the appropriate amount of the fine. As point 13 suggests, if the sales during the last year are clearly not representative (the undertaking sold all or a substantial part of its relevant business or, conversely, acquired the business of one of its competitors, or the geographic scope of the infringement significantly changed during the lifetime of the infringement), alternative references may be used. H. DE BROCA, “The Commission revises” 3.
6292 Fining Guidelines 2006, point 22. However, as examined above (“The Commission’s policy prior to 1998”) all these factors had been frequently considered by the Commission in the period previous to the introduction of the 1998 Guidelines. See for a more detailed assessment of these factors supra (“The Commission’s policy prior to 1998”) and infra section 5.3 of this Chapter.
of competition’. Since, as a matter of policy, these types of anticompetitive agreements must be heavily fined, the Guidelines indicate that the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.6293

5.2.1.3. The duration

The amount resulting from the percentage of the value of sales is consequently multiplied by the number of years of participation in the infringement, which is individually assessed for each undertaking. The Guidelines also specify that periods of less than six months count as half a year, while periods longer than six months but shorter than one year will be counted as a full year.6294

5.2.1.4. The new entry fee

Next, the Commission includes in the basic amount a sum of between 15% and 25% of the value of sales. This additional amount6295 – which is applied irrespective of the duration of the undertaking’s participation in the infringement – is meant to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements.6296 The Commission considers the same factors as in the analysis of the variable amount in deciding on the proportion of the value of sales in a given case, namely, (i) the nature of the infringement, (ii) the combined market share of all the undertakings concerned, (iii) the geographic scope of the infringement and (iv) whether or not the infringement has been implemented.6297

5.2.2. The adjustment factors: mitigating and aggravating circumstances

After the calculation of the basic amount, the Commission may adjust the fine depending on the presence of aggravating and/or mitigating circumstances.

The 2006 Guidelines also contain a list of examples that may be relevant. The 2006 fining system has not introduced any major changes with respect to the possible adjustment factors compared to the 1998 Guidelines. In fact, the 2006 Guidelines codify the previous case law and the Commission’s practice as regards the application of the previous Guidelines.6298

In essence, the revised methodology merges the aggravating factors listed in the 1998 method in three groups of factors, namely: (i) refusal to cooperate with or obstruction of the investigation, (ii) role of leader in, or instigator of, the infringement; coercing or retaliatory behaviour and (iii) repeated and or continued infringement. The impact of this last factor in the fine calculation has been modified considerably under the 2006 Guidelines. First, the Commission may take into account not only its previous decisions establishing a cartel infringement, but also the decisions of NCAs

6293 Fining Guidelines 2006, point 23.
6294 Fining Guidelines 2006, point 24. As underlined in point 5 of the preamble, this illustrates the Commission’s wish that duration should play an essential role. See further infra section 5.3.1.5 of this Chapter.
6295 This term was used by the Commission for the first time in its Press Release concerning the 2006 Fining Guidelines (COMMISSION, PRESS RELEASE IP/06/857, “Commission revises Guidelines for setting fines in antitrust cases”).
6296 The Commission may also apply such an additional amount in the case of other infringements. However, in the case of cartels the application of the entry fee is mandatory. See further infra section 5.31.6 and 5.4 of this Chapter.
6297 Fining Guidelines 2006, point 25.
6298 See supra section 4.3 of this Chapter.
applying European competition law in order to establish the existence of a repeated infringement. Second, each prior infringement justifies an increase of the fine. Third, the fine can be increased by up to 100% for each infringement that has been established.

As regards the mitigating factors, the 2006 Guidelines list the following examples: (i) termination in case of intervention in non-cartel cases, (ii) negligence, (iii) limited role and non-implementation, (iv) effective cooperation outside the Leniency Notice and (v) encouragement by public authorities. The Guidelines make clear — stating the obvious — that it belongs to the undertaking claiming the application of mitigating circumstances to provide evidence that such circumstances are present.

5.2.3. The deterrence multiplier

After adjusting the fine on the ground of mitigating and aggravating factors, the Commission may apply a deterrence multiplier. The practice of fixing a multiplier, was developed by the Commission under the 1998 Guidelines. However, under the former fining system, this multiplier was applied after the classification of the agreement on the basis of its gravity.

According to the 2006 method, the Commission may impose such multiplier in two cases. First, when undertakings have a particularly large turnover beyond the sales of goods or services to which the infringement relates. Second, when there is a need to increase the fine in order to exceed the amount of gains resulting from the infringement, if it is possible to estimate that amount.

5.2.4. Final reductions: maximum fine, leniency (and settlement) reductions and ability to pay

If the fine – as adjusted to take into account aggravating/mitigating circumstances and the need for deterrence – still exceeds 10% of the firm’s total turnover in the business year preceding the decision, the Commission reduces the fine to remain under this limit.

Logically, the granting of reductions on the basis of the Leniency Notice and the settlement procedure and the application of the legal maximum of 10% is not affected by the 2006 Guidelines. Therefore, if applicable, further reductions are granted under the Leniency Notice.

Finally, the 2006 method specifically provides that the Commission may take account, in exceptional cases, of the undertaking’s inability to pay. In this regard, the Commission may reduce the fine in (i) a specific social and economic context and (ii) when there is objective evidence that imposition of the fine would irretrievably jeopardise the economic viability of the undertaking and

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6299 This approach is in line with the modernisation reforms and the system of full parallel competences in the enforcement of Article 101 TFEU (see further supra Chapter 5).
6300 Fining Guidelines 2006, point 28, para 1.
6301 In this regard the Guidelines also clarify that the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount. Fining Guidelines 2006, point 29, para 3.
6302 Fining Guidelines 2006, points 30 and 31. These rules do, however, not specify which concise deterrence factor are likely to be applied in practice. See further infra section 5.3 of this Chapter.
6303 See further supra section 4.3 of this Chapter.
6304 Ibid, points 32 and 33. As regards the 10% limit see supra section 2 of this Chapter.
6305 Fining Guidelines 2006, point 34.
cause its assets to lose all their value. The Guidelines also underline that reductions cannot be granted ‘on the mere finding of an adverse or loss-making financial situation’. 6306

5.3. The application of the 2006 Fining Guidelines

This section examines the application of the Guidelines by the Commission and Courts of the different parameters that are taken into account by the Commission in setting fines under the 2006 methodology. This analysis not only clarifies how the Commission calculates and interprets certain key fining parameters, such as the basic amount. Furthermore, the table below provides the results of an extensive analysis of all the decisions of the Commission imposing fines under the 2006 Guidelines. 6307 This table contains several columns, which specify the key factors used in the calculation of fines, namely: (i) the name and year of the cartel decision, (ii) whether the Commission considered the value of sales within the relevant EEA geographic area or beyond the EEA; (iv) the percentage of the value of sales taken into account; (v) the figure used to consider the duration of the infringement; (vi) the entry fee applied; (vii) the aggravating and mitigating circumstances identified by the Commission in its decisions and the (positive or negative) percentage applied; (viii) the deterrence multiplier imposed; (ix) whether reductions were granted under the leniency or settlement systems; (x) whether the 10% turnover cap was applied; and finally (xi) whether firm’s claims for ability to pay were considered in the calculation of the final fine.

The Table below contains the following abbreviations:
EEA: Value of sales within the relevant EEA geographic area
P: Proportion of the value of sales
D: Duration factor
E: Entry fee
DM: Deterrence Multiplier
TC: Turnover cup of 10 %
Di: Discretion exercised pursuant to point 27 of the Guidelines.
L - S: Reductions granted on the basis of the leniency programme or the settlement procedure
AP: Ability to pay considerations

The numbers of the Table correspond to the following aggravating and mitigating circumstances:
1: Repeated or continued infringement
2: Refusal to cooperate or obstruction
3: Leader, instigator or coercer
4: Termination of the infringement as soon as the Commission intervenes
5: Negligence
6: Limited involvement and non-implementation
7: Effective cooperation outside the scope of the Leniency Notice
8: Authorized or encouragement by public authorities or legislation
9: Other

6306 Fining Guidelines 2006, point 35.
6307 It should be noted that certain (aspects of) decisions have not been published, generally due to confidentiality reasons. This is indicated in the table with a “C”, which stands for confidential (or not mentioned). The information collected in the Table below is based on the Commission’s cartel decisions and does not consider adjustments following possible appeals to the European Courts.
## The application of the 2006 Fining Guidelines

<table>
<thead>
<tr>
<th>Decision</th>
<th>Basic amount</th>
<th>Aggravating factors</th>
<th>Mitigating factors</th>
<th>Other adjustments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional videotapes (2007)</td>
<td>X 18% 3 17%</td>
<td></td>
<td></td>
<td>30%</td>
</tr>
<tr>
<td>Chloroprene Rubber (2007)</td>
<td>X 21% 9-6.5 20% 60% 50%</td>
<td></td>
<td></td>
<td>1,4 1,1 I+R</td>
</tr>
<tr>
<td>Flat Glass (2007)</td>
<td>X 18% 1-1.5 17% C</td>
<td></td>
<td></td>
<td>C R</td>
</tr>
<tr>
<td>Bananas (2008)</td>
<td>X 15% 3 15%</td>
<td></td>
<td></td>
<td>60% 60% 60%</td>
</tr>
<tr>
<td>Candle waxes (2008)</td>
<td>X 17% 0.5-13 17% 18% 15% 60% 60% 50%</td>
<td></td>
<td></td>
<td>2 1.7 1.4 1.2 I+R</td>
</tr>
<tr>
<td>Aluminium Fluoride (2008)</td>
<td>Wider 17% 0.5 17%</td>
<td></td>
<td></td>
<td>I</td>
</tr>
<tr>
<td>International Removal Services (2008)</td>
<td>X 17% 0.5-19 17%</td>
<td></td>
<td></td>
<td>X R 70%</td>
</tr>
<tr>
<td>Nitrile Butadiene Rubber (2008)</td>
<td>X 16% 2 16% 50%</td>
<td></td>
<td></td>
<td>10% R</td>
</tr>
<tr>
<td>Sodium Chlorate (2008)</td>
<td>X 19% 3-5.5 19% 90%</td>
<td></td>
<td></td>
<td>70% X I+R</td>
</tr>
<tr>
<td>Carglass (2008)</td>
<td>X 16% 1.5-5 16% 60%</td>
<td></td>
<td></td>
<td>X R</td>
</tr>
</tbody>
</table>

These decision may occasionally include (the information concerning) different infringements.

I stands for immunity and R stands for reductions granted under the Leniency Notice.
<table>
<thead>
<tr>
<th>Description</th>
<th>X</th>
<th>17%</th>
<th>0,5-3</th>
<th>17%</th>
<th>50% 100%</th>
<th>20% 19% 18%</th>
<th>4</th>
<th>16% 50%</th>
<th>4,16-4,25</th>
<th>16%</th>
<th>I+R</th>
<th>6310</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calcium carbide and magnesium based reagents (2009)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Heat stabilisers (2009)</td>
<td>X</td>
<td>20%</td>
<td>19%</td>
<td>18%</td>
<td>90% 90%</td>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
<td>X C</td>
</tr>
<tr>
<td>Marine hoses (2009)</td>
<td>Wider</td>
<td>25%</td>
<td>19</td>
<td></td>
<td>25% 30%</td>
<td>18% 18%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>E.On – GdF (2009)</td>
<td>X</td>
<td>15%</td>
<td>3-7,5</td>
<td>15%</td>
<td></td>
<td>18% 18%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Power Transformers (2009)</td>
<td>Wider</td>
<td>16%</td>
<td>4</td>
<td>16%</td>
<td>50%</td>
<td>10% 10% 10%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Airfreight (2010)</td>
<td>X</td>
<td>16%</td>
<td>0,33-6,16</td>
<td>16%</td>
<td>50%</td>
<td>15 % for 12 firms</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>LCD (2010)</td>
<td>X</td>
<td>16%</td>
<td>4,16-4,25</td>
<td>16%</td>
<td></td>
<td>1,2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
</tr>
<tr>
<td>Animal Feed Phosphates (2010)</td>
<td>X</td>
<td>17%</td>
<td>9,83-34,66</td>
<td>17%</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R+S</td>
<td>70%</td>
</tr>
<tr>
<td>DRAMS (2010)</td>
<td>X</td>
<td>16%</td>
<td>0,67-3,92</td>
<td>16%</td>
<td></td>
<td>1,1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R+S</td>
<td></td>
</tr>
<tr>
<td>Pre-stressing steel (2010)</td>
<td>X</td>
<td>16%</td>
<td>0,58-18,66</td>
<td>16%</td>
<td>60% 50%</td>
<td>5% 5% 15%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>I+R</td>
</tr>
</tbody>
</table>

6310 In this case, one company, Almamet, received a reduction of its fine by 20 % outside of the application of point 35 of the 2006 Guidelines based on an evaluation of its special circumstances, its financial position and the required deterrent effect of the fine.
<table>
<thead>
<tr>
<th>Category</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>X</th>
<th>I+R</th>
<th>50%</th>
<th>50%</th>
<th>50%</th>
<th>25%</th>
<th>25%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bathroom fittings &amp; fixtures</td>
<td>X</td>
<td>15%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>6311</td>
<td>15%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consumer detergents</td>
<td>X</td>
<td>16%</td>
<td>3.16</td>
<td>16%</td>
<td>C</td>
<td>I+R+S</td>
<td></td>
<td>20%</td>
<td>20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Exotic fruit</td>
<td>X</td>
<td>15%</td>
<td>0.06</td>
<td>15%</td>
<td></td>
<td></td>
<td>6312</td>
<td>0.41</td>
<td>1,41</td>
<td>1.1</td>
<td></td>
</tr>
<tr>
<td>Refrigeration compressors</td>
<td>X</td>
<td>17%</td>
<td>C</td>
<td>17%</td>
<td>10%</td>
<td>18%</td>
<td>6313</td>
<td>1,1</td>
<td>1,2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CRT glass bulbs</td>
<td>X</td>
<td>16%</td>
<td>3,83</td>
<td>16%</td>
<td></td>
<td></td>
<td>6314</td>
<td>1,1</td>
<td>1,2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freight Forwarding</td>
<td>X</td>
<td>16%</td>
<td>4,41</td>
<td>16%</td>
<td>15%</td>
<td>18%</td>
<td></td>
<td>1,1</td>
<td>1,1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mountings for windows</td>
<td>X</td>
<td>16%</td>
<td>C</td>
<td>15%</td>
<td>5%</td>
<td>I+R</td>
<td>6315</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TV and computer monitor tubes</td>
<td>X</td>
<td>19%</td>
<td>4,41</td>
<td>4%</td>
<td>19%</td>
<td>18%</td>
<td></td>
<td>1,1</td>
<td>1,2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water management products</td>
<td>X</td>
<td>15%</td>
<td>0.5</td>
<td>15%</td>
<td></td>
<td></td>
<td>6316</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shrimps</td>
<td>C</td>
<td>C</td>
<td>2.91</td>
<td>2.91</td>
<td>C</td>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Euro Interest Rate</td>
<td>C</td>
<td>C</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td>I</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6311 The non-confidential version of this decision is not available yet.
6312 These (different) percentages for the variable amount and the additional amounts concerned different infringements, which were published in the same decision.
6313 These (different) percentages for the variable amount and the additional amounts concerned different infringements, which were published in the same decision.
<table>
<thead>
<tr>
<th>Product Description</th>
<th>Wider</th>
<th>Lower</th>
<th>Upper</th>
<th>Spread</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Derivatives (2013)</strong>[^6314]**</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Automotive Wire Harnesses (2013)</strong></td>
<td>16%</td>
<td>16%</td>
<td>0.16-9.41</td>
<td></td>
</tr>
<tr>
<td><strong>Yen Interest Rate Derivatives (2013)</strong></td>
<td>X 17%</td>
<td>X 17%</td>
<td>0.08-0.83</td>
<td></td>
</tr>
<tr>
<td><strong>Envelopes (2014)</strong></td>
<td>X 15%</td>
<td>X 15%</td>
<td>4.41-4.5</td>
<td>C</td>
</tr>
<tr>
<td><strong>Steel abrasives (2014)</strong></td>
<td>X 16%</td>
<td>X 16%</td>
<td>6.33-6.66</td>
<td>10%</td>
</tr>
<tr>
<td><strong>Swiss Franc interest rate derivatives (2014)</strong></td>
<td>17%</td>
<td>17%</td>
<td>1.33</td>
<td></td>
</tr>
<tr>
<td><strong>Swiss Franc Interest Rate Derivatives (Bid Ask Spread) (2014)</strong></td>
<td>X 16%</td>
<td>X 16%</td>
<td>0.33</td>
<td></td>
</tr>
<tr>
<td><strong>Power exchanges (2014)</strong></td>
<td>X 16%</td>
<td>X 16%</td>
<td>0.58</td>
<td></td>
</tr>
<tr>
<td><strong>Power cables (2014)</strong></td>
<td>Wider 17%</td>
<td>17%</td>
<td>50%</td>
<td></td>
</tr>
</tbody>
</table>

[^6314]: This decision has not been published.
<table>
<thead>
<tr>
<th>Product Type</th>
<th>Year</th>
<th>Market Share (%)</th>
<th>Price Range</th>
<th>Commission Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Smart card chips (2014)</td>
<td>X</td>
<td>17%</td>
<td>1.25-1.41</td>
<td>X</td>
</tr>
<tr>
<td>Mushrooms (2014)</td>
<td>X</td>
<td>17%</td>
<td>2.75-4.75</td>
<td>X, I+R+S</td>
</tr>
<tr>
<td>Automotive bearings (2014)</td>
<td>X</td>
<td>16%</td>
<td>15%</td>
<td>X</td>
</tr>
<tr>
<td>Parking Heaters (2015)</td>
<td>X</td>
<td>18%</td>
<td>10</td>
<td>X</td>
</tr>
<tr>
<td>Polyurethane Foam (2015)</td>
<td>X</td>
<td>17%</td>
<td>7.91</td>
<td>1.1</td>
</tr>
<tr>
<td>Retail Food Packaging (2015)</td>
<td>16%</td>
<td>0.08-7.91</td>
<td>5%, 5%, 5%</td>
<td>X</td>
</tr>
<tr>
<td>Optical Disc Drives (2015)</td>
<td>X</td>
<td>17%</td>
<td>50%, 50%</td>
<td>I+R</td>
</tr>
<tr>
<td>Alternators and starters (2016)</td>
<td>X</td>
<td>17%</td>
<td>15%</td>
<td>I+R+S</td>
</tr>
<tr>
<td>Trucks (2016)</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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6313 This decision is not available yet. The information of the able concerning this case is based on the press release.

6316 The Commission granted an exceptional 5% reduction of the fine to each of the addressees in each cartel to reflect the considerable duration of the proceeding and the special circumstances of this case. The reduction was applied after the application of the 10% turnover limit in order to ensure that it had an impact on the fines imposed on all addressees.

6317 This decision has not been published.

6318 This decision has not been published.
Before proceeding with the analysis of the Commission’s practice, it may be useful to briefly recall that to establish the basic amount of the fine, the Commission first calculates ‘the value of sales’. The Commission then applies to that figure a percentage reflecting the degree of gravity of the infringement, which is subsequently multiplied by the number of years of infringement. In cartel cases, the Commission also applies an ‘entry fee’. The basic amount is subsequently adjusted upwards or downwards for each participant, on the basis of aggravating or mitigating circumstances specific to it, so as to reflect the relative gravity of its participation in the infringement. The European Courts have explicitly stated that there is nothing to warrant criticism in the method chosen by the Commission in the Guidelines.\footnote{Case T-73/04, \textit{Le Carbone-Lorraine v Commission}, [2008] ECR II-2661, para 100; Judgment of the General Court of 12 December 2012, Case T-352/09, \textit{Nováče chemické závody v Commission}, para 58.}

In \textit{Dansk Rørindustri} the ECJ confirmed that the Commission is entitled to modify its methodology on fines and to apply such new methodology to infringements committed in the past without infringing the principles of legitimate expectation and non-retroactivity, provided that the methodology appears “reasonably foreseeable”.\footnote{Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, \textit{Dansk Rørindustri A/S a.o. v Commission}, [2005] ECR I-5425, paras 218-232.} This is certainly the case of the 2006 Guidelines, which is essentially based on the key calculation factors set out in Regulation No 1/2003 as well as its predecessor Regulation 17: the gravity and the duration of the infringement. Both factors were also the essential calculation parameters under the 1998 Guidelines.

### 5.3.1. Calculation of the value of sales

The calculation method of the 2006 Guidelines, and more precisely, the basic amount of the fine, is based on the value of the undertaking’s sales of goods or services ‘directly or indirectly relat[ed] to the infringement in the relevant geographic market within the EEA’, normally during the last full business year of the undertaking’s participation in the infringement.\footnote{Fining Guidelines 2006, para 13.}

The importance of this step in the calculation of the fine has been confirmed by the European Courts. While an undertaking’s overall turnover constitutes an imperfect indication of its size and economic power, the 2006 criterion pursues the objective of adopting, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking’s contribution to it.\footnote{Case C-580/12 P, \textit{Guardian Industries Corp. and Guardian Europe Sàrl v Commission}, [2014] ECR I-2759, para 50; Judgment of the General Court of 17 December 2014, T-72/09, \textit{Pilkington v Commission}, paras 220 and 221; Case T-128/11, \textit{LG Display and others v Commission}, para 68; Judgment of the General Court of 27 February 2014, Case T-91/11, \textit{InnoLux v Commission}, para 40. This is indeed fully in line with point 6 of the Fining Guidelines of 2006 which state that ‘[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement’.} In the view of the Courts the methodology set out in the 2006 Guidelines allows the fine imposed to reflect the limited market share of an undertaking on the relevant market, despite the importance of the latter’s overall turnover.\footnote{Case T-73/04, \textit{Le Carbone-Lorraine v Commission}, [2008] ECR II-2661, para 100; Judgment of the General Court of 12 December 2012, Case T-352/09, \textit{Nováče chemické závody v Commission}, para 58.}
5.3.1.1. Relevant sales

The European Courts have clarified how the concept of the value of sales established in point 13 of the 2006 Guidelines should be interpreted. According to the Courts the concept of the value of sales cannot extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel. On the other hand, the concept of value of sales cannot be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel. Such a limitation would not only have the effect of artificially minimise the economic significance of the infringement committed by a specific undertaking. In addition, this would also lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel. In the Courts’ view this amounts to a reward for being secretive which adversely affects the objective of the effective investigation and sanctioning of infringements.

Furthermore, the ECJ has recently explained that in order to establish the value of the undertaking’s sales of goods or services which directly or indirectly relate to the infringement no distinction must be drawn between internal sales and sales to independent third parties. In its view, ignoring internal sales ‘would inevitably give an unjustified advantage’ to vertically integrated companies.

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72/09, Pilkington v Commission, paras 398 and 399) without prejudice to the Commission’s power to depart from the methodology set out in the 2006 Guidelines. See further infra (this section).


3502 In this regard, the General Court has also pointed out that ‘[i]t is apparent from the broad logic and the wording of point 18 of the 2006 Guidelines that the expression ‘the total value of the sales of goods or services to which the infringement relates’ must be understood to mean the total value of the sales of the undertakings participating in the infringement and not the total value of the sales of all undertakings active on the market in which the undertakings committed the infringement. The sales of undertakings not participating in the infringement are not sales ‘to which the infringement relates’. In addition, this textual interpretation is consistent with the broad logic of point 18 of the 2006 Guidelines which seeks to reflect both the aggregate size of the relevant sales and the relative weight of each undertaking in the infringement. The latter objective implies that only the value of sales of the undertakings participating in the infringement is taken into account. (Judgment of the General Court of 18 June 2013, Case T-406/08, Industries chimiques du fluor (ICF) v Commission, paras 183-184). However, as illustrated by the Commission decision in Automotive bearings (2014), when the scope of the infringement is limited in a sub-segment of the relevant sales, the Commission may decide to use only a fraction of the undertaking’s value of sales corresponding to this subsegment. In particular, in this case the Commission used as the value of sales 100% of the sales of bearings to car and truck manufacturers and 50% of the sales of bearings to automotive component manufacturers. See Case AT.39922 — Bearings [2014] OJ C 238/10, para 76.

3503 T-72/09, Pilkington v Commission, paras 223; Case C-580/12 P, Guardian Industries Corp. and Guardian Europe Sàrl v Commission, para 58.

3504 It has been commented that this very loose standard seems to rely on the (over-simplistic) premise that a cartel concerning a given relevant market necessarily distorts competition in the entirety of that market. E. Barbier de la Serré and E. Lagathu, “The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings”, 2015 (6-7) Journal of European Competition Law & Practice, 530-552, at 531 (hereafter: ‘E. Barbier de la Serré and E. Lagathu, “The Law on Fines”’). However, as it will be seen below (“Assessment of the 2006 method of calculation”) taking into account the (low) probably of detection is fully in line with economic theory and even necessary to attain deterrence.

3505 Case C-580/12 P, Guardian Industries Corp. and Guardian Europe Sàrl v Commission, paras 57–63. This is because, in the view of the Court, either those undertakings pass on the price increases in the inputs as a result of the infringement in the price of the processed goods or they do not pass those increases on, which thus effectively grants them a cost advantage in relation to their competitors that obtain those same inputs on the market for the goods that are the subject of the infringement (para 60). See for a critical view on this approach E. Barbier de la Serré and E. Lagathu, “The Law on Fines” 531-532. In fact, these author argue that “this interpretation contradicts the wording of paragraph 13 of the 2006 Guidelines, in so far as it expressly refers to “the undertaking’s sales”.”
5.3.1.2. Sales in (and beyond) the relevant European Economic Area

In practice, in order to calculate the first step of the basic amount (i.e. the value of sales), the Commission generally takes as a point of departure (i) the value of the undertaking’s sales of the goods or services to which the infringement directly or indirectly relates (ii) in the relevant geographic area within the EEA. As commented above, the rule concerning the calculation of the basic amount when the geographic of infringements scope does not extend beyond that of the EEA, pursues the objective of adopting an amount which reflects the economic significance of the infringement and the relative size of the undertaking’s contribution to it. This rule is thus designed, inter alia, to ensure that the fine has sufficient deterrent effect, which justifies taking into consideration the size and the economic power of the undertaking concerned.

However, in a more limited number of cartels which extended beyond the EEA, the Commission applied the derogation contained in point 18 of those Guidelines, according to which it may take into consideration the value of sales of goods in the area covered by the cartel (wider than EEA). This provision codifies the Commission’s past practice under the previous Guidelines, which has also been confirmed by the Court for worldwide market sharing arrangements and for worldwide price-fixing cartels. Furthermore, the fact that the Commission has the power to impose sanctions only within the EEA does not preclude it from taking into consideration worldwide turnover derived from sales of the relevant product in order to evaluate the economic capacity of the members of the cartel to harm competition within the EEA.

Under the 2006 Guidelines, the Commission considered (for the first time) in Aluminium Fluoride (2008) that it was appropriate to apply this methodology to ensure that the starting amounts would reflect the nature of the infringement, its actual impact on the market and the scope of the geographic market covered by the collusive behaviour of the parties, which went well beyond the EEA market. In this case two companies – Industrial Química de Mexico and QB Indústrias – contested the methodology based on the market share in a wider geographic area than the EEA and argued that their fines should be calculated by reference to their turnover in Europe. In addition, according to these firms such methodology could only be applied in market sharing cases and not in price fixing cases, such as the cartel at hand. The Commission rejected these arguments and pointed out that, while a “worldwide approach” is particularly appropriate in market sharing cases, it cannot be concluded a contrario that such approach should be excluded in (pure) price-fixing cartels. In this case the Commission further clarified the application of this method. In

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3506 Judgment of the Court of 20 January 2016, Case C-373/14 P, Toshiba Corporation v Commission, para 85; see also to that effect, Judgment of the Court of 19 March 2015, C-286/13 P, Dole Food and Dole Fresh Fruit Europe v Commission, para 148.
3507 See, to that effect, C-286/13 P, Dole Food and Dole Fresh Fruit Europe v Commission, para 142.
3508 For a complete overview of these cases see supra Table 3.
3509 Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 Tokai Carbon and others v Commission [2004] ECR II-1181, paras 196-204.
3512 Ibid, para 229.
3513 Ibid, para 230.
3514 This point is indeed explicitly mentioned in the 2006 Guidelines.
3515 Case COMP/39.180 — Aluminium fluoride [2011] OJ C 40/22, paras 231-232. In this regard, the Commission further clarified that the fact that the parties’ joint effort to increase prices meant that their overall, that is worldwide, competitive potential was not therefore applied for the benefit of the European market. If they had not taken part in the
particular, it explained that ‘the relative strength of each undertaking is determined as the percentage for which its sales of the goods or services to which the infringement relates in the geographic area covered by the cartel account in relation to the aggregate sales in that area of all of the undertakings concerned. This percentage or market share is then applied to the aggregate sales of the goods or services to which the infringement relates in the EEA’.  

The rule concerning the sales outside the EEA\(^{3517}\) (equally) pursues the objective of reflecting in the most appropriate way possible the weight and economic power of the undertaking at issue in the infringement and, thereby, to ensure the sufficient deterrent effect of the fine.\(^{3518}\) As the European Courts have clearly held, interpreting the concept of ‘value of sales’ as applying only to the turnover achieved by the sales that were actually affected by the cartel would be contrary to the goal pursued by the 2006 Guidelines.\(^{3519}\)

This reasoning is perfectly illustrated by the \textit{Power Transformers} case (2009).\(^{3520}\) The undertakings involved in \textit{Power Transformers}, participated in an infringement covering the entire EEA, consisting of an arrangement to share markets between European and Japanese producers of power transformers to respect each others’ home markets and to refrain from selling in those markets. The Commission basically argued that if only the sales in the EEA had been taken into account, Toshiba would have avoided any fine, since it did not make any sales in the EEA during the reference year used by the Commission. In addition, even if the sales in Japan had been taken into account, such an approach would have ignored the fact that the parties to the Gentlemen’s Agreement are power transformer producers active at worldwide level.\(^{3521}\) Both the General Court and the Court of Justice shared the Commission’s view. In particular, the General Court observed that as a result of the agreement the worldwide, competitive potential of the undertakings concerned had not been used to the advantage of the EEA market. Therefore, limiting the relevant geographic area to those two territories would not have appropriately reflected the weight of the undertaking in the cartel and would not have ensured the deterrent effect of the fine.\(^{3522}\) The Court of Justice fully agreed with the Commission’s and the General Court’s view and held that an interpretation of the concept of ‘relevant geographic area (wider than the EEA)’ which took into account only the territories affected by the unlawful cartel would run counter to the objective referred to in point 18 of the 2006 Guidelines and indeed in Article 23(2)(a) of Regulation No 1/2003’.\(^{3523}\)

5.3.1.3. The year of reference

In normal circumstances, the value of sales of an undertaking involved in a cartel varies routinely over the years. Determining the value of sales for each year of the infringement in order to calculate

\footnotesize{price-fixing cartel, they would have been free to set their price policy without any commitment to their competitors, and therefore to sell below the prices fixed by the cartel and so increase their market share in Europe’.

\(^{3516}\)Case COMP/39.180 — \textit{Aluminium fluoride} [2011] OJ C 40/22, paras 232-233. This implies, on the other hand, that the question whether captive sales of other undertakings are taken into account, and exactly how the geographic market should be defined, is thus irrelevant for the calculation of the value of sales. What matters for the calculation of the value of sales and the final fine is the sales of the goods or services of the undertakings concerned and their respective relative market shares thereof.

\(^{3517}\)Fining Guidelines 2006, point 18.


\(^{3519}\)Case C-580/12 P, \textit{Guardian Industries Corp. and Guardian Europe Sàrl v Commission}, para 57.


\(^{3521}\)Ibid, paras 231-236.

\(^{3522}\)Case T-519/09, \textit{Toshiba Corp. v Commission}, para 275.

\(^{3523}\)Judgment of the Court of 20 January 2016, Case C-373/14 P, \textit{Toshiba Corporation v Commission}, para 87. It is also interesting to note that the Advocate General correctly stated in point 153 of his Opinion in this case that ‘taking into account only the territories of Japan or the EEA would have had the effect, in essence, of rewarding the participants in the Gentlemen’s Agreement for having complied with the terms of the unlawful cartel, which provided specifically that the parties were to refrain from any sale in the territory of the other group of undertakings’.

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fines is, however, an extremely time consuming task which entails practical difficulties. Therefore, instead of calculating the sales of each year, the Commission as a rule considers only the preceding year's value of sales and multiplies it by the number of years, in which the infringement occurred in accordance with the 2006 Guidelines. This continued practice of relying on the last full year of the cartel’s operation as the relevant year for determining the basic amount of the fine has also been accepted by the European Courts. In particular, in the view of the Courts the method of taking account of the turnover of each of the undertakings during the reference year, (namely the last full year of the infringement), permits to assess the size and economic power of each undertaking and the scale of the infringement committed.

This function of the reference year, implies on the other hand that the Commission may take other years into account for the determination of the value of sales when that last full business year is not sufficiently representative. Moreover, the Commission may also depart from the self-imposed rules of practice set out in the 2006 Guidelines when this is justified. This possibility follows from the term ‘normally’ used in paragraph 13 of the Guidelines with respect to using the last full business year of the undertaking’s participation in the infringement as the reference year.

The decisional practice shows that the Commission is quite flexible in this respect and that it had adjusted the relevant year for a number of reasons. For example, the Commission has commonly made adjustments when the duration of the infringement was less than 1 year. In this scenario, the Commission calculates a notional annual value of sales by extrapolating the actual value of sales. Basically, this method consists in dividing the value of sales by the number of days during which sales occurred and multiplying the result by 365 or 366.

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3524 See also stressing these difficulties e.g. E. ENGELSTING AND H.-H. SCHEIDER, “Article 23 Fines” 1798.
3528 According to the case-law, even though the Commission may, as a rule, rely on the last year of participation in the infringement as the reference period in order to calculate the value of sales, such a choice does not always have to be made. A method should be chosen that permits account to be taken of the size and economic power of each of the undertakings concerned, as well as of the scope of the infringement committed by each of them, in light of the economic reality as it appeared at the time the infringement was committed (Judgment of the Court of 16 November 2000, Case C-291/98 P, Sarrió v Commission [2000] ECR I-9991 and Judgment of the General Court of 13 September 2010, Case T-40/06, Trioplast Industrier v Commission [2010] ECR II-4893, para 92).
3529 This implies, on the one hand, that undertakings may be able to present plausible arguments for a lower value of sales in the previous years. This goes without saying that in this case the interested undertakings have to provide the respective documents.
3530 See also 2006 Fining Guidelines, para 37. See also confirming this reasoning T-72/09, Pilkington v Commission, para 212; Case T-519/09, Toshiba Corp. v Commission, para 255. See also commenting on this practice e.g. E. BARBIER DE LA SERRE AND E. LAGATHU, “The Law on Fines” 534.
3531 This practice was adopted in the Calcium Carbide case, in which the Commission established that the period of liability case of Degussa, did not cover a full business year. Therefore, it decided to calculated a full business year by extrapolation of the value of sales of calcium carbide powder of its then subsidiary SKW Stahl-Technik GmbH & Co KG for the latter’s period of participation (22 April 2004 – 30 August 2004). Case COMP/39.396 – Calcium Carbide and magnesium based reagents for the steel and gas industries [2009] OJ C 301/18, para 287. (See confirming this practice Judgment of the General Court of 23 January 2014, Case T-391/09, Evonik Degussa and other v Commission, paras 124, 125, and 131). A similar reasoning was applied in Power exchanges. In this case the infringement also lasted less than a full year and the Commission decided to use the sales by the parties in 2011, as the greater part of the infringement took place in that year. Case COMP/39.129 - Power Transformers [2009] OJ C 296/21, para 71. See also commenting on this practice E. BARBIER DE LA SERRE AND E. LAGATHU, “The Law on Fines” 532-533.
The Commission also considered frequently that the value of sales calculated on the basis of the last full business year was not representative when the market, the infringement, or the undertaking had evolved significantly in the course of the infringement. In such circumstances, the Commission decided to rely on an average instead.

In Shrimps (2013), the Commission ascertained that, as it had been argued by Heiploeg, the business year 2007/2008 was not representative. More precisely, the Commission confirmed that the price of North Sea shrimps was volatile and that in the last full business year of the infringement, the value of sales of Heiploeg was more than 10% above the average for the period of the infringement. The same could be said about Klaas Pauw, whose value of sales for 2007/2008 was even more than 40% above the average. In contrast, for Kok Seafood, the value of sales in 2008 was more than 30% below the average of the relevant period. For Stührk, the value of sales in 2006 was very similar to the average of the period. In view of this situation, the Commission concluded that it was more representative to use for every participant the average value of sale of the financial years covered by the individual infringement period.

The decision in Carglass (2008), is also interesting in this context. In this case the Commission departed from the regular reference year on the ground that the cartel had varied in intensity during the infringement period. In order to consider such intensity, the Commission divided the infringement into three periods: the roll-out period, the central phase and the decline period. With regard to the roll-out and the decline period, the Commission only had direct evidence of cartel activity for certain manufacturers. Therefore, the Commission took a ‘more calibrated’ approach which consisted in reducing the weighting of the ‘roll-out’ period and the ‘decline’ period by only taking into account the value of sales for which it had direct evidence. The total value of sales for all three periods was then divided by the number of months of participation in the infringement and multiplied by 12 to obtain an annual weighted average.

The Commission also departed from the full year reference method in other cases including, for instance, Blocktrains (2015), Envelopes (2014), Bearings (2014).

In 2014, the General Court repeatedly endorsed this method on the ground that it ‘is capable of establishing a fine that reflects more accurately the characteristics of the cartel at issue than if the fine had been calculated by reference to only those sales made during the last full year of the applicants’ participation in the infringement’.

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3534 In this case the Commission explained that the last full business year was not sufficiently representative, because the value of sales was clearly not constant over the entire period of the infringement. Based on that and on the information provided by the parties in this respect, the Commission calculated an average of each party’s relevant sales during the entire infringement period, which reflected more adequately the considerable volatility of sales. Case AT.40098 — Blocktrains [2015] OJ C 351/5.
3535 Case AT.39780 — Envelopes [2015] OJ C 74/5, para 73. In this case the last year was not sufficiently representative and, based on the information provided by the parties, the Commission took into account another year.
3536 Case AT.39922 — Bearings [2014] OJ C 238/10, paras 77–79. In Bearings the Commission calculated the basic amount based on an average of the value of sales in view of the ‘cyclical nature’ of the parties’ sales during the cartel period. When calculating the average, it also decided to take into account only 10% of the value of sales for a 2.5-year period of limited activity and lower intensity of the cartel.
3537 T-72/09, Pilkington v Commission, paras 208–210; Judgment of the General Court of 27 March 2014, Cases T-56/09 and T-73/09, Saint-Gobain Glass France SA and others v Commission, paras 156–158. When the Commission uses an average, an individual undertaking cannot compel the Commission to rely on a different period in its case, unless it can prove that its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement that it committed. See also Case T-543/08, RWE AG and RWE Dea AG v Commission, paras 219 and 244; Judgment of the General Court of 11 July 2014, Case T-540/08, Esso Société anonyme française and others v Commission, para 96; Case T-541/08, Sasol and Others v Commission, para 334.
5.3.1.4. The variable amount or “the percentage”

One of the key questions concerning the 2006 Guidelines regards the application of this variable amount. With regard to cartels, point 23 presumes that these are infringements that justify the application of a percentage of sales which will ‘generally be set at the higher end of the scale’.

Following the publication of the Guidelines in 2006, there was considerable uncertainty about the application of the 30%-rule. Based on the wording of the Guidelines, one may indeed presume that the percentage for cartel cases would be set somewhere in the rage of 20-25% or even higher. However, it was unclear whether the Commission would apply this rule strictly in practice or whether lower percentages (than expected) would be used.

The analysis of the (48) decisions imposing fines under the 2006 Guidelines, clarified a number of important aspects.

a. The nature of the agreements as decisive factor

As examined above, in order to establish the proportion of the value of sales, the Commission considers a number of factors, including the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

In practice, the key element in this assessment is without any doubt the nature of the infringement. Although under the 2006 Guidelines, infringements are no longer classified according to the seriousness of the infringement, it is well established case-law that horizontal agreements on prices, market sharing and limitation of production, remain by their nature, among the most serious restrictions of competition. In fact, the Commission’s practice suggests that once a restriction is qualified as a cartel, and thus as a very serious infringement by nature, the variable amount is set as a matter of policy above 15%.

The serious nature of cartels is always stressed in the Commission’s fining practice. Just to cite one example, in Professional videotapes (2008), Sony and Maxell put forward a number of arguments intended to diminish the gravity of their infringement. In particular they argued that the

3539 See e.g. J. CONNOR, “Cartel Fine Severity” 10 of the online version of this article.
3540 See e.g. Case T-406/09, Donau Chemie AG v Commission; Judgment of the Court of Justice of 2 October 2003, C-199/09 P, Corus UK v Commission [2003] ECR I-11177, para 80; C-554/08 P, Carbone-Lorraine v Commission [2009] ECR I-189, para 44; Case T-410/03, Hoechst v Commission [2008] ECR II-881, para 325). This is also reflected in point 23 of the 2006 Guidelines, according to which ‘[h]orizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition’. See also Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition (De Minimis Notice), [2014] OJ C 291/1, point 13. For some literature see e.g H. DE BROCA, “The Commission revises” 3-4. Despite the fact that the qualification of hardcore cartels as very serious restrictions of competition is fully in line with the view of the European Courts, the doctrine has pointed out that the general classification of hardcore cartels as “serious restrictions” constitutes an important limitation of the discretion of the Commission to calculate fines. See S. B. VOLCKER, “Rough Justice? An analysis of the European Commission’s new fining Guidelines”, 2007 (44-5) CMLRev, 1285-1320, at 1298).
Commission should have also taken into account among other considerations that (i) the affected sales were relatively minor, (ii) the infringement was short, (iii) the infringement was unstructured, (iv) the effects of the infringement were limited. The Commission, however, found that those arguments could not alter its conclusion on the gravity of the violation and noted that price-fixing is always considered, by its very nature, as a very serious infringement of the Treaty. Moreover, the alleged absence of institutionalized arrangements and the unstructured and undisciplined nature of the conduct could not modify such assessment.

In addition, it is also important to note that as the EU courts have acknowledged, the secret nature of an infringement of the competition rules is a factor liable to exacerbate its gravity.

b. Percentage set normally between 15% and 19%

The decisions imposing fines in cartel cases show that the Commission does not automatically apply the highest rates (i.e. above 20%). In practice, the Commission commonly applies a percentage ranging from 15% to 19%. In deciding which precise percentage above 15% should be applied the Commission takes into account the specific circumstances of the case, and in practice constantly refers to the (four) non-limitative examples of factors listed the Guidelines to determine the gravity, namely: (i) the nature of the infringement, (ii) the combined market share of all the undertakings concerned, (iii) the geographic scope of the infringement and (iv) whether or not the infringement has been implemented. It is interesting to recall that the first and the third factors (nature and geographic scope of the infringement) are similar to those mentioned in the 1998 Guidelines and have been addressed in a substantial line of case-law. The other two factors (whether or not the infringement has been implemented and the combined market share of the parties) have been added in the 2006 Guidelines, although the Commission in practice also analysed these parameters.

For example, in Professional videotapes (2007), the Commission commented that it had considered different factors, in particular the nature, the combined market share and the geographic scope of the infringement. First, the decision emphasised that horizontal price-fixing is by its very nature among the most harmful restrictions of competition. Second, the estimated combined market share of the three undertakings participating in this infringement was more than 85%. Third, the geographic scope of the infringement was at least the EEA. Finally, the Commission observed that the infringement had been generally implemented. On the basis of these observations, the Commission applied a variable amount of 18%.

In Flat Glass (2007) the Commission also set the proportion of the value of sales of each undertaking at 18%. This conclusion was based on the following observations. First, the Commission took into account the nature of the infringement (in this case horizontal price-fixing),

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3542 Ibid, paras 211-212.
3543 In its decision the Commission also added that ‘the allegedly moderate size of affected sales and the duration of the infringement are already reflected in the calculation of the value of sales and the establishment of the duration respectively’, Case COMP/38.432 – Professional Videotapes [2008] OJ C 57/10, para 213.
3544 See confirming this approach e.g. T-286/09, Intel Corp. v Commission, para 1586 (In this case, the Commission took into account Intel’s attempts to conceal its conduct, among many other factors, when assessing the gravity of the infringement); see also Joined Cases T-259/02 to T-264/02 and T-271/02, Raiffeisen Zentralbank Österreich and others v Commission [2006] ECR II-5169, para 252.
3545 See supra Table 3.
3546 See further section 3 and 4.3 of this Chapter.
3548 Ibid, paras 206-209.
the fact that the combined market share of the undertakings was over 80%, the geographic scope of the infringement which concerned the EEA and the fact that infringement was generally implemented.\textsuperscript{3550}

c. Clarification of (the meaning of) factor regarding the implementation element

The factor regarding the implementation of the agreement (which is mentioned in the 2006 Guidelines) should be distinguished from the factor concerning the ‘actual impact, of the cartel where this can be measured’ (which is no longer mentioned in the 2006 Guidelines, but was mentioned under the 1998 methodology).\textsuperscript{3551} The difference between these two factors, which was rather ambiguous under the previous fining system, has been clarified under the 2006 Commission’s fining practice.

In \textit{Flat Glass} (2007), for instance, Pilkington contended that there was no evidence on the implementation of the agreements, as shown by the negotiated prices with its customers. According to this firm this lack of implementation should be taken into account when assessing gravity. The Commission, on the other hand, held that those arguments could not attenuate the gravity of the infringement. In particular, the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives.\textsuperscript{3552}

The Court of Justice has also clarified and stressed the difference between the criterion of whether or not an infringement has been implemented and the criterion of its actual impact on the market. In the case of hardcore cartels – i.e. agreements such as market-sharing, quota-fixing, customer allocation, price-fixing and the exchange of sensitive commercial information – the implementation criterion is satisfied if it is demonstrated that what was agreed among the participants was in fact implemented in their commercial practices in the sense that the parties took measures to apply the agreed prices. This could be done, for example, by announcing the price to customers, instructing the employees to use the prices as the basis for negotiation and monitoring their application by their competitors and their own sales departments.\textsuperscript{3553}

In addition, according to the European Courts, the implementation of an infringement is such a relevant factor that, depending on the particular circumstances of the case, it may suffice to reach the conclusion that the infringement had a real impact on the market.\textsuperscript{3554} Still, the implementation of an agreement does not necessarily mean that it has an actual impact.\textsuperscript{3555} The criteria concerning the implementation of the activity and the criterion of its actual impact on the market are thus quite different and it cannot be presumed that, when the former is satisfied, the latter will automatically

\textsuperscript{3550} Ibid, paras 475-479.

\textsuperscript{3551} In this regard it may be useful to recall that under the 1998, in practice, the Commission gathered evidence on the basis of which assumptions could be made about the effects of an infringement. Measuring the actual impact of the cartel was however extremely difficult. These difficulties have also been acknowledged by Commission staff members who added in this context that ‘in addition, since cartels (which represent the majority of cases where fines are imposed) are traditionally infringements by object, it appeared to make more sense to solely refer [in the Guidelines] to the implementation — or not — of the infringement’. H. DE BROCA, “The Commission revises” 3.

\textsuperscript{3552} See Case COMP/39165 – \textit{Flat glass} [2008] OJ C 127/9, paras 480-482.


be satisfied too. In any case, under the 2006 the Commission is not obliged to take the concrete impact of the infringement into account or to measure it to establish the percentage of the value of sales. It is sufficient that the level set by the Commission of the proportion of the value of sales to be taken into consideration is justified by other factors capable of influencing the determination of gravity.

d. The same percentage of the value of sales is applied for all the undertakings

As Table 3 above illustrates, the Commission established almost always the same percentage of the value of sales for all the companies involved in the cartel. The Commission only made an exception to this rule in three decisions.

The decision in Heat stabilisers (2009) illustrates that the Commission may exceptionally decide to set different percentages of the value of sales depending on the specific gravity of the conduct of each undertaking. In assessing the gravity of the cartel, from a general perspective, the Commission stressed the harmful and serious nature of the multi-faceted market sharing cartels. The decision also emphasised the efforts of the parties to ensure the secrecy of the agreements. Furthermore, the overall combined market shares in the relevant geographic area within the EEA were estimated above 90% for tin stabilisers and just above 80% for ESBO/esters. As regards the geographic scope, the cartels covered almost the entirety of the EEA. Last, the Commission took the view that the arrangements had been implemented and monitored. However, such implementation and monitoring were not uniform throughout the entire duration of the infringements. In particular, audits no longer took place after 1996. The Commission explained in its decision that, in determining the basic amount of the fine, it took account of the rigorous implementation that took place until 1996 and that no increase for implementation was applied for the period thereafter (because the implementation was less rigorous). In addition, certain undertakings (Faci, Chemtura and Arkema) only joined the infringements at a relatively late stage. Accordingly, implementation was not taken into consideration for Faci (ESBO/esters infringement), Chemtura (both infringements) and Arkema France (tin stabilisers infringement). Given the specific circumstances of this case, the Commission established that 20% of the value of sales should be taken into account for the tin stabiliser infringement. For Chemtura and Arkema France, in contrast, the rigorous implementation was not considered which resulted in the percentage to be applied for of 19%. With respect to the ESBO/esters infringement, the value of sales to be taken into account was 19%. The rigorous implementation should not be considered for

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3557 See Fining Guidelines 2006, para 22.
3558 On the other hand, the fact that the Guidelines do not expressly provide for the analysis of the actual impact of the infringement on the market for the purpose of determining the gravity of the infringement, does not mean that the Commission was not at liberty also to consider that factor in this case (Case T-406/09, Donau Chemie AG v Commission, para 77). Still, if the Commission considers it appropriate to take into account the actual impact of the infringement on the market, it must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market, T-286/09, Intel Corp. v Commission, para 1623).
3560 Ibid, paras 701-703.
3561 Ibid, para 705.
3562 Ibid, para 706. The Commission clarified in its decision that ‘if there had been rigorous implementation during the entirety of the cartels, the increase would have been higher’. From this perspective, this case also illustrates the importance of the implementation criterion.
3563 Ibid, para 707. More precisely, ‘Faci joined the ESBO/esters infringement at a relatively late stage (6 November 1996). Chemtura joined both infringements on 29 May 1998. For Arkema France, […] only the second part of the tin stabilisers infringement (that is from 9 September 1997 to 21 March 2000) is subject to fines’.
3564 Ibid, para 793. For Arkema France’s involvement in the ESBO/esters infringement (September 1991 until September 2000), an increase was applied for implementation.
Chemtura and Faci. Therefore, the percentage to be applied for Chemtura and Faci should be 18%.

A similar approach was adopted in *Pre-stressing steel* (2010). In this case, all undertakings except Fundia were involved in extremely harmful restrictions of competition, namely, market sharing (quota fixing), customer allocation and horizontal price fixing. Fundia’s participation in the cartel was limited to the (... client co-ordination. The Commission estimated the combined market share of the undertakings in the EEA around 80%. As regards the implementation of the arrangements, it was noted that although the cartel was not always completely successful or effective, the arrangements were implemented. The geographic scope of the infringement covered, according to this decision, 12 Member States but evolved over time. However, the Commission specified that certain firms (Socitrel, Proderac, Fapricela and Fundia), which participated exclusively in Club España (covering Spain and Portugal only) or – for the latter undertaking – in the (...) co-ordination. For these firms, the awareness of the infringement could only be established at a very late stage of the infringement. Therefore, the Commission took into account a more limited geographical scope in determining the proportion of the value of the sales. Based on the considerations above, the Commission concluded that taking into account the criteria discussed above relating to the nature of the infringement and the geographic scope, the proportion of the value of sales to be taken into account should be 16% for the Fundia undertaking, 18% for the undertakings Socitrel, Fapricela and Proderac and 19% for all other undertakings.

Establishing different percentages of the value of sales is normally not necessary given that such percentage is set by general reference to (the four criteria used to assess) the gravity of the infringement. However, when it appears certain factors to assess the gravity (for instance, the implementation of an agreement) had a more important role for certain firms than for others, it is indeed desirable to impose different percentages of the value of sales. Such different percentages are in this situation more appropriate to reflect not only the conduct of a given undertaking, but also the harm or gains deriving from such behaviour.

e. Highest proportion of the value of sales equalled 25%

According to the Guidelines, as a general rule, the proportion of the value of sales taken into account is set at a level of up to 30%. In practice, the proportion of the value of sales chosen by the Commission has never reached 30%.

The highest percentage imposed was 25% in the *Marine hoses* (2009) decision. In order to determine the proportion of the value of sales in this case the Commission firstly referred to the serious nature of the infringement and specially stressed that ‘[h]orizontal price and quota fixing, tender allocation and geographic market sharing are by their very nature among the most harmful restrictions of competition, as these practices distort competition with regard to the main parameters

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3567 *Ibid*, paras 947-949. In particular, the infringement covered ‘the then 15 Member States except for Greece, the United Kingdom and Ireland and including Norway as an EEA Contracting Party [...]. From 1984 to 1995, it included Germany, France, Italy, the Netherlands, Belgium, Luxemburg, Spain and Austria. From 1996 to 2002, the infringement covered the same countries and Portugal, Denmark, Sweden, Finland and Norway’.
3568 *Ibid*, para 949. The decision also clarified that ‘[t]his reasoning would not be applied to the other Club España participants (Emesa/Galycas, Tyca/Trefilerias Quijano) who participated simultaneously at several levels of the cartel and/or for which awareness of the infringement is established at a much earlier stage. Also for the Club Italia participants the situation is different from Socitrel, Proderac and Fapricela as the geographic scope of Club Italia largely overlaps with that of the pan-European arrangements and is thus much larger than the geographic scope of Club España (Spain and Portugal).

of competition’. Given this feature, the percentage is as a matter of policy set at a high level.\textsuperscript{3572} Second, the Commission took account of the fact that the combined market share was more than 90%.\textsuperscript{3573} Third, the infringement covered the entire EEA. Finally, consideration was given to the implementation of the agreement. In this regard, the Commission pointed out that the arrangements were indeed implemented (although not always completely successful) and monitored. More specifically, the Commission observed that after coming to agreements on the basic principles of collusion, cartel members implemented them by agreeing on the allocation of specific tenders and the price levels quoted during these tenders. Evidence also showed that the cartel members monitored the implementation of the agreed market shares and that over specific periods the cartel led to an inflation of marine hoses prices.\textsuperscript{3574}

The second highest percentage of the value of sales established by the Commission was applied in \textit{Chloroprene Rubber} (2007).\textsuperscript{3575} In this decision, the Commission reached the conclusion that the proportion of the value of sales of each undertaking should be 21%.\textsuperscript{3576} To come to this figure the Commission took into account (i) the extremely harmful nature of market sharing and price fixing arrangements,\textsuperscript{3577} (ii) the fact that the estimated combined EEA market share of the participants was 100 %,\textsuperscript{3578} (iv) the global geographic scope of the infringement and (v) the systematic implementation of the infringement.\textsuperscript{3579}

The Commission’s practice therefore illustrates that, despite the Guidelines’ warning that the percentage of the value of sales would be set very high in cartel cases, it was rather cautious when establishing the final range. Except for the two decisions commented above, the most common percentages range from 16 to 18%. This implies, on the other hand, that the Commission has still has plenty of leeway to increase average fines by using 30% as starting points instead of the effectively applied proportions of 16-18%.\textsuperscript{3580}

5.3.1.5. The duration

The duration of infringements established and fined by the Commission varied considerably from a few months to decades.

Under the 2006 fining methodology, the duration factor became a key parameter. The Commission opted for a method under which each year of participation is completely reflected in the basic amount of the fine.\textsuperscript{3581} The 2006 Guidelines provide that the amount determined on the basis of the value of sales is multiplied by the number of years of participation in the cartel in order to fully take into account the length of the participation of each member in the cartel. Periods which are shorter than six months count as half a year, while periods longer than six months but shorter than one year count as a full year.\textsuperscript{3582}

\textsuperscript{3571} Ibid, para 439.
\textsuperscript{3573} Ibid, para 442.
\textsuperscript{3574} Ibid, para 444.
\textsuperscript{3575} Case COMP/38.629 — \textit{Chloroprene Rubber} [2008] OJ C 251/11.
\textsuperscript{3576} Ibid, para 535.
\textsuperscript{3577} Ibid, para 525.
\textsuperscript{3578} See further ibid, para 55.
\textsuperscript{3579} Ibid, para 535.
\textsuperscript{3580} See for a similar view e.g. J.\ CONNOR, “Cartel Fine Severity” 10 of the online version of this article.
\textsuperscript{3581} See further infra section 5.4 of this Chapter.
\textsuperscript{3582} Fining Guidelines 2006, para 24.
In practice, the Commission strived to apply this rule strictly, in particular during the years following the publication of the Guidelines.

In *Chloroprene Rubber* (2007), in example, the Commission established that the infringement lasted for 9 years for Bayer, DuPont, Denka, Enichem and Tosoh and for 6 years and 1 month for Dow and DPE. In accordance with point 24 of the Guidelines, the amount of fines was multiplied by 9 for the first group of undertakings and by 6.5 for the second group.

In the *Flat Glass* decision (2007), the cartel lasted for at least 1 year and 1 month for Pilkington and Saint-Gobain, and 10 months for Glaverbel and Guardian. As a result, the multiplying factors were 1.5 and 1 respectively.

In *Bananas* (2008), since the infringement lasted for 3 years for Dole and Weichert and for 2 years and 11 months for Chiquita, the amount of fines was multiplied by 3.

As the Commission gained some experience in the application of its Guidelines, it gradually adopted an adjusted approach towards the duration rule. Instead of rounding upwards for periods longer than six months but shorter than one year and for periods shorter than six months, the Commission quite soon started applying a proportional increase of the multiplier on a monthly and pro rata basis. The application of this adjusted rule was clarified in *Heat stabilisers* (2009), in which the Commission commented that ‘if, for instance, the duration is six years, four months and four days, the calculation will take into account six years and four months without counting the number of days at all’.

The pro rata basis rule is in effect reflected in various cases. For instance, in the *Airfreight* case (2010) the infringement lasted from 4 months to 6 years and 2 months and the Commission applied a multipliers ranging from 0,33 (4/12) to 6,16 (6+2/12.)

The *LCD* cartel (2010) lasted for 4 years, 3 months and 25 days in the case of all companies except HannStar, for which the duration was 4 years, 3 months and 1 day. The amount of fines was multiplied with 4,25 years (i.e. 4 + 3/12) for all the parties.

In *Animal Feed Phosphates* (2010), — one of the longest cartels ever punished by the Commission — lasted for 34 years and 8 months. The duration of the infringement was translated into a multiplier of 34,66 (34 + 8/12). In this same case, other firms were involved in the infringement during 9 years and 10 months, which lead to a corresponding multiplier of 9,83.

In *Consumer detergents* (2011), the starting date for the participation in the infringement of each undertaking was 7 January 2002 and the end date 8 March 2005. Once again, the Commission took

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3584 Ibid, para 536.
3586 Ibid, para 485.
3588 Ibid, para 462.
3590 Ibid, para 712. Unfortunately, the concrete multipliers applied in this decision were not specified.
3593 Except LGD for which, due to its partly accepted ‘partial immunity’ for 2006, the multiplier was 4,16 years corresponding to 4 years and 2 months. Ibid, para 418.
3595 Ibid, paras 206-209.
into account the actual duration of participation in the infringement rounded down to the month. As a result, the fine was multiplied by 3.16 corresponding to 3 years and 2 months.3597

The same approach was followed in the decision in Blocktrains (2015),3598 in which the infringement lasted 7 years and nearly 11 months and the multiplier was set at 7.91 3599

Furthermore, the analysis of the Commission’s decisions also suggests that the duration factor can be differentiated on the basis of periods of limited activity or in situations where an undertaking did not participate in all the aspects of the anticompetitive agreement.

In CRT glass bulbs (2011),3600 the duration of the undertakings’ involvement in the infringement was 3 years and 11 months for AGC, 4 years and 5 months for NEG and SCP and 3 years and 10 months for Schott. Multipliers corresponding to 3.91, 4.41 and 3.83 were applied respectively. The decision clarified that a period of limited activity had not been taken into account for purposes of calculating the fines and was thus not reflected in the respective duration multipliers.3601

The Marine hoses cartel (2009)3602 lasted more than 21 years. However, a period of 2 years of limited activity of the cartel was excluded for the purpose of calculating fines. In particular, the Commission considered that given the limited evidence of collusion available for the period between 13 May 1997 and 11 June 1999, this period should not be taken into account.3603 As only 19 years of duration were duly accounted for, the amount of fine was multiplied by factors up to 19.3604

5.3.1.6. The entry fee

The Commission has discretion to decide whether or not to impose an additional amount or entry fee in imposing fines for infringements of Article 101 and 102 TFEU. Nevertheless, the 2006 Guidelines stipulate that such amount will be as a matter of policy imposed in cartel cases.3605 In line with this view, the Commission applied an entry fee in all the decisions imposing fines for cartel behaviour.

This entry fee can vary from 15 to 25% of the value of sales and is imposed irrespectively of the duration of the undertaking’s participation in the infringement. The main purpose of the entry fee is to deter undertakings from even entering into illegal cartel behaviour. This objective is in effect constantly emphasised in the Commission’s decisions imposing fines.3606

3597 Ibid, paras 80-81.
3599 Ibid, paras 85-86.
3601 Ibid, para 81.
3603 Ibid, para 283.
3604 Ibid, paras 446-448.
3605 See 2006 Fining Guidelines, para 25; see also Case T-406/09, Donau Chemie AG v Commission, para 125. In this case, the General Court pointed out that ‘the Commission was not required to decide whether or not to include the entry fee in the basic amount of the fine which it was to impose on the applicant: the method set out in the Guidelines, to which the Commission must adhere, provides for the inclusion of such a sum in the basic amount’.
In particular, in the \textit{LCD} (2010) cartel decision LPL argued that it was not necessary to increase its fine for deterrence purposes because no unlawful gain had been obtained from the infringement. To support this view, it submitted an econometric analysis according to which its prices were not higher due to the lack of implementation of the price discussions. This firm also pointed out that the fine imposed in the United States provided for sufficient deterrence.\textsuperscript{3607} The Commission rejected this view and firmly stated that ‘[n]one of the[se] arguments justify a deviation from the explicit Commission policy […] of imposing a so-called “entry fee” to deter undertakings from even entering into a horizontal price-fixing agreement. With respect to an alleged lack of gain resulting from the cartel, the Commission explained that this factor does not constitute an element to be taken into account when setting the percentage. Next, fines imposed in other jurisdictions reflect the harm done by the cartel in those jurisdictions. Therefore, in the Commission’s view, the argument concerning the lack of systematic implementation and the econometric analysis supporting should not be taken into account either. The entry fee in this case was finally set at 16% of the average annual value of sales for all the undertakings concerned.\textsuperscript{3608}

The decisions imposing fines demonstrate that, in order to establish the entry fee specific percentage, the Commission does not conduct an apart assessment of the gravity of the case; instead it refers to the considerations made in the context of the general examination of the gravity. This choice is logical as the specific range of (entry fee) percentage is meant to reflect the serious nature of the infringement. In other words, the actual level of the entry fee depends very much on the general criteria used for the assessment of the percentage of the value of sales. On the other hand, this also implies that the same level of entry fee applies commonly to all the participants of a given agreement.\textsuperscript{3609}

The findings above can be illustrated by the following cases. In \textit{Chloroprene Rubber} (2007), for example, the Commission considered necessary to deter undertakings from entering into market sharing or horizontal price fixing agreements by increasing the basic amount with an additional amount or “the entrance fee”. For that purpose, Commission simply referred to the circumstances of the case and, in particular, the factors discussed concerning the assessment of gravity. The Commission concluded that an additional amount of 20% of the value of sales was appropriate.\textsuperscript{3610} Similarly, in \textit{Calcium carbide and magnesium based reagents} (2009), the Commission pointed that “[g]iven the specific circumstances of this case, taking into account the criteria discussed above relating to the nature of the infringement and the geographic scope of the infringement, the percentage to be applied for the additional amount should be 17%”.\textsuperscript{3611}

\textsuperscript{3607} In this case similar claims were made by AUO, according to which there was no need to increase the fine for deterrence purposes. HannStar, on the other hand, claimed that it is the smallest of the participating undertakings and that a very significant proportion of its world-wide turnover is attributable to LCD panels. See Case COMP/39.309 — LCD [2011] OJ C 295/8, paras 421-422.


\textsuperscript{3609} This method has been accepted by the European Courts which have declared in this regard that both the percentage of the value of sales and the deterrence multiplier is determined in the light of factors which reflect the characteristics of the infringement as a whole, that is to say inasmuch as it combines all of the anti-competitive conduct of all of the participants. Consequently, the factors listed in point 22 of the 2006 Guidelines to determine both the multiplier for ‘gravity of the infringement’ (point 21 of the 2006 Guidelines) and the multiplier for the ‘entry fee’ (point 25 of the 2006 Guidelines), all aim to evaluate the infringement of the competition rules of the European Union, taken as a whole. Judgment of the General Court of 25 October 2011, Case T-348/08, Aragonesas Industrias y Energía, SAU v Commission [2011] II-7583, paras 265-267.


5.3.1.7. Adjustments on the basis of aggravating and mitigating factors

As commented above, the 2006 Guidelines contain in essence the same aggravating and mitigating factors as the 1998 methodology. However, some modifications or nuances have been made in order to bring the 2006 calculation method fully in line with the relevant case law.

Before analysing the main changes, it is important to underline the different objectives pursued by the fine calculation steps. On the one hand, the application of a multiplier for the ‘gravity of the infringement’ and the deterrence multiplier or the ‘entry fee’ aim to evaluate the infringement of the competition rules taken as a whole. On the other hand, the aggravating and mitigating factors listed in the 2006 Guidelines characterise the individual anti-competitive conduct of each of the participants to the infringement at issue.

a. Aggravating factors

Increases on the basis of aggravating factors were not often applied under the 2006 Guidelines, with the exception of the factor concerning repeated infringements. For this factor increases ranged from 50% to a maximum of 100%. The rest of aggravating circumstances led to increases from 30% to 50%.

(i) Recidivism

The 2006 calculation system contains two important novelties in the context of repeated conduct. First, the Commission can take into account its own decisions finding a violation of Article 101 [or 102] TFEU, but also the decisions of NCAs concerning the same undertaking in order to establish the existence of recidivism. In addition, the 2006 Guidelines specify that a maximum 100% increase in the basic amount can be applied for each prior infringement. Indeed, as Table 3 above shows, of all the possible aggravating factors recidivism is not only one of the most frequently considered aggravating circumstances. In addition, increases for repeated infringement lead in practice to the largest upward adjustments.

Out of the 48 cases in which the Commission applied the 2006 Guidelines, the factor of repeated infringement (committed by at least one firm) is found in 12 cases. The Commission firmly stressed in all these decisions that the repetition of the same type of illegal business activities (either in the same industry or in different sectors), shows that the first penalties did not have a sufficient deterrent effect.

The analysis of the Commission’s practice shows that increases imposed for recidivism vary between a minimum of 50% to a maximum of 100%. In order to establish the precise increase, the Commission takes account of the number of infringements committed previously by the relevant

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3613 Ibid, point 25.
3614 Ibid, point 22.
3615 Case T-348/08, Aragonesas Industrias y Energía, SAU v Commission [2011] II-7583, para 267. The role of the application of mitigating aggravating factor was indeed similar under the 1998 fining method. See further supra section 4.3 of this Chapter.
3616 For the concrete overview of cases see Table 2.
undertaking(s). However, increases are not necessarily proportional to the number of infringements. In particular, the Commission follows the next rule: a 50% increase is applied for one previous violation; a 60% increase for two, a 90 % for three and a 100% for four or more previous infringements.\footnote{See also identifying the use of this rule e.g. J. CONNOR, “Cartel Fine Severity” 14-20 of the online version of this article; W. WILS, “Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis”, 2012 (35-1) World Competition.; 5-26, at 4-5 of the online version of this article available at http://ssrn.com/abstract=1957088 (hereafter: ‘W. WILS, “Recidivism”’); E. BARBIER DE LA SERRE AND C. WINCKLER, “Legal Issues Regarding Fines Imposed in EU Competition Proceedings”, 2010 (1-4) Journal of Competition Law & Practice, 327-347, at 336-337; E. BARBIER DE LA SERRE AND C. WINCKLER “A Survey of Legal Issues Regarding Fines Imposed in EU Competition Proceedings”, 2011 (2-4) Journal of European Competition Law & Practice, 356-370, at 360-361; C. VELJANOVSKI, “Deterrence, Recidivism” 14.}

These findings can be illustrated by the following cases. The first case in which the Commission applied this aggravating factor under the 2006 Guidelines was the \textit{Chloroprene Rubber} (2007) cartel. In this case, the Commission established that Bayer and Enichem had already been the addressees of previous Commission cartel decisions at the time of the infringement. In particular, Anic a subsidiary of the ENI Group had participated in \textit{Polypropylene} (1986), and Enichem had taken part in \textit{PVC II} (1994). With respect to Bayer, its fully own subsidiary Harmann & Reimer Corporation was an addressee of the Decision in \textit{Citric Acid} (2001). In its decision, the Commission regretted the fact that the previous penalties did not prompt those undertakings to change their conduct. As a consequence, the fine for Bayer was increased by 50% and that of Enichem by 60%.\footnote{Case COMP/38.629 — Chloroprene Rubber [2008] OJ C 251/11, para 540.}

The highest increase for recidivism was applied in \textit{Calcium carbide and magnesium based reagents} (2009). In this case, Akzo Nobel and Degussa had already been subject to previous Commission decisions. While Akzo Nobel had been fined in four previous cases (\textit{Sodium Gluconate} (2002), \textit{Organic Peroxide} (2003), \textit{Choline Chloride} (2004), and \textit{Monochloroacetic acid} (2005)), Degussa had been previously punished in the \textit{Methionine} decision (2002). This aggravating circumstance led to the highest increase ever imposed of 100% for Akzo Nobel and to an increase of 50% for Degussa. It is interesting to mention in this regard that the Commission rejected Degussa’s claim that no extra deterrence was needed because it had already put a strict compliance programme in place after the previous decision. In the Commission’s view the reoccurrence of anticompetitive behaviour actually demonstrated that the adoption of such program had not prevented an infringement from occurring.\footnote{Case COMP/39.396 – Calcium Carbide and magnesium based reagents for the steel and gas industries [2009] OJ C 301/18, paras 309-312.}

The second highest increase for recidivism was imposed in \textit{Sodium Chlorate} (2008).\footnote{Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6.} In this case, Atochem had already been the addressee of three previous Commission decisions (\textit{Peroxygen products} (1984), \textit{Polypropylene} (1986) and \textit{PVC} (1994)) at the time the infringement took place. In the Commission’s view, this aggravating circumstance justified an increase of 90% in the amount of the fine.\footnote{See confirming this approach Case T-343/08, Arkema France v Commission [2011] ECR II-2287, paras 02-103.} It is interesting to mention that the Commission rejected the argument raised by Atochem that the previous cartel behaviour occurred more than 12 years before the beginning of the \textit{Sodium Chlorate} infringement, and therefore could not be relied on to establish repeated infringements. The Commission explained that the relevant factor in the context of recidivism is not the period in which the previous infringements took place, but the date of the decision finding such an infringement. To elaborate on this point, the Commission observed that the \textit{PVC} decision was adopted in 1994, \textit{i.e.} during the same year in which Atochem started participating in the \textit{Sodium Chlorate} cartel. In addition, the decisions in \textit{Polypropylene} (1986) and \textit{Peroxygen products} (1984), had only been rendered some eight and ten years respectively before the start of the current
infringement and, thus, before the PVC decision was issued in 1994. In *Danone v. Commission*, the (now) General Court held that there is no maximum period in relation to the finding of repeated infringements. In particular, the Court stated that “where a relatively short time of less than 10 years has elapsed between the finding of an infringement and a repeated infringement, the Commission may rightly conclude that the repetition of unlawful conduct shows a tendency not to draw the appropriate conclusions from that previous finding, thereby justifying an increase of the fine for such repetition.”

In *Carglass* (2008), Saint-Gobain had already been the addressee of two previous Commission cartel decisions (*Flat Glass* (1984) and *Flat Glass Italy* (1988)) at the time the infringement took place. After stressing that the repeated behaviour demonstrated the lack of deterrent effect of the previous fines, the Commission concluded that this aggravating circumstance justified an increase of 60% in the basic amount of the fine.

In *Heat stabilisers* (2009), recidivism was considered as an aggravating circumstance for Arkema France, which had taken part in three previous violations in *Peroxyn products* (1984), *Polypropylene* (1986) and PVC (1994). As a result, the amount of the fine was increased by 90%.

In *Power cables* (2014), ABB had been held liable for an infringement of Article 101 TFEU in the *Gas Insulated Switchgear* decision (2007). The basic amount of the fines for ABB was increased by a factor of 50%.

The same increase was applied in *Alternators and starters* (2016) in which the Commission decided to apply an increase of 50% of the fine of Melco and Hitachi for recidivism because both undertakings had been addressees of the *Gas Insulated Switchgear* decision (2007).

Yet, it is also important to point out that – despite the reinforced need to enhance deterrence in cases where the companies were recidivists – the Commission does not always believe that fines should be increased on the basis of this aggravating factor. This was specially the case when the previous infringement had been established by a NCA.

This particular situation occurred in *Shrimps* (2013), in which the Commission observed that although “[t]he Statement of Objections foresaw the possibility of increasing the fine of Heiploeg and Klaas Puul on the basis of a previous conviction by the Dutch Competition Authority for a similar infringement of Article [101 TFEU], the fines of [these undertakings] are already sufficiently deterrent, reaching the legal maximum, without applying this aggravating circumstance.”

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3622 Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6, paras 525-527. Moreover, in this case Atochem argued that its activity in the sector of polypropylene had been ceased since 2004. With respect to this argument, the Commission simply pointed out that this change occurred years after the Sodium Chlorate infringement had ended. In any event, the repetition of similar infringements justifies an increase in the fine because it proves that the earlier fine was not sufficiently deterrent. Deterrence, however, cannot be limited only to the market concerned by a particular infringement but must apply to all of an undertaking’s activities. Thus, the fact that Atochem may not be able to “re-offend” in a particular business sector is irrelevant for its increase in the fine on account of repeated infringements.

3623 This view was also confirmed by the ECJ in its Judgment of 8 February 2007, Case C-3/06 P, *Danone v Commission* [2007] ECR I-1331, para 47.


3628 See elaborating on this aspect supra section 4.3 of this Chapter.

The application of the 2006 Guidelines shows that the Commission has been rather cautious in imposing increases in fines for recidivism.\textsuperscript{3631} Even though the Commission is entitled to increase the fine up to 100\% on the basis of this factor, it seems reluctant to make use of this possibility. In fact, the highest increase did involve a 100\% percentage but took account of four previous infringements. It is also true that the application of 50\% for one previous infringements, 60\% for two, 90\% for three and 100\% for four is greatly below the 100 \%, 200 \%, 300 \% and 400 \% respectively applicable limits set out in the 2006 Fining Guidelines.\textsuperscript{3632} This inevitably raises the question whether the increases applied under the 2006 Guidelines suffice to deter companies which show a strong tendency to commit competition law violations.\textsuperscript{3633}

(ii) Refusal to cooperate or obstruction

The factor concerning refusal to cooperate with or obstruction of the Commission in carrying out its investigations has only been applied in one case under the 2006 Guidelines. The application of this factor led to a 30\% increase in fines.

In \textit{Professional videotapes} (2007), representatives of Sony refused to answer oral questions during the inspections and an employee shredded documents from a file labelled "Competitors Pricing". Although Sony did not contest these facts, it argued they could not constitute aggravating circumstance. Its defence in this respect mainly focused on the alleged absence of effects that this behaviour had on the Commission’s investigation.\textsuperscript{3634} The Commission clarified that for this aggravating circumstance to be applicable, it is sufficient that the conduct of the undertaking is deliberately obstructive, irrespective of any effects it may have had on proceeding. In the Commission’s view, Sony’s behaviour necessarily disrupted the proper conduct of the investigation and hindered the Commission’s inspectors in the exercise of their investigative powers.\textsuperscript{3635} In relation to the refusal to answer the Commission’s questions, Sony argued that certain questions went beyond the Commission’s powers under former Regulation 17. The Commission rejected that argument because all questions were aimed at obtaining explanations concerning documents found at the inspected premises. In any event, the Commission stressed that Sony’s simply refused to answer all questions without providing any justification, despite the assistance of the company’s legal counsel.\textsuperscript{3636} As to the shredding of documents, Sony claimed that it was done by a junior employee acting contrary to the company’s policy of full compliance with antitrust laws. The Commission answered that it is the undertaking’s responsibility to employ, instruct and control its employees, and to ensure that none of them obstructs or hampers the Commission’s work during an inspection.\textsuperscript{3637} The Commission finally penalised Sony’s obstructive behaviour with an increase in the basic amount of the fine of 30\%.\textsuperscript{3638}

(iii) Leadership

The Commission increased fines based on the role of leader, instigator, or coercer in the infringement in two decisions. In these cases the fines were increased by 30\% and 50\%. Both

\textsuperscript{3631} J. CONNOR, “Cartel Fine Severity” 16-17 of the online version of this article.
\textsuperscript{3632} This should be recalled that the 2006 Fining Guidelines (point 28) allow for an increase of 100\% per each repeated infringement. See also stressing this aspect W. WILS, “Recidivism” 4-5 of the online version of this article. In this context J. Connor even observed that ‘the average recidivism penalty has increased only 11 percentage points under the 2006 fining guidelines’. J. CONNOR, “Cartel Fine Severity” 17 of the online version of this article.
\textsuperscript{3633} This issue is analyzed below (“Assessment of the 2006 Guidelines”).
\textsuperscript{3634} Case COMP/38.432 – \textit{Professional Videotapes} [2008] OJ C 57/10, para 220.
\textsuperscript{3635} \textit{Ibid}, paras 221-222.
\textsuperscript{3636} \textit{Ibid}, para 225.
\textsuperscript{3637} \textit{Ibid}, para 226.
\textsuperscript{3638} \textit{Ibid}, paras 219-226.
decisions suggest that the importance and complexity of the activities exercised by the undertakings in question influenced the level of increase.

In *Candle waxes* (2008), the Commission had evidence that Sasol had among others activities (i) arranged almost all meetings by sending invitations, proposing agendas and organised many of them by reserving hotel rooms, chaired the technical meetings by initiating and organising the discussions on prices, followed-up the meetings by bilateral contacts and represented one of the other undertakings involved at least once.\(^{3639}\) In this regard, Sasol suggested that other undertakings played a leading role with respect to certain periods or aspects of the infringement. The Commission, however, rejected such allegations because in its view they were not based on evidence. The basic amount of the fine for Sasol was increased by 50\%.\(^{3640}\)

In the *Marine hoses* decision (2009), the Commission stated that it would ‘take account of the role of a leader of the infringement of DOM, Bridgestone, and ITR. DOM, Bridgestone, and ITR each served during a certain period of the infringement as coordinator of one of the two groups of undertakings giving structure and organisation to the cartel. As such, they chaired meetings, served as hubs for communication among cartel members, and took initiatives to promote and develop the cartel’.\(^{3641}\) The basic amount of the fine for Parker ITR and Bridgestone was consequently increased by 30\%.

b. Mitigating factors

The Commission applies reductions on the ground of mitigating factors more often than it imposes increases for aggravating circumstances. Nevertheless, in line with the case-law and the new wording of the Guidelines, a number of factors which were considered under the 1998 Fining Guidelines are no longer applicable. The most frequently applied circumstances are, without any doubt, the factor concerning limited involvement and non-implementation and the factor regarding cooperation outside the scope of the Leniency Notice. The reductions for the undertakings concerned range from 3\% to 60\%.

(i) Termination of the agreement as soon as the Commission intervenes

The Commission always rejected the undertaking’s arguments concerning the application of this factor.

For instance, in *Pre-stressing steel* (2010), a number of parties claimed that the Commission should take into account the fact that they ceased to participate in the cartel immediately following the inspections as an attenuating circumstance. The Commission reasonably replied that according to point 29 of the 2006 Guidelines this factor ‘[does] not apply to secret agreements or practices (in particular cartels)’. The Commission further stated that it ‘does not see in the particular case


\(^{3640}\) Ibid, paras 682-686.

\(^{3641}\) Case COMP/39.406 — *Marine Hoses* [2009] OJ C 168/6, paras 457-463. It is interesting to note that the decision further indicated that ‘the facts show that between 1 April 1986 and 14 March 1997, […] and Bridgestone coordinated the cartel ([…] vis-à-vis the European members and Bridgestone vis-à-vis the Japanese members). However, as DOM should not be held liable for the conduct of […] prior to December 1997, it should not be held liable for leadership of the cartel in the period from 1986 to 1997. When the cartel was strengthened again in 1999 after the period of limited activity, Parker ITR, together with Mr. [cartel coordinator], was the driving force behind the move to overcome the internal struggles among the cartelists and re-establish the elaborate formal ‘Club’-structure. From that time until late 2001, Parker ITR was the coordinator of one cartel group, while the other group was coordinated by Mr. [cartel coordinator]. Inquiries from the cartel group were registered with Parker ITR, and Parker ITR took over the role of coordinating and deciding on the allocation of tenders, as well as giving bidding instructions to all cartel members’. See paras 239-241 and 243, of the non-confidential version of this decision.
of cartels the adherence or re-adherence to the law as a conduct which merits any reward as it is rather the normal obligation of undertakings.  

(ii) Negligence

Comparably, the Commission also rejected the application of reductions on the basis of negligence in all its cartel decisions applying the 2006 Fining Guidelines.

To cite an example, in *International Removal Services* (2008), Coppens claimed that the infringement was committed by negligence or ignorance since it was not aware of the illegality of its behaviour. The Commission rejected this argument and stressed that for an infringement to be regarded as intentional, it is not necessary for the undertaking to be aware that it was infringing the European competition rules. Furthermore, it added that the initiatives taken to conceal the cartel – such as the drawing up of invoices with fictitious particulars to settle the payment of commissions – demonstrated that the members of the cartel were well aware of their activities.

(iii) Limited involvement and competitive behaviour

The 1998 Fining Guidelines recognised that the fine could be reduced if the undertaking had taken an exclusively ‘passive or follow-my-leader’ role in the infringements. The 2006 methodology, in contrast, do not include this as an attenuating factor. Nevertheless, under the 2006 Guidelines the Commission may mitigate the fine for substantially limited involvement if the company concerned actually avoided applying the illegal agreement by adopting competitive conduct in the market.

The factor regarding limited involvement was the most frequently applied mitigating circumstance and led to reductions in fines in 13 (of 48) cartel cases. Compared to the practice under the previous Guidelines, the Commissions decisions confirm that its approach is currently far more restrictive.

In *Bananas* (2008), the Commission could not prove that Weichert was aware of Dole’s pre-pricing communications with Chiquita or that it could have reasonably foreseen them. On the other hand, Dole and Chiquita were aware of the overall cartel scheme. Taking into account the circumstances of the case, the Commission applied a reduction of 10 % to the basic amount of the fine of Weichert.

In the *Airfreight* decision (2010), the majority of carriers invoked the argument that they had played a passive or limited role in the cartel. In this case the Commission firmly stressed that a passive role in the infringement no longer constitutes a mitigating circumstance under the 2006 Guidelines. However, the Commission accepted that a number of undertakings, which had operated in the periphery of the cartel, only had a limited number of contacts with other carriers and were involved

3646 Fining Guidelines 2006, point 29, third sentence.
3648 Ibid, paras 475-476. In this case the Commission did, however, also reject Weichert’s argument that its participation was limited because it participated in pre-pricing communications only infrequently. The Commission found in this regard that Weichert's communications formed an established and consistent pattern and that they took place over a long period of time (three years).
in less aspects of the cartel. These companies were accordingly granted a reduction of 10% of their basic amount.  

Likewise in *Pre-stressing steel* (2010), several companies invoked the factor regarding limited participation in the cartel. Basically, these companies argued that they had not participated in the cartel from the start. The Commission acknowledged that the role of Proderac and Trame had been substantially more limited than the role of other cartel participants. Proderac, in particular, participated in only 12 (Club España) meetings over eight years. Moreover, Proderac complained to the other members about the fact that the agreements had been established without its implication, which according to the Commission showed its marginal role. Proderac also submitted tables comparing the assigned quota with the alleged actual data which showed that it deviated most from its assigned quotas. With regard to Trame, in the Commission’s view this firm was also marginal player in Club Italia as it attended only around 18 cartel meetings in more than five years. In addition, Trame’s role in the cartel was frequently discussed in its absence which, according to the evidence, created tensions with the other participants. Both companies obtained a reduction of 5%.  

Conceptually speaking, the exclusion of the (mere) passive role as an attenuating circumstance under the 2006 Guidelines is however logical. In the context of a cartel, not all companies can play the role of leader. Yet, passive members remain essential for the functioning of the agreement. Rewarding these less active companies – systematically – with a reduction is therefore inappropriate. As these “followers” also obtain gains from the participation in the cartel when it is successful. Excluding this mitigating factor is thus also a correct initiative from an economic perspective.

**(iv) Cooperation outside the scope of the Leniency Notice**

Once cartels have been detected by the Commission, undertakings are generally willing to cooperate with the Commission in its investigation. In eight cartel decisions, undertakings provided useful cooperation which enabled the Commission to establish the existence of the infringement more easily. When such cooperation could not be rewarded under the leniency programme, the Commission reduced the basic amount of fines by considering the firm’s conducts as a mitigating factor. The percentage of reduction ranged from 3% to a maximum of 18%.

For example, in *Power Transformers* (2009), the Commission concluded that exceptional circumstances of the case justified granting both Hitachi and Areva T&D a reduction of 18% of the fine for their effective cooperation (outside the 2002 Leniency Notice). In particular, Areva cooperated fully on a continuous basis throughout the Commission's investigation and made its employees available for a meeting with the Commission in which they provided on-the-spot explanations for previous statements.
In *Pre-stressing steel* (2010) the Commission refused to apply this mitigating factor to a number of companies because they had not provided information of significant added value. However and quite remarkably, the Commission accepted that – taking into account the need to maintain the incentives for companies to cooperate in its investigation – it was appropriate to grant ArcelorMittal a reduction in respect of its liability deriving from the participation of its (former) subsidiaries Emesa/Galycas in the infringement.

In *Refrigeration compressors* (2011), the fine imposed on Embraco was reduced for cooperation outside leniency because this firm provided the Commission with evidence concerning commercial refrigerators for a substantial period of the infringement, which allowed the Commission to increase the duration of the infringement.

This mitigating factor was also applied more recently in *Power cables* (2014) to Mitsubishi and in *Retail Food Packaging* (2015) to NEW. In view of their effective cooperation outside the scope of the Leniency Notice, the Commission reduced the fine by 3% and 5% respectively.

**v) Authorisation or encouragement by the state or by legislation**

The factor regarding encouragement or authorisation by legislation or by the state was accepted in three cartel decisions between 2008 and 2011. In these cases the basic amount of fines was reduced by 60%, 20% and 15%.

The highest reduction was applied in *Bananas* (2008). In this case, the Commission took into account the fact that during the relevant period the banana sector was subject to a very specific regulatory regime. In essence, this regime was based on strict import quotas and tariffs. In light of the very particular circumstances of this case, a reduction of 60% was applied to the basic amount of the fines for all the parties.

In *Exotic fruit* (2011), Pacific and Chiquita argued that the EU-regulatory regime in place was identical to the regulatory regime which applied at the time of the infringement in the *Bananas*. Accordingly, an equivalent reduction should apply in their view. However, the Commission found that a number of elements (such as the type of quotation prices) which were established in *Bananas* did not exist in the Southern European region. Furthermore, the price fixing identified in this case did not limit itself to such quotation prices. As a result, the Commission held that the essential elements which justified a mitigating factor of 60% in the *Bananas* decision were not present in this case. In view of these circumstances, a lower reduction of 20% was applied.

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3655 The Commission also stressed that the non-contestation of the facts does not in itself suffice to qualify for a reduction of the fine under Point 29 of the 2006 Guidelines on fines, particularly when the facts are established on the basis of ample evidence. See Case COMP/38.344 — *Prestressing Steel* [2011] OJ C 339/7, paras 1009.

3656 Ibid, paras 1006-1012.

3657 Case COMP/39.600 — *Refrigeration compressors* [2012] OJ C 122/6

3658 Ibid, para 85


3660 Under the 1998 Fining Guidelines, this factor was considered under the heading of “Existence of reasonable doubt”). For a more detailed assessment see supra (“The 1998 Fining Guidelines”).

3661 According to the decision, ‘the import of bananas into the European Community was regulated under Council Regulation (EEC) No 404/9336 of 13 February 1993 on the common organization of the market in bananas. From 1 July 1993 until 1 January 2006, the regime was based on import quotas and tariffs. Banana import quotas were set annually and allocated on a quarterly basis with certain limited flexibility between the quarters of a calendar year. Since 1 January 2006 the banana import arrangement has been based on a tariff only system’. See further on this regime Case COMP/39.188 — *Bananas* [2009] OJ C 189/12, paras 36-40.


In Airfreight (2010), several undertakings submitted that the existence of state regulatory regimes under which coordination between carriers on prices and surcharges was encouraged should be taken into account as a mitigating circumstance. In particular, the airlines claimed that a conflict between the operation of local regimes and the requirements of EU competition law gave rise to uncertainty as regards the legality of their actions. In line with the case law, the Commission considered that if national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU. Still, the Commission also recognized that some regulatory regimes encouraged certain elements of the anticompetitive conduct. This was more precisely the case for the Air Service Agreements that governed air services between EEA countries and third countries, which provided price agreements between the designated airlines. The Commission, therefore, concluded that this regulatory environment constituted a mitigating circumstance which justified a 15% reduction for all the firms involved.

These decisions indicate that not only the level of regulatory intervention is important to establish the percentage of reduction. The question whether regulatory regimes simply encourage or impose restrictions is decisive in the context of this mitigating factor.

5.3.1.8. Deterrence multiplier

In determining the amount of the fine, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. Although according to the Guidelines the deterrence multiplier can be imposed to take into account (i) the overall turnover of undertakings or (ii) the gains improperly made as a result of the infringement, in practice, the Commission only referred to the former.

The ECJ has also confirmed the application of the increase for deterrence and held that: ‘[…] the purpose of the multiplier for deterrence and of taking into consideration, in that context, the size and global resources of the undertaking in question resides in the desired impact on that undertaking, and the penalty must not be negligible in the light, particularly, of the financial capacity of that undertaking […]’.  

Under the 2006 Guidelines, the multiplier has been applied in 13 cases. According to the published information, the factors applied varied from 1.1 to 2. The most common factors applied were 1.1 and 1.2, which were applied to 10 and 8 undertakings respectively. The highest multiplier was 2 and was only applied in 1 case.

The first case in which a multiplier was applied was Professional Videotapes (2007). The Commission commented in its decision that in the financial year preceding the adoption of the decision Sony had a particularly large turnover beyond the sales of goods or services to which the infringement related, and that such turnover was, in absolute terms, much larger than Fuji's or

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3664 See in particular Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato [2003] ECR I-8055, para 56.
3666 See further supra section 4.3 of this Chapter.
3668 Judgment of the Court of 18 July 2013, C-499/11 P, Dow Chemical, para 86.
3669 For a complete overview see Table 3.
Maxell's (namely Sony’s turnover amounted to EUR 55 300 million; Fuji’s to EUR 18 548 million, and Maxell to EUR 1 348 million). Sony argued that there was no need to increase the fine because the gains of the cartel were modest. The Commission rejected this view and found that ‘[i]n cartel cases there may be a need to apply a specific increase for deterrence in consideration of the size of the undertaking's turnover beyond the sales of goods or services to which the infringement relates, even if it is not possible to estimate the amount of gains improperly made’. Accordingly, it decided to increase the fine to be imposed on Sony by 10%.  

The highest multiplier has been imposed in **Candle Waxes** (2008). In this case, one firm claimed that the multiplier should not be imposed given the lack of gains of the infringement. In addition, it argued that it was not in a position to control its employees beyond what it had already done. The Commission did not accept these arguments and stated that fines must ensure that the group as a whole takes the necessary steps to ensure compliance with competition rules. Then, it observed that the turnover of various undertakings in 2007, the most recent financial year preceding the decision, was remarkably high compared to the turnover of other firms. In view of this, the Commission decided to apply multiplier of 2 to ExxonMobil and Shell (whose turnover exceeded € 250 billion), of 1,7 to Total (whose turnover exceeded € 150 billion) a multiplier, of 1,4 to ENI (whose turnover exceeded € 85 billion) and of 1,2 to Repsol and RWE (whose turnover exceeded € 40) billion.

In **Sodium Chlorate** (2008) several parties claimed that there was no need to increase their fine for different reasons. First, Finnish Chemicals argued that at the time of the infringement it was a much smaller player than EKA and that it had never been the subject of infringement proceedings. Consequently, any fine eventually imposed would have a deterrent effect. Second, Atochem and Elf Aquitaine contended that they had been subject to significant fines imposed in four recent Commission decisions under which deterrence considerations had already been made. Atochem added that it had introduced a compliance programme. Finally, Aragonesas and Uralita pointed out that their turnover was not particularly large. The Commission countered these arguments by stressing the need to apply a specific increase for deterrence in cartel cases is based on the size of the undertaking's turnover. Furthermore, it noted that although the introduction of a compliance program may indicate Atochem's efforts to respect competition law, this in itself does not constitute a sufficient guarantee of compliance. In the Commission’s view, this was confirmed by the fact that the infringement in **Methacrylates** continued despite the introduction of the compliance program. Next, the Commission stressed that the adoption of several previous decisions imposing fines does not rule out an increase of the fine for deterrence. Rather, the participation in a series of cartels confirms the need to ensure appropriate deterrence in each decision. After an assessment of the total turnover of the companies it observed that Elf Aquitaine (with EUR 139 389 million) had a particularly large turnover which was much larger than the turnover of the other undertakings involved. Accordingly, the fine imposed on Elf Aquitaine was increased by 70%.

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3672 Case COMP/38695 — Sodium Chlorate [2009] OJ C 137/6, paras 545-549.
5.3.1.9. Discretionary adjustments

The Commission’s Fining Guidelines set out that cartel fines are calculated on the basis of the value of sales of the product relating to the infringement (i.e. the cartelized product). For mono-product undertakings, the turnover deriving from the cartelized product constitutes almost (if not) all its turnover. This implies that fines for mono-product companies are far more likely to reach the 10% turnover threshold limit. This aspect was recognised in June 2011 by the General Court in *Putters*, in which it held “the application of the 10% ceiling […] is now the rule rather than the exception for any undertaking which operates mainly on a single product-market and has participated in a cartel for over a year. In that case, any distinction on the basis of gravity or mitigating circumstances will as a matter of course no longer be capable of impacting on a fine which has been capped in order to be brought below the 10% ceiling.”

The General Court further suggested that the failure to distinguish fines on the basis of their gravity may be contrary to the principle that fines must be ‘specific to the offender and the offence’.

Since 2012, the Commission has exercised its discretion under point 37 of the Fining Guidelines in 8 cases in order to adjust the fines for mono-product undertakings and reduce their fines below the 10% ceiling.

Case COMP/38.629 — *Chloroprene Rubber* [2008] OJ C 251/11, paras 583-586. In *Chloroprene Rubber*, the Commission first observed that in 2006, (i.e. the financial year preceding the adoption of the decision), the total turnover of the undertakings was as follows: Eni: EUR 86 105 million, Dow: EUR 39 124 million, Bayer: EUR 28 956 million, DuPont: EUR 21 839 million, Tosoh: EUR 5 350 million and Denka: EUR 2 254 million. In order ensure the deterrent effect of fines, the Commission multiplied by 1.4 the fine to be imposed on Eni and by 1.1 the fine to be imposed on Dow. In the Commission’s view, applying a multiplier was not necessary for the rest of the undertakings (Bayer, DuPont, Tosoh and Denka).

Case COMP/39.129 - *Power Transformers* [2009] OJ C 296/21, paras 275-278. In this case, the fine for Siemens (worldwide turnover/sales ca. EUR 77 000 million) and Hitachi (worldwide turnover/sales ca. EUR 69 000 million) was multiplied by 1.2 and the fine for Toshiba (worldwide turnover/sales ca. EUR 47 000 million) was multiplied by 1.1. The Commission also stressed in this case that that the fact Hitachi was not present in the business at the time of adoption of this Decision, is not relevant for the use of the deterrence multiplier. The relevant criterion is that Hitachi caused damage to the European power transformer market by concluding and implementing the GA which resulted in the absence of competition from Japanese producers.

Case COMP/39.462 — *Freight forwarding* [2012] OJ C 375/7, paras 1021-1024. In this case, the worldwide turnover of Deutsche Post AG in 2010 was EUR 51.481 billion. Furthermore, the worldwide turnover of Deutsche Bahn AG in 2010 amounted to EUR 34.410 billion. Finally, United Parcel Service, Inc. generated a total turnover of EUR 37.3 billion in 2010. Taking into account the overall turnover of these companies, the Commission saw the need to set the amount of the fines at a level to ensure deterrence. In this case, a deterrence multiplier of 1.2 was applied to Deutsche Post AG group (in relation to the NES, AMS and PSS infringements) and of 1.1 to Deutsche Bahn AG group (in relation to the AMS and PSS infringements) and United Parcel Service, Inc. group (in relation to the AMS and CAF infringements).

Case AT.40098 — *Blocktrains* [2015] OJ C 351/5, paras 92-93. In this case, a multiplier of 1.1 was applied to Schenker which had an annual world-wide turnover of approximately EUR 39 billion in 2014.


T-211/08, *Putters International NV v Commission*, para 75. See also Judgment of 16 September 2013, T-386/10, Aloys F Dornbracht GmbH & Co KG v Commission, paras 218-223. Former Competition Commissioner, Joaquín Almunia, also acknowledged the need to ensure that mono-product companies are not treated in a discriminatory manner as compared to other cartelists when setting cartel fines. J. ALMUNIA, SPEECH/11/515 ‘Speech on Competition Policy 2010’, delivered to ECON Committee on 12 July 2011.

This practice has been criticised because the Commission ‘remains silent as to the precise methodology for calculating the reduction to the fines’. L. ABRAM, E. ALIENDE RODRIGUEZ AND JULIE VANDENBUSSCHE, “European Union: Cartels and Leniency”, 2016 *The European Antitrust Review*, available at http://globalcompetitionreview.com/reviews/72/sections/239/chapters/2892/european-union-cartels-leniency/.
In *Mountings for windows* (2012), the Commission observed that this case was exceptional because eight of the nine parties would reach the limit of 10% of the total turnover. Referring to the judgment in *Putters* and to the principle that ‘fines must be specific to the offender and the offence’, the Commission exercised its discretion in accordance with point 37 of the 2006 Guidelines and adapted the amount of the fines. Such adjustment was meant to take into account the proportion of the sales of the cartelised product in the total turnover and the differences between the parties in view of their individual participation in the infringement.

Following the same reasoning, the fines were also adapted in *Shrimps* (2013). The Commission reduced the fines in accordance with point 37 of its Guidelines to stress the differences between the companies that participated in the infringement. Still, the fines of two companies had to be capped at 10% of their turnover.

Similar considerations were noted in *Envelopes* (2014) and *Steel abrasives* (2014), in which the Commission also reduced the fines imposed on the different mono-product companies, ‘in a way that takes into account the characteristics of the companies and the differences of their participation in the infringement’.

In addition to adapting the fine in the case of mono-product undertakings, the Commission also exercised its discretion under point 37 in two cases to limit the maximum fines of certain separate legal entities to the level of 10% of their own total turnovers, instead of taking into account the total turnover of the whole undertaking.

For example, in *Polyurethane Foam* (2014), the Commission explained that – although the 10% cap laid down in Article 23(2) of Regulation 1/2003 is calculated on the basis of the total turnover of all the entities constituting an ‘undertaking’ – the legal entity Carpenter Belgium NV became a subsidiary of Carpenter Co. as of 9 July 2007 and, therefore, it could not be held jointly and severally liable with its current parent company Carpenter Co. for the period preceding the acquisition. The Commission accordingly reduced the parts of the fine for which Carpenter Belgium NV was solely liable, to a level not exceeding 10% of Carpenter Belgium NV’s own turnover. Without further elaborating on it, the Commission added that the same approach was followed with respect to Eurofoam and its parents Recticel N.V./S.A. and Greiner Holding.

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681 T-211/08, *Putters International NV v Commission*.

682 Case COMP/39.452 — Mountings for windows and window doors [2012] OJ C 292/6, paras 518-523. Commissioner Almunia commented that the fines were reduced to take account of the mono-product nature of the companies and their different degrees of participation in the cartel. Speech delivered at the International Bar Association Antitrust Conference in Madrid on 15 June 2012.


684 Unfortunately the reductions were not mentioned due to confidentiality reasons. In the specific circumstances of the case, and in view of the fact that all parties were dealing to a different but important extent in North Sea shrimps, it was proposed to apply a decrease [...] to the fine of Stührk, [...] to the fines of Heiploeg and Klaas Puul and [...] to the fine of Kok Seafood.


687 Case AT.39801 — *Polyurethane foam* [2014] OJ C 354/6, paras 97-100.

688 The same reasoning was followed in Case AT.39922 — *Bearings* [2014] OJ C 238/10, paras 99-101. Finally in Case AT.39965 — *Mushrooms* [2014] OJ C 453/21 (para 73), the Commission exercised its discretion under point 37 of the Guidelines and took into account that ‘Prochamp [was] a very small independent company that [did] not belong to a large group of companies’. Prochamp was granted an additional 10% reduction. As it was argued in Chapter 9, section 5.2, this flexible and exceptional approach could be linked to the application of the settlement procedure.
5.3.1.10. The application of the leniency system and the settlement procedure

Table 3 illustrates that the (2002 or 2006) leniency system was applied almost in every case. Furthermore, in an overwhelming majority of cases, undertakings qualified for immunity. Reductions were also very frequently granted.\textsuperscript{3689} On the other hand, the settlement procedure was also followed in 18 cases.\textsuperscript{3690}

A general issue in setting appropriate fines for cartels concerns the impact of leniency and settlement awards on deterrence. In the context of leniency, when the reductions granted under the programme are too generous (discounts on the fine that otherwise would be paid),\textsuperscript{3691} the effectiveness of the enforcement system taken as a whole can be undermined.\textsuperscript{3692} The first Commission’s leniency regime was not optimally designed (and applied).\textsuperscript{3693} As a result, unnecessary discounts were granted which had the consequent negative effect of deterrence. The revised 2006 leniency programme was, on contrast, significantly improved in terms of design and application. Overall, the reductions granted appeared generally justified given the important value of undertakings’ cooperation. With respect to the 2006 Leniency Notice, it can be affirmed in line with the conclusions drawn in Chapter 8, that the enhanced detection and punishment probabilities flowing from the leniency system surpass the negative effects that the granting of discounts in fines has on deterrence.\textsuperscript{3694} The same conclusion can be drawn with regard to the settlement procedure. Undertakings which chose to follow the settlement path obtain a fix 10\% reduction in their fine if they admit to the Commission’s objections and waive certain procedural rights. As concluded in Chapter 9, settlements constitute a desirable enforcement instrument for the Commission which generally allows a quicker administrative process, more efficient use of staff and resources and a reduced number of appeals to the court. These advantages effectively compensate for the reduced deterrence resulting from the 10\% settlement reduction.\textsuperscript{3695}

\textsuperscript{3689} For a more detailed assessment of the application of the Commission’s leniency programme see Chapter 8.

\textsuperscript{3690} For a detailed analysis see Chapter 9.

\textsuperscript{3691} J. CONNOR analysed the (percentages of) discounts granted under the leniency policy. He points out that ‘[o]n average post-leniency cartel fines were 33\% to 35\% lower than the pre-leniency fines (those that would have been imposed, absent the rewards due to the Leniency Program). By comparison, a careful analysis of 56 cartel decisions made under the EC’s 1998 Guidelines finds that leniency discounts caused pre-leniency fines to decline by 36.3\%. Therefore, so far, Commission leniency discounts under the 2006 Guidelines have been similar to those under the 1998 Guidelines’. J. CONNOR, “Cartel Fine Severity” 20 of the online version of this article. However, it should be kept in mind that, even if the level of reductions granted under both systems are comparable, the relevant question to assess the effectiveness of the leniency system is whether the reductions granted are justified or not given the value of the contribution of the undertaking concerned.

\textsuperscript{3692} See further in this context Chapter 8; J. CONNOR, “Cartel Fine Severity” 19-21 of the online version of this article; W. WILS, “Leniency” 26-27, of the online version of this contribution; W. WILS, “The Commission Notice” 130; M. Motta and M. POLO, “Leniency programs”; C. Marvão “The EU Leniency Programme”. This last author even comments that ‘there is some evidence that firms can “learn how to play the leniency game”, either learning how to cheat or how to report, as the reductions given to multiple offenders (and their cartel partners) are substantially higher’.

\textsuperscript{3693} See further supra Chapter 8.

\textsuperscript{3694} As J. CONNOR observed in this context ‘[a]n optimal degree of leniency is difficult to determine. Outsiders are in no position to second-guess the appropriateness of particular leniency decisions, because assessing the “value added” of each leniency contribution would require access to all the information’. J. CONNOR, “Cartel Fine Severity” 20 of the online version of this article.

\textsuperscript{3695} See further supra Chapter 7.
5.3.1.11. The application of the turnover cup

Also under the 2006 fining methodology, the Commission is not permitted to impose fines that exceed 10% of an undertaking global turnover in the business year preceding the adoption of the decision.

In the Commission’s decisions applying the 2006 Fining Guidelines, this requirement led to a limitation of the fine for one or more undertakings in 13 cases of 48. As pointed out above, the fact that fines have to be capped so often may suggest that they are not being set at an optimal deterrent level.

5.3.1.12. Ability to pay

Point 35 of the Guidelines refines the previous Commission’s practice concerning the (in)ability to pay of undertakings involved in competition law proceedings. The 2006 Guidelines provide some formal and substantial indications as to how and when a reduction for inability to pay can be granted. As to the form, the 2006 methodology states that the undertaking concerned must request the Commission to take account of its inability to pay in a specific social and economic context. Such a request can furthermore only be made on the basis of objective evidence. On substance, the 2006 Guidelines set a considerably high standard, in line with the case law. The undertakings concerned have to show that the imposition of a fine ‘would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value’.

Under the 2006 Guidelines, the Commission accepted inability to pay claims in 11 cases. The highest reductions amount to 70%-75% and the lowest to 25%.

One of the highest reductions was granted in International Removal Services (2008). In this case the Commission found that the fine of Interdean NV should be reduced by 70% due to special circumstances concerning this firm and its parent companies.

In Pre-stressing steel (2010), 23 legal entities invoked that their 'inability to pay' should be taken into account in the calculation of their fines. The Commission, however, only accepted this claim for three undertakings, and reduced their fines by 25 %, 50 % and 75 %. This decision is interesting because it illustrates the complexities involved in the process of assessing the undertakings’ financial situation. In the assessment of this case, the Commission firstly considered the financial statements of the last five financial years, as well as their projections. In this regard, a number of

3696 In this regard, the decisions imposing fines simply mention that the fines on the undertakings concerned will be set so as not to exceed the permissible limit.

3697 See further infra section 5.4 of this Chapter. Some have even argued that the fact that the severe fines imposed under the 2006 fining policy are being capped frequently could imply that this half-century-old rule ought to be revisited.

3698 J. CONNOR, “Cartel Fine Severity” 19 of the online version of this article.

3699 The Commission conducts this assessment by analogy to the assessment of "serious and irreparable harm" in the context of interim measures. Such analysis is based on the undertaking's ability to pay on the financial situation of the undertaking as a whole, including its shareholders, irrespective of the finding of liability (Order of the President of the Court of 14 December 1999, Case C-335/99 P (R), HFB v Commission [1999] ECR 1-8705; Order of the President of the Court of 23 March 2001, Case C-7/01 P, FEG v Commission [2001] ECR I-2559; Case T-410/09 R, Almamet v Commission, paras 47 et seq.

3700 As shown in Table 3, Commission final decisions frequently withhold the level of ability-to-pay discounts.

3701 Case COMP/38.543 — International removal services [2009] OJ C 188/16, paras 656-662. Unfortunately, these specific circumstances were not mentioned in the decision due to confidentiality reasons.
financial ratios measuring the solidity (in this case, the proportion which the expected fine would represent of the undertakings' equity and assets), their profitability, solvency and liquidity, were taken into account. The Commission also considered the firm’s relations with financial partners (such as banks) and shareholders. Next, the Commission assessed the specific social and economic context for each undertaking whose financial situation had been found to be sufficiently critical. In this assessment, the impact of the global economic and financial crisis and the expected consequences for the undertaking concerned also played a relevant role.\footnote{A number of undertakings in this case stated that the economic crisis had a particularly severe impact on the construction sector and on all undertakings that directly or indirectly offer products or services to that industry, such as PS producers. They also argued that there was a dramatic drop in demand in demand for PS from mid-2008 until the third quarter of 2009 due to the economic crisis. They further argued that the margins in the PS sector in Europe are under strong pressure. According to the Commission, these arguments were, for the sector in general, supported by studies such as the report produced by the Directorate General for Enterprise and Industry of the European Commission entitled "Impact of the economic crisis on key sectors of the EU – the case of the manufacturing and construction industries" of February 2010.\textsuperscript{1261}}\footnote{Case COMP/38.344 — Prestressing Steel [2011] OJ C 339/7, paras 1133-1189.}

5.4. (Economic) assessment of the 2006 calculation method

At a conceptual level, the calculation of fines under the 2006 Fining Guidelines follows the same three-step procedure as the 1998 calculation method. Firstly, the basic amount is calculated on the basis of the gravity and duration of the infringement. Secondly, the resulting amount is adjusted according to aggravating or mitigating circumstances and the deterrence multiplier. Finally, a number of adjustments are made. Namely, reductions under the leniency system and/or the settlement procedure are granted if the relevant conditions are satisfied, the 10% turnover threshold is applied and the ability to pay of the undertaking in question is considered.

Despite the apparent similarities with the 1998 methodology, the 2006 Fining Guidelines differ significantly from the former calculation method. In effect, the 2006 Guidelines maintain the concept of a basic amount, but now define it to include (i) a new value of sales calculation, (ii) a very different duration multiplier, (iii) a new “entry fee” for hard core violations, (iv) new adjustments for recidivism and (v) a new deterrence multiplier.

To calculate the starting amount of the fine, the 2006 Fining Guidelines moved away from the lump-sum system which was mainly based on the nature of the offence, to a calculation method based on the value of sales and duration. According to the 2006 Guidelines, the basic amount generally corresponds to a percentage up to 30% of the value of sales of the goods or services to which the infringement relates within the relevant area within the EEA.\footnote{Fining Guidelines 2006, points 13 and 21.} When the sales in the relevant area within the EEA do not represent the weight of each undertaking in the infringement, (\textit{i.e.} in the case of global cartels) the global turnover usually constitutes the relevant parameter to calculate the value of sales of a given undertaking.\footnote{Ibid, point 18.}

In order to decide the proportion of sales for each given case, the Commission looks into a number of factors such as (i) the nature of the infringement, (ii) the combined market shares of all the firms concerned, (iii) the geographic scope of the infringement and (iv) whether or not the infringement has been implemented.\footnote{Ibid, points 22-23.} All these factors are as a rule assessed in practice. Just like under the
previous Guidelines, the criterion regarding the nature of the infringement plays a decisive role also under the 2006 calculation method in the determination of the specific percentage of the value of sales.\textsuperscript{3707} In practice, once an agreement is classified as a very serious infringement on the basis of its nature (as is the case of cartels), the percentage of sales is set at a minimum of 15\%, thus quite far from the maximum of 30\%. Depending on the assessment of the rest of the factors listed above, such percentage can be set higher. The percentage for agreements between undertakings with a significant market share, which are generally implemented in a wide geographic territory is commonly set higher, normally in the range of 16\%-19\%. In exceptionally harmful cases, the percentage is even set at a higher level. This can be the case when the combined market share equals (almost) the whole market and the agreements are strictly implemented.\textsuperscript{3708}

The second difference with respect to the previous fining method concerns the duration factor, which now has a far more important impact on the basic amount. In particular, the amount of fines is now multiplied by the number of years of duration, rather than by merely adding a percentage of 10\% per year.\textsuperscript{3709} In addition, although (the wording of) the Guidelines indicate that periods of less than six months would count as half a year and periods longer than six months but shorter than one year would count as a full year, this rule was not followed in practice. In fact, the Commission applied a proportional (and more appropriate) percentage per month of duration in order to take into account periods shorter than a year. The Commission also makes adjustments in practice to the multiplication factor based on duration, when the intensity of the agreement is weak. By doing so the Commission makes its calculation method more accurate and, therefore, more adequate to measure the impact of the agreement.\textsuperscript{3710}

Another important modification is the application of the so-called entry fee. The entry fee consists in an amount between 15\% and 25\% of the value of sales which is imposed regardless of the duration of the infringement. According to the 2006 Guidelines, this amount is meant to deter companies from entering into cartels.\textsuperscript{3711} In practice, the entry fee and the percentage of the value of sales were commonly set at the same level.

Regarding the impact of aggravating or mitigating circumstances on the fine calculation, the most important modification – compared to the 1998 method – concerns the repeated infringement factor. The currently applicable Guidelines not only quantify the adjustment for recidivism, which may be up to 100\% of the basic amount for each previous infringement. Furthermore, infringements established by the Commission but also by a NCAs are considered in this context.\textsuperscript{3712} In practice, the Commission did not make full use of this possibility and applied much lower increases. More precisely, one previous infringement led to an increase of 50\%, two previous infringements to a 60\% increase, three to an increase of 90\% and four to the maximum increase of 100\%.\textsuperscript{3713} Furthermore,

\textsuperscript{3707} See also illustrating this aspect \textit{ibid}, point 23.
\textsuperscript{3708} See further \textit{supra} section 5.3 of this Chapter.
\textsuperscript{3709} Fining Guidelines 2006, point 24.
\textsuperscript{3710} However, it remains a fact that such measurement is based on rough and imperfect approximations (see further \textit{infra}).
\textsuperscript{3711} Fining Guidelines 2006, point 25.
\textsuperscript{3712} \textit{Ibid}, point 28, first sentence.
\textsuperscript{3713} This approach has been criticised in the literature for being inconsistent see e.g. J. CONNOR, “Cartel Fine Severity” 16-17 of the online version of this article.
infringements of Article 101 TFEU established by NCAs were never taken into account.\textsuperscript{3714} Another less relevant modification concerns the stricter interpretation of the former mitigating factors regarding the follow-the-leader role and the non-implementation factor. Under the 2006 Guidelines the Commission merged both factors\textsuperscript{3715} and, practice, fines are only lowered when the undertaking’s participation in the cartel was substantially limited and it adopted a clear competitive conduct in the market.\textsuperscript{3716}

Finally, the 2006 Guidelines offer the Commission the possibility to increase a fine (i) in order to exceed any gains made by the company and (ii) based on the undertaking’s high turnover.\textsuperscript{3717} The deterrence multiplier is indeed frequently applied but only on undertakings with a very high turnover and never to take into account the illegal gains of a cartel. The most frequent multipliers added amount to 0.1 and 0.2.\textsuperscript{3718}

Based on this discussion of the fining parameters, the 2006 calculation methodology can be expressed in the following terms:

\[ \text{Fines} = \text{gravity \ (proportion of sales between 15\% and 30\%) \times duration \ (years of the infringement)} + \text{proportion of sales \ (entry fee)} + / - \text{percentage determined according to aggravating or mitigating circumstances \times deterrence multiplier}. \]

Keeping in mind the optimal fine formula, the key modifications included in the 2006 fining methodology are now assessed from a more economic perspective.

Under the 2006 method, the value of sales relating to the infringement constitutes the point of departure to calculate fines. In contrast to the previous Guidelines – which were mainly based on an unrepresentative presumption of harm which depended on the nature of the agreement\textsuperscript{3720} – the undertaking’s turnover in the affected market throughout the duration of the infringement can safely be assumed to be positively correlated to the expected gain deriving from the violation.\textsuperscript{3721} Although the use of the value of the sales related to the infringement as a proxy for the illegal gains does indeed not constitute a full effects analysis, this parameter is structurally sound from an economic perspective.

\textsuperscript{3714} See further \textit{supra} section 5.3.1.7(a)(i) of this Chapter.

\textsuperscript{3715} Fining Guidelines 2006, point 28, third sentence.

\textsuperscript{3716} See further \textit{supra} section 5.3.1.7(b)(iii) of this Chapter.

\textsuperscript{3717} Fining Guidelines 2006, points 30-31.

\textsuperscript{3718} See further \textit{supra} section 5.3.1.8 of this Chapter.

\textsuperscript{3719} See also establishing comparable formulas e.g. C. VELIANOVSKI, “Cartel Fines” 66-68 (this author affirms that “[a]lthough the Commission is not required to employ the formula, all decisions made under the 2006 Guidelines have meticulously adhered to the formulaic methodology’’); J. CONNOR, “Cartel Fine Severity” 3 of the online version of this article; see for a more algebraic explanation P. M. SCHINKEL, “Effective Cartel Enforcement in Europe”, 2007 (30-4) \textit{World Competition}, 539-572, at 15-16 of the online version of this contribution available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948641 (hereafter: ‘P. M. SCHINKEL, “Effective Cartel Enforcement’’”). These authors also argue that the 2006 Guidelines were designed to lead to higher fines.

\textsuperscript{3720} See further \textit{supra} section 5.3.1.8 of this Chapter.

\textsuperscript{3721} See also e.g. W. WILS, “The European Commission's 2006 Guidelines” 18 of the online version of this publication; P. MANZINI, “European Antitrust in Search” 12-13; stating that ‘[b]y taking into account a percentage of the value of sales, the Commission aims at determining the firm’s gain from the anticompetitive behaviour’. It is also important to stress that, as commented by W. Wils (at 19 of the same contribution) the 2006 method constitutes an extreme improvement compared to the calculation method used by the Commission before the introduction of the first Guidelines. During this early period, the Commission calculated the basic amount as a really low percentage of the undertakings turnover, which was fixed within the range of 2\% to 9\%.
This idea is also shared by the Commission, which explains in its Guidelines that ‘[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement’.  

Furthermore, the practice of taking into account the worldwide market shares in the cartelised product and applying them to the aggregate market share within the relevant geographic area constitutes a significant improvement with respect to the 1998 Guidelines. It is true that under the previous methodology, the Commission tried to take into account the weight of each undertaking in the infringement by grouping them into categories of turnover. When undertakings had taken part in a global cartel their absolute turnover was normally the relevant point of reference. Still, this method lacked a link between the undertakings’ global shares and their shares in within the EEA. The 2006 methodology effectively corrects this deficiency thereby reflecting the weight of each undertaking in the infringement in a more appropriate manner.

The range of up to 30% for the proportion taken of the affected turnover has the advantage of being wide enough to allow the Commission to calibrate the fine depending on the gravity of the infringement. It is also unlikely that this range of percentage was chosen randomly. As analysed in Chapter 2, a number of studies have estimated the average overcharge somewhere between 15% and 30% on the basis statistics of prices before, during and after a large number of cartels. It is therefore not unthinkable that the 1%-30% range is linked to the cartel overcharges, which at the same time are strongly correlated with the profits of the arrangement.

The nature of the infringement plays a decisive role in determining the appropriate percentage. This aspect is also corroborated by the 2006 Guidelines, which firmly state that for very serious cartel infringements (such as price fixing and market sharing) the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale’. As pointed out above, once an agreement was classified as a cartel (by nature), the percentage of the value of sales was always set at the minimum of 15%.

3722 P. M. SCHINKEL, “Effective Cartel Enforcement” 26 of the online version of this contribution.
3724 See further supra section 4.4 of this Chapter.
3725 H. DE BROCA indeed explained that ‘[t]his rather wide range of possible percentages appeared necessary mainly for the following two reasons: (1) unlike the 1998 Guidelines, the 2006 Guidelines do not contain categories of infringements (minor, serious or very serious infringements). Since there is no classification anymore, the methodology applies to every possible infringement; there was therefore a need to have a sufficient range of percentages available to cover every possible type of infringement; (2) the Guidelines now set a maximum basic amount. In order to ensure that this maximum level would nevertheless leave sufficient room of manoeuvre for the Commission, the Guidelines had to include a wide range of percentages of the value of sales. The choice of a given percentage depends upon the gravity of the infringement’. H. DE BROCA, “The Commission revises” 3.
3726 For more details on these statistics see Chapter 2, section 2.
3729 Fining Guidelines 2006, point 23.
The fact that the Commission pays special attention to special the nature of cartels can be explained on the ground of two main economic considerations, namely their reduced likelihood of detection and their (assumed) profitability.\(^{3730}\) First, imposing higher fines when the agreement in question is secret by definition is adequate in the view of the far lower probability of detection and punishment.\(^{3731}\) Second, when undertakings decide to take part in a cartel, they do so because they expect to obtain benefits by colluding.\(^{3732}\) Given that deterrence can only be attained when the expected fine is higher than the expected illegal gains, punishing cartels based on their expected profitability (even if in practice no or less benefits than expected are achieved) also makes sense in economic terms. In addition, it is at least remarkable that the Commission decided to set the percentage at a minimum the level of 15\%, \textit{i.e.} the average amount of cartel overcharges according to numerous studies.\(^{3733}\)

As regards the remaining factors used to determine the percentage of the value of sales, such parameters (\textit{i.e.} the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented) are certainly relevant for the effective functioning of the cartel. In particular, a cartel is more likely to be successful in raising prices – and thereby produce gains and damage the economy – when the parties have a considerable combined market share and when the agreement is fully implemented. Likewise, successful cartels covering a large territory are by definition more profitable and damaging than cartels covering a smaller area. Given that these factors relate to the success of the cartel and thus to both its profitability and the harm it produces it is economically reasonable that such factors are taken into account in the determination of the percentage of the value of sales.\(^{3734}\) In the light of this, it can be concluded that a fine for hardcore cartels of up to 30\% of the value of sales constitutes a suitable starting point to calculate fines.\(^{3735}\)

As regards the duration factor, in accordance with the 2006 Guidelines, the amount established on the basis of the proportion of the value of sales is multiplied by the number of years of participation in the infringement. This duration increase is very different from the duration adjustment made under the Guidelines of 1998,\(^{3736}\) which usually only increased the fine by 10\% per year.\(^{3737}\) The revised duration rule implies that each additional year will involve a 100\% increase. This revised duration

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\(^{3730}\) See also sharing this point of view \textit{e.g.} W. WILS, “The European Commission's 2006 Guidelines” 19-20 of the online version of this publication; E. ENGELSPING AND H.-H. SCHEIDER, “Article 23 Fines” 1796.

\(^{3731}\) See further supra Chapter 2, section 5.1.

\(^{3732}\) \textit{Ibid.}

\(^{3733}\) See generally supra Chapter 2.

\(^{3734}\) See also W. WILS, “The European Commission's 2006 Guidelines” 19-20 of the online version of this publication.

\(^{3735}\) See for a very different opinion A. RILEY, “Modernising cartel sanctions: effective sanctions for price fixing in the European Union”, 2011 (32-11) ECLR, 551-563, at 553-554 (hereafter: ‘A. RILEY, “Modernising cartel sanctions”’). In the opinion of this author the Commission’s fining policy suffer from a ‘constitutional issue of proportionality’. In the words of this commentator ‘[t]here is at least a case here for any fines modernisation programme to take greater account of the different types of cartel and in particular to distinguish more clearly in sanction policy between profitable cartels which have inflicted significant damage on the European economy and less successful cartels, perhaps defensive in origin, which have had far less impact’. These critics are, however, not well founded. As the analysis of the Commission’s practice illustrated, the 2006 fining methodology does take the profitability factor into account in the assessment of the gravity, even if such assessment does not directly refer to this factor. Furthermore, this authors does not consider the need to impose fines based on the \textit{expected} profits of the cartel, instead of on the actual profits. If fines for cartel infringements were simply based on a distinction between profitable and non-profitable cartels, the Commission fining policy could be seriously undermined in terms of deterrence.

\(^{3736}\) V. TURNER \textit{et al.} “New EU Antitrust Fines” 54.

\(^{3737}\) See further supra section 4.4 of this Chapter.
factor is fully appropriate to reflect the gains resulting from the agreement for every year of participation, in the basic amount of the fine.\textsuperscript{3738} As pointed out above, assuming that the intensity of the cartel activity remains stable, the gains and/or harm deriving from the collusive agreement will be directly proportional to its duration. By multiplying the fine by the duration of the cartel the Commission is therefore in a position to take full account of the effects of the cartel. In addition, as the Commission’s decisions show, the duration factor can be differentiated on the basis of periods of limited activity or in situations where an undertaking did not participate in all the aspects of the anticompetitive agreement.\textsuperscript{3739} This more nuanced approach is appropriate for situations in which it is clear that the cartel produced less gains compared to other periods due to the reduced intensity of the firm’s behaviour. In fact, the application of such flexible duration factor demonstrates that the Commission aims to measure the gains of the cartel as correctly as possible. Arguably, it would be far easier for the Commission to strictly follow its Guidelines and multiply the fine by the years of duration. Likewise, the fact that the Commission did not round up short periods to a full year in practice, may also be seen as an attempt to make the duration rule – as contained in the Guidelines – more proportional and appropriate to reflect any potential gains.

Finally, the entry fee amounting to 15\%-25\% of the value of sales seems to be precisely designed to take specific account of the secrecy of cartels and the common difficulties in uncovering such agreements. Indeed, while this additional amount may be applied on the whole range of antitrust infringements, the 2006 Guidelines specify that the entry fee is applied as a general rule on cartel cases. This idea is as such also supported by (the wording of) the Guidelines from two different points of view. On the one hand, the Guidelines underline that the rationale of the entry fee is to deter companies from even entering into illegal practices and, on the other hand, the entry fee is not multiplied by the duration of the infringement. In effect, since the duration of the illegal agreement is not related to the probability of discovery, the entry fee can be applied after having considered the duration of the agreement.\textsuperscript{3740} At the same time, the fact that the entry fee is imposed on cartel cases by definition may explain why Commission choses to stay far below the limit of 30\% of the value of sales used as a starting point to calculate fines. Presumably, if the Commission would choose a percentage near to 30\% of the value of sales and commonly an equal entry fee is added to that amount, fines would not only risk to reach the 10\% far more frequently. Most importantly, the issue of overdeterrence may become more problematic.

The next step in the calculation of fines concerns the adjustment of the fine on the basis of aggravating and mitigating factors. As argued in the previous section,\textsuperscript{3741} although the application of attenuating and aggravating circumstances is in principle meant to reflect the specific and individual behaviour of the offenders in the amount of the fine, the justification of (almost) each circumstance seems (more or less) directly connected to the harmful effects caused by the agreement

\textsuperscript{3738} H. DE BROCA, “The Commission revises” 2.
\textsuperscript{3739} See further supra section 5.4 of this Chapter.
\textsuperscript{3740} See for a very different (but unfounded) opinion A. RILEY, “Modernising cartel sanctions” 552-553. In the opinion of this commentator ‘it is difficult to see how the imposition of an entry fee in para.25 can easily be fitted within a gravity analysis’. In particular, he observes that “[p]aragraph 25 requires the imposition of an entry fee irrespective of the duration or nature of the price-fixing infringement. Even if an undertaking has only engaged in price-fixing for a short period of six to eight months and the price-fixing was limited in its impact the price-fixer will face an automatic minimal penalty of 15 per cent of the turnover of the affected market’. It is, however, clear that this author does not consider the need to prevent cartel agreements from being formed (i.e. to try and see) and, thereby, to consider the lower probabilities of detection in case of secret agreements.
\textsuperscript{3741} Supra section 4.4 of this Chapter.
or to the illegal benefits deriving from the collusive activity. This can also be affirmed with regard
to the mitigating and aggravating factors as reformulated in the 2006 Guidelines.\textsuperscript{3742} By imposing
higher fines based on such circumstances, the Commission is able to consider the questions (i)
whether certain companies such as the cartel leaders play a greater role in producing damage and (i)
whether certain firms (such as recidivists) obtained (more) profits from it.

While taken as a whole, the possibility to individualise the sanction based on mitigating and
aggravating circumstances, is (still) appropriate,\textsuperscript{3743} the 2006 Guidelines rethinks the 1998 factors
and brings the Commission’s approach more in line with deterrence considerations. This is first
illustrated by the direct (and correct) exclusion of cartels from the application of the mitigating factor
regarding the ending of the infringement when the Commission starts its inspections.\textsuperscript{3744} Although
under the previous fining methodology, this factor was never applied in practice, the clear and firm
wording of the 2006 methodology leaves no doubt in this respect. In the Commission’s view there
are two main reasons why no such reduction should be granted to undertakings which participated
in a cartel. First, the harm or benefit resulting from the illegal activity is already reflected in the
duration factor and, second, companies have been caught and the most normal reaction is to stop,\textsuperscript{3745}
there is no apparent reason to grant a discount in this situation.\textsuperscript{3746}

Next, the Commission also adopted a desirable stricter approach in the application of the mitigating
factor concerning the passive role and non-implementation of the agreement.\textsuperscript{3747} This new approach
shows that the Commission will only consider this factor when the undertaking in question adopted
an openly competitive conduct, thereby, destabilising the agreement.\textsuperscript{3748} The limited scope of
application of this factor is fully adequate to prevent that undertakings which are simply slightly
deviating from the cartel without really defying it (\textit{i.e.} cartel cheaters),\textsuperscript{3749} abuse the Commission’s
system by obtaining a reduction in fines.

Finally, the 2006 policy is also tougher on repeated infringements.\textsuperscript{3750} Although it has been argued
that under the 2006 Guidelines ‘[t]he Commission has stayed relatively close to its practice

\textsuperscript{3742} It should be noted that, generally, the mitigating and aggravating factors contained in the 1998 Guidelines were
maintained under the 2006 Fining Guidelines. See further supra section 5.2 of this Chapter.

\textsuperscript{3743} As commented above, this approach is fully in line with the case law according to which the assessment of
aggravating or mitigating circumstances makes it possible to examine the individual conduct of each undertaking (CFI
9 July 2003, Case T-224/00, \textit{Archer Daniels Midland v Commission} [2003] ECR II-2597, para 265. See also confirming
this aspect e.g. Case T-18/03, \textit{CD-Contact Data GmbH v Commission} [2009] ECR, II-1021, paras 95-98; Case T-406/09,
\textit{Donau Chemie AG v Commission}, para 92). Furthermore, by taking into account such factors, the Commission may
discourage companies to adopt certain kinds of behaviour which also serve general deterrence purposes.

\textsuperscript{3744} Fining Guidelines, point 29, first sentence.

\textsuperscript{3745} This is specially so given that continuing an infringement is considered as an aggravating factor and, under the 2006
Fining Guidelines, may lead to a 100% increase in the basic amount of the fine.

\textsuperscript{3746} See further supra section 4.3.5.2(c) of this Chapter.

\textsuperscript{3747} \textit{Ibid}.

\textsuperscript{3748} Although such companies may indeed contribute to a lesser extent to the effectiveness of the cartel, their participation
in the cartel is essential for the functioning of the agreement. Therefore, granting a reduction on the basis of these
mitigating factors may be counterproductive.

\textsuperscript{3749} See further on this concept supra Chapter 2, section 5.1.

\textsuperscript{3750} One of the frequently asked questions which were made by the time of the adoption of the 2006 Guidelines was how
what impact the new recidivism penalty would have on fines. See e.g. J. \textsc{Connor}, “\textit{Cartel Fine Severity}” 15-16 of the
online version of this article; see also for a detailed assessment of recidivism in the context of European competition
law enforcement W. \textsc{Wils}, “\textit{Recidivism}” 9-12 of the online version of this article. In this contribution, W. \textsc{Wils} puts
forwards four reasons for imposing higher fines on recidivists: (i) higher than average propensity to commit
infringements (ii) need to express increased moral condemnation (iii) lower probability of detection (iv) discovery of
preceeding the 2006 Fining Guidelines, when it usually increased fines by 50 % on account of recidivism, irrespective of the number of prior infringements. The truth is that now the Commission applies a 90% increase when three previous infringements have been committed. This is indeed a much higher increase than the 50% applied previously. Nevertheless, it remains at least remarkable that the Commission did not make full use of the possibilities provided for in the revised fining methodology. More specifically, the Commission applied increases which were arguably lower than expected. Moreover, infringements established by NCAs were not taken into account in the determination of the specific increase. The cautiousness of the Commission in the application of increases for repeated conduct not only indicates that the wording of the 2006 Guidelines is harsher than its application but also raises the question of how much increase should actually be imposed on the basis of this factor.

The answer to this question is obviously not straightforward. In practice, under the 2006 Guidelines eight undertakings (or 47% of the total undertakings which had been penalized for repeated infringements) had committed one previous infringement and received a 50% increase. Although a percentage of 50% is the half of the maximum possible increase per infringement under the 2006 Guidelines, the application of such increase is justified and seems appropriate to compensate the lack of deterrence of the fine imposed for the previous infringement. This view has also been endorsed by the European Courts which have consistently confirmed Commission decisions imposing 50% increases to penalise recidivism.

However, when a company commits a third infringement, the Commission only increases the fine by 60%, i.e. (only) 10% more than the previous increase. Taking into account that the previous fine

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the profitability of infringements, V. TURNER, T. CALVANI AND C. CAMERON commented that ‘[i]f the Commission imposes a 100 percent uplift due to an earlier infringement for which a company has obtained immunity, what effect would such a policy have on the decision to seek immunity in the first place? Immunity may not have much value if it is effectively clawed back at a later date’ (V. TURNER et al., “New EU Antitrust Fines” 54). With this comments these authors were however predicting that undertakings which obtain immunity will probably commit new infringements and be treated harder on the basis of the recidivism policy. In the view of the four arguments given by W. WILS to punish recidivism the Commission has indeed good reasons to impose a harsher fine on companies which commit an infringement after having obtained immunity in a previous case.

It is, however, true that since such high increases have only been applied in a small number of cases (supra), the practical consequences of the higher increases is indeed limited.

See also stressing this aspect W. WILS, “Recidivism” 4-5 of the online version of this article; J. CONNOR, “Cartel Fine Severity” 17 of the online version of this article.

This last authors correctly stresses that the Commission has ignored all hard-core cartel decisions adopted by the EU NCAs. According to his calculations, ‘fine enhancements of up to 43,000 more percentage points could have been added by counting qualifying cartel decisions by EU NCAs. Unless the Commission was unaware of 75 or more previous convictions in the EU, these data show an inexplicable reticence in applying the Guidelines. One wonders whether such a severe undercounting is an unannounced policy or simply the result of poor record-keeping by the Commission’. Given the information exchange mechanisms contained in Regulation 1/2003, is it is unlikely that the Commission was unaware of such infringements. This therefore reflects the Commission’s reluctance to impose extreme increases on the basis of recidivism and perhaps, to impose higher fines in general.

See also considering this question W. WILS, “Recidivism” 16 of the online version of this article.

See in particular Case C-306/06 P, Danone v Commission [2007] ECR I-1331; Judgment of the Court of Justice of 17 June 2010, C-413/08 P, Lafarge v Commission, [2010] I-5361. See further supra section 4.3 of this Chapter. See for a comparable view W. WILS, “Recidivism” 17 of the online version of this article.
had already been increased by 50%, and, still, it was insufficient to produce deterrence, a 60% increase may be arguably too low.

In fact, if the basic amount of a fine has been increased by 50% a second violation and the undertaking in question decides to commit a third infringement, one may assume that the gains obtained by the undertaking through its participation in the second infringement were far bigger than the fine imposed (which had already been increased by 50%). If the Commission wishes to disgorge the previous gains and to impose a deterrent penalty for the new infringement, adding only 10% to the previous increase may, arguably, not suffice.

The application of the Guidelines also supports this finding. In particular, under the 2006 Guidelines five undertakings (29% of the undertakings punished for repeated conduct under the 2006 Guidelines) had committed two previous infringements and received a 60% increase and three (18%) undertakings participated in three previous infringements and were penalized with a 90% increase. As these ciphers indicate, the number of undertakings which are still willing to commit a violation after having participated in two and three infringements is indeed considerable.

Regardless of this finding, it is important to take into account the fact that in practice all the undertakings which have been penalized for recidivism under the 2006 Guidelines, had committed previous infringement(s) which had been penalized under the 1998 Guidelines or under the previous methodology, but never under the current system. Given that the 2006 fining method can be considered more effective than its predecessors, the real impact or effectiveness of the increase will naturally be linked to question whether the calculation method was as such appropriate to deter undertakings from participating in anticompetitive agreements.

The significance of this aspect can also be illustrated by the application of the highest increase imposed under the 2006 Guidelines. In Calcium carbide and magnesium based reagents (2009), the Commission increased the fine by 100% for one undertaking (Akzo Nobel) which had taken part in four previous infringements. The fact that such increase had to be applied does, however, not indicate that increases of 90%, 60% or 50% do not work in general terms. In this case, the undertaking Akzo Nobel had indeed been involved in four previous cartels whose decisions dated

3757 It should be recalled that also under the 1998 Guidelines, increases of 50% were applied for recidivism.
3758 See however for a different opinion W. WILS, “Recidivism” 17 of the online version of this article. According to W. WILS, ‘the difference between no prior infringements and one or more prior infringements would appear much more relevant in the light of those four reasons than the difference between one prior infringement and two prior infringements. The recent Commission practice of increasing fines by 50 % in case of one prior infringement and 60 % in case of two prior infringements thus again appears reasonable. The relevance of the difference between two prior infringements and three prior infringements would appear to be less than that of the difference between one prior infringement and two prior infringements. The more prior infringements there are the less difference one additional prior infringement would appear to make’. This reasoning is, however, at odds with the Commission’s practice of imposing a 90% increase for three previous infringements.
3759 These finding should, however, be read carefully. In particular, it should be taken into account that the fact that a company has obtained a 90% increase on the basis of recidivism does not imply that this company has been previously sanctioned for a repeated infringement with a 60% increase. This depends on the timing of the decisions and on the respective application of the 1998 or 2006 Guidelines fining the infringements concerned. However, under the 1998 Guidelines, all companies were also penalized with a 50% increase for repeated. Therefore, unless the firms in question had obtained leniency, it can be assumed that the repeated infringement had been considered and penalized by a 50% increase.
3760 See arguing that the Commission’s policy on recidivism need to be reformed J. CONNOR, “Cartel Fine Severity” 21-22 of the online version of this article.
from 2002, 2003, 2004 and 2005. Since the fines for such infringements had not been calculated under the 2006 Guidelines, but under the less strict 1998 method, the deterrent effect of the previous increases, and of the fines in general, was arguably undermined.

The answer to the question what increase should be applied to reflect the number of infringements is certainly contentious from both an economic and a legal perspective. However, trebling or quadrupling fines on the basis of this factor – as the 2006 Fining Guidelines allow – does not seem necessary or justified.

The discussion above suggests that in deciding whether a percentage of a certain level should be regarded as appropriate or not for multiple recidivism it is essential to take the timing of the decisions imposing previous fines into account. The practice of the Commission of imposing 50% for one previous infringement may indeed suffice when such increase is calculated under the 2006 Guidelines. In the same line of reasoning, it can be argued that 60% increases may also have the desired effect but only if such 60% increase is calculated under the 2006 Guidelines and if the previous (50%) increase had been imposed under the 1998 Guidelines. Conversely, if the Commission has already imposed an increase of 50% under the current method, it is more than questionable that a 60% increase is appropriate for two previous infringements that have been punished under the 2006 Guidelines. In this scenario the Commission may need to adopt a higher increase to take account of the illegal gains deriving from the cartel. Given that an increase of 90% for three previous infringements has already been backed up by the European Courts, setting the level of the increase at 70% for two previous infringements seems an appropriate intermediate position.

After decreasing or increasing the fine to consider mitigating or aggravating factors, the Commission applies a deterrence multiplier which is meant to exceed any gains to the offender or to consider undertakings’ large turnover.

In practice, the deterrence multiplier was never applied with the objective of exceeding the gains deriving from the cartel when they can be calculated. This is most likely due to the difficulties of making such calculation in a more or less accurate way. Nevertheless, this possibility is important to prevent that the Commission sets fines at a level which is clearly lower than the illegal profits from the infringement. This supplementary tool can indeed play an essential role when the gains deriving from a cartel can be estimated.

See for more details supra section 5.3.1.7(a)(i) of this Chapter.
See further supra section 4.4 of this Chapter.
See for a similar opinion in this regard W. WILS, “Recidivism” 17 of the online version of this article.
See also W. WILS, “Recidivism” 17 of the online version of this article. Although this author indeed agrees that imposing a 50% increase for one previous infringement is appropriate, he does not make a difference between infringements penalized under the 1998 Guidelines and under the 2006 method. In my view, this difference is essential to assess whether the increase in question may work or not.
In contrast, W. WILS believes that and 60 % in case of two prior infringements ‘again appears reasonable’ regardless of which Guidelines were applied. W. WILS, “Recidivism” 17 of the online version of this article.
See also J. CONNOR, “Cartel Fine Severity” 18 of the online version of this article, commenting that the application of increases should ‘result in roughly equal percentage penalties for each prior EU price-fixing violation’. [...] ‘To do otherwise is to require the Commission to discriminate across prior violations for hard-core price fixing and assign them to different classes of gravity’. See also P. MANZINI, “European Antitrust in Search” 15. This commentator notes that the consideration of the deterrence factor could be invalid. This observation is made on the basis that the calculation of the proportion of the
The deterrence multiplier has however been frequently applied for undertakings which a large turnover. Most commonly, the Commission applies a multiplier of 1.1 or 1.2. Or put differently, it adds an additional amount of 10% or 20%. Comparing the 2006 Guidelines with the optimal sanction formula, it can been argued that this additional amount may (also) reflect the (lower) probability of detection. Nevertheless, the Commission’s formula considerably differs from pure economic arguments. In fact, economic theory suggests that highest probability of detection is equal to 30% (0.3). According to the optimal formula, the multiplier factor would be equal to 3.33 which would imply a 333% increase of the relevant amount. There is no need to mention that such amount is extremely higher than the 10% or 20% applied by the Commission.

Still, as pointed out above, this does not mean that the Commission disregards the importance of the probability of detection in its fine calculation. On the contrary, as commented above the Commission seems to take into account the lower probability of cartel detection in a number of factors, including the setting of the percentage of the value of sales, the entry fee and the consideration of aggravating factors (to a lesser extent). Only if the Commission believes that such considerations have not sufficed to attain deterrence it may use of the possibility of applying the deterrence multiplier. Such situation is most likely to occur when the Commission can be sure that the gains resulting from the violation were higher than the fine or when undertakings enjoy an important financial position which may facilitate new infringements. From this perspective, the deterrence multiplier applied on the basis of undertaking’s turnover can be seen as a measure of harm.

Furthermore, it seems quite obvious that the 333% increase suggested by economic theory is simply not viable in practice. This is particularly true from the point of view of the proportionality principle. Furthermore, if the Commission would impose such extremely high fines the 10% value of sales is already based on the illegal gains of the cartel. Therefore, in his view considering the same element twice could amount to a breach of the principle ne bis in idem. This reasoning is however questionable. Although the calculation of the proportion of the value of sales can be seen as a proxy for the gains of the cartel, this does not mean that such estimation is precise and that the actual gains cannot be taken into account later. In addition, even if the calculation method would consider the gains of the cartel in two different steps, this does not mean that the undertaking in question is being punished twice. Both steps of calculation form part of one formula to punish antitrust infringement. Finally, it should not be forgotten that the application of the deterrence multiplier has been confirmed by the ECJ (supra section 5.3.1.8 of this Chapter).

This argument would make sense keeping in mind the optimal sanction formula (i.e. fines = gain/harm multiplied by the inverse of the detection probability). In effect, under the 2006 methodology the basic amount is based on gain and harm considerations multiplied by the duration of the infringement. From this perspective the deterrence multiplier should in principle correspond to the consideration of the detection probability.

Furthermore, it seems clear that the 333% increase suggested by economic theory is simply not viable in practice. This is particularly true from the point of view of the proportionality principle. Furthermore, if the Commission would impose such extremely high fines the 10% value of sales is already based on the illegal gains of the cartel. Therefore, in his view considering the same element twice could amount to a breach of the principle ne bis in idem. This reasoning is however questionable. Although the calculation of the proportion of the value of sales can be seen as a proxy for the gains of the cartel, this does not mean that such estimation is precise and that the actual gains cannot be taken into account later. In addition, even if the calculation method would consider the gains of the cartel in two different steps, this does not mean that the undertaking in question is being punished twice. Both steps of calculation form part of one formula to punish antitrust infringement. Finally, it should not be forgotten that the application of the deterrence multiplier has been confirmed by the ECJ (supra section 5.3.1.8 of this Chapter).

See e.g. E. COMBE AND C. MONNIER, “Legal, Renaud, Cartels: The Probability of Getting Caught in the European Union”, available at SSRN: http://ssrn.com/abstract=1015061 or http://dx.doi.org/10.2139/ssrn.1015061. These authors establish in this paper that the probability of getting caught fall around 13%.

This figure is the result of the inverse of 30/100, namely 100/30.

P. MANZINI, “European Antitrust in Search” 13-14. This author adds that ‘[o]n the basis of this last observation, we can make the claim that even with the new Guidelines the fine’s basic amount would be much lower than the one required for effectively dissuading firms from engaging in anticompetitive practices’. As commented below, this observation is however not fully accurate since the Commission does take the probability of detection in a number of steps of the calculation of the fine.

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threshold cup would be systematically applied in all cartel decisions. In turn, the application of the turnover cup as a general rule would break the link between the gravity of the conduct and the final fine, which is one of the key principles of the fine calculation established in Article 23 of Regulation 1/2003.

After the deterrence multiplier is applied, there are three last possible adjustments: discounts for leniency and settlements, the 10% cap, and inability to pay considerations.

Although the 2006 method for setting fines is far more appropriate from a deterrence perspective, the Commission still must respect the legal maximum fine as specified Article 23(2) of Regulation 1/2003. Under this provision, fines against undertakings cannot exceed 10% of the total turnover of the undertaking the preceding business year.

As has been demonstrated above, fines for undertakings are frequently capped under the Commission’s fining policy. The frequent application of the 10% ceiling indicates that the economically sound formula set out in the 2006 Guidelines will not lead to the expected or desirable results in all these cases. In this regard it is indeed often argued that the ceiling on the level of sanctions is very low compared to the cost imposed on society by cartel offenders and that it deviates from the concept of appropriate sanction in accordance with deterrence model.

On the other hand, it should be taken into account that the rational of such ceiling is to ensure that the sanctions against antitrust violators remain proportional to the infringement or in relation to the size of the undertaking. According to the case law, the purpose of setting an upper limit on a fine imposed on an undertaking at 10% of its turnover is ‘to adjust the amount of the fine imposed in respect of the infringement committed to the economic capacity of the undertaking’. The emphasis on the connection between the infringement and the economic capacity of the offender suggests that the ceiling of Regulation 1/2003 seems to be generally concerned with the issue of the retributive view of punishment. Indeed, the utilitarian conception of punishment, which justifies fines being set at the level required for optimal deterrence at the lowest cost, competes for the allegiance of the legal system with the retributive view of punishment. Under the latter view, punishment is not justified by its future consequence of deterring harmful conduct, but rather on the ground that it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.

As regards discounts granted under the Leniency Notice or the settlement procedure I remit to the conclusions established in Chapter 8 and 9.


See supra Table 3.

See I. LIANOS “An Optimal” 36. See assessing this limit on the basis of pure economic analysis I. BOS AND M. P. SCHINKEL, “On the Scope” 681. I. BOS AND M. P. SCHINKEL Conclude that ‘[i]f the European Commission is truly determined to deter anticompetitive behavior, the now tight constraint of the legal maximum fine should be reason to reconsider the need for a fixed fine cap’. In other contribution concerning the Dutch Fining practice these authors argue that ‘[r]emoving the fining maxima from the competition law or to increase them to a non-binding higher level and the implementation of more progressive punishments in competition policy are likely to improve the social welfare level’. Similar considerations are made in J. A. H. MAKS, M. P. SCHINKEL AND I. A. M. BOS, “Perverse incentive effects of bounding fines for infringements of competition law: the Dutch case”, Amsterdam Center for Law and Economics. Conference Remedies and Sanctions in Competition Policy. February 2015.

See further supra section 2.6 of this Chapter.

See further supra section 2.6 of this Chapter.
very high fines, not only from the point of view of proportional justice but also as to the risk of inability to pay.\textsuperscript{3779}

As regards the principle of proportionality of sanctions,\textsuperscript{3780} it is difficult to see (specially from an economic point of view) how the quantitative measure of 10% the total turnover of the undertaking in the preceding business year can ensure that the penalty is not disproportionate to the severity of the infringement. Under the current Commission’s policy, even if a given fine is considerably high in terms of overall turnover, below this threshold, fines will not be considered disproportionate, because the 10% threshold is an abstract safeguard against disproportionality.\textsuperscript{3781}

The not always proportional results following from the application of the turnover cap are well illustrated by the Commission’s practice in case of monoproduct undertakings.\textsuperscript{3782} Given that under the 2006 Guidelines fines are calculated on the basis of the value of sales of the product relating to the infringement (\textit{i.e.} the cartelized product), fines are far more likely to reach the 10 turnover threshold limit for mono-product undertakings. When the 10% ceiling is systematically applied, fines no longer make reference to the gravity and duration of the infringement as required by Regulation 1/2003. In this scenario the ceiling has indeed the opposite effect of making fines no longer ‘specific to the offender and the offence’,\textsuperscript{3783} \textsuperscript{3784} which in turn undermines the deterrent effect of fines.

In addition, the 10% ceiling appears to be insufficient to ensure that the undertakings have enough economic capacity to pay for their infringement. This is demonstrated by the fact that the Commission may reduce the fine in exceptional cases on account of the undertaking's inability to pay.

With respect to this last aspect, there is no doubt that fines for cartel infringements should be imposed on colluding firms even in times of recession or when firms struggle to stay afloat as a part of the competitive process. In particular, the concept of effective competition implies, \textit{inter alia}, that less efficient market players will eventually have to leave the market. Nevertheless, as discussed

\textsuperscript{3779} W. WILS, “Optimal Antitrust Fines” 22 of the one version of this contribution. See also I. LIANOS “An Optimal” 36; I. LIANOS, “Competition law remedies in Europe: Which Limits for Remedial Discretion?” in I. LIANOS AND D. GERADIN (eds.) \textit{Handbook in EU Competition Law}, Cheltenham, Edward Elgar 2013, 688 p., at 362-455; M. MOTA, “On Cartel Deterrence” 209. According to this author ‘the existence of a 10 per cent (over worldwide turnover) upper threshold on the fines, limits the possibility that an efficient firm may be forced to exit because it has to pay a fine’.

\textsuperscript{3780} In essence this principles requires that the severity of penalties must not be disproportionate to the criminal offence.


\textsuperscript{3782} See Case C-397/03 P, \textit{Archer Daniels Midland v Commission} [2006] ECR I-4429, paras 100-106. See also I. LIANOS “An Optimal” 36.

\textsuperscript{3783} \textsuperscript{3784} See further supra section 5.3.1.9 of this Chapter. Since 2012, the Commission has exercised its discretion under point 37 of the Fining Guidelines in a number of cases in order to adjust the fines for mono-product undertakings and reduce their fines below the 10 per cent ceiling.

\textsuperscript{3780} T-211/08, \textit{Putters International NV v Commission}, para 75. See also T-386/10, \textit{Aloys F Dornbracht GmbH & Co KG v Commission}, para 218-223.

\textsuperscript{3784} In economic literature it has also been noted that “distortive effects” result from the application of the cap. For example, V. BAGERI, Y. KATSoulACOS AND G. SPAGNOLO show based on empirical research that ‘[f]ine caps based on total revenue, as set by the EU Commission, when binding tend to generate much higher fines for more diversified firms, potentially inducing inefficient under-diversification as a means to reduce legal exposure’ (V. BAGERI, Y. KATSoulACOS AND G. SPAGNOLO, “The distortive effects of antitrust fines based on revenue”, 2013 (123) \textit{Economic Journal}, 545–557, at 557 (hereafter: ‘V. BAGERI \textit{et al.}, “The distortive effects”’). See also I. LIANOS “An Optimal” 37.
under the previous Guidelines,\textsuperscript{3785} taking into account undertakings’ inability to pay can be justified under special and exceptional circumstances. The 2006 Guidelines create space for the consideration of a firm’s financial difficulties, hence their ability to pay such fines in advancement of the greater economic and social good. Of course, as the Commission’s decisions show, such a consideration must be carefully assessed, weighed, balanced, and allowed only in very exceptional circumstances. This is in particular the case when imposition of the normal fine would irrevocably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value in a specific social and economic context.\textsuperscript{3786} Furthermore, the clarifications incorporated in the 2006 Guidelines in line with the case law, make clear that the recession defense is not available.\textsuperscript{3787} This is important given that such a consideration may be susceptible to abuse.

6. Concluding remarks

This Chapter has illustrated the great evolution of the Commission’s fining policy over the last decades. As the Commission gained experience in fining companies for cartel infringements, the influence of economic theory in the calculation methodology was more and more apparent and deterrence considerations became the main driver of the Commission’s fining policy.

During the years preceding the adoption of the 1998 Guidelines the Commission did not have an official method of calculation. However, the analysis of the Commission’s decisions shows that it calculated fines based on a percentage of the undertakings’ (global) turnover and the behaviour of the undertaking in question. Economic considerations played a very limited role in this calculation method. In 1998 the Commission published its first Fining Guidelines. The adoption of the Guidelines not only created transparency and certainty for undertakings as regards the factors taken into account by the Commission to set fines, but also slightly improved its fining method. The 1998 method (which was mainly based on the classification of the infringement) could be (indirectly) associated with harm considerations. Despite the presence of certain economic insights in the 1998 Guidelines, this method contained considerable shortcomings which undermined the potential of these Guidelines to produce deterrence. The most relevant deficiencies concerned, more precisely, the fact that the classification of infringements could not be linked to any kind of quantitative measure of harm and the small impact of the duration factor. The 2006 revision has clearly addressed these issues. Fines are now based on the turnover relating to the sales of the cartelised product and the duration factor has a full impact on the calculation of the fine. Furthermore, the 2006 method contains new elements specially designed to take into account the secret nature of cartels as well as

\textsuperscript{3785} It should be recalled that this possibility was also more briefly mentioned in the 1998 Guidelines, according to which, ‘depending on the circumstances, account should be taken […] of certain objective factors such as […] [the undertaking’s] real ability to pay in a specific social context, and the fines should be adjusted accordingly’. Fining Guidelines 1998, section 5(b).

\textsuperscript{3786} Fining Guidelines 2006, point 35.

\textsuperscript{3787} Despite the new criteria provided by the Commission in its 2006 Fining Guidelines and the additional guidance provided by the Commission’s decisions, it has been argued that ‘[t]he Commission’s decisions which granted fine reductions on the ground of financial constraints generally contained very limited justification for the reduction of the level of the fine’. D. GERADIN, “The EU Competition Law Fining” 36; see also in this regard A. STEPHAN, “The Bankruptcy Wildcard in Cartel Cases”, 2006 Journal of Business Law, 511-536, at 527. As the analysis of the Commission’s decision illustrated such assessment in extremely complex. Therefore, providing an exhaustive list of assessment factors is simply not viable. On the other hand, it is true that the Commission decision frequently delete information regarding claims for inability to pay for confidentiality reasons. In order to provide additional clarity in this regard the Commission published an informative note on the Commission’s ability to pay policy, this document is available at \url{http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-737-EN-2-0.Pdf}
the need to attain deterrence. From an economic point of view this method can indeed be qualified as economically sound. In addition, the fact that the undertaking’s behaviour can also be taken into account under the mitigating and aggravating factors also discourages the creation and maintenance of cartels when companies which play a more important role in the agreement are more severely punished.

Although, taken as a whole, the 2006 Fining Guidelines can be considered as an appropriate method of calculation to sanction cartel members, the considerable level of recidivism indicates that rather frequently cartels remain a profitable business activity. The common application of the 10% turnover limit, which limits the deterrent effect of the method of calculation by capping fines that exceed this threshold may also contribute to such profitability.

While the question regarding the appropriateness of the 10% turnover to ensure the proportionality of fines is not quite settled, at the same time one may question whether the current level of fines for undertakings should be increased. In fact – notwithstanding the application of the 10% turnover rule – the Commission is entitled to increase the level of fines in order to exceed the amount of gains improperly made as a result of the infringement when it is possible to estimate that amount. The fact that this possibility has never been used not only reflects the difficulties of calculating the gains resulting from an infringement, but may reveal the Commission’s reluctance to impose even higher sanctions. This reflection leads us to the key question of whether the current level of fines for undertakings should be increased if does not suffice to produce not full deterrence. Or said differently: will higher fines for companies be able to solve the deterrence gap?

The analysis conducted in this Chapter, and more precisely the considerable level of recidivism, confirms that the current deterrent effect of the Commission’s fines is not always sufficient. Yet, there is a number of reasons why higher fines do not seem desirable or even acceptable. First of all, higher fines entail also entail costs and are difficult to implement. It is for instance almost unthinkable that the Commission would attempt to fully adopt the optimal sanction formula or that it would use its right to multiply the fine by the number of previous infringements in cases of recidivism. In fact, if the fining methodology is adjusted in order to increase the level of fines, the probability that fines reach the 10% threshold will also be higher. If the 10% turnover limit is applied as a general rule, the Commission’s fines will no longer differentiate between the role played by each undertaking in the infringement and their behaviour will also be of no relevance. In addition, a systematic application of the 10% cap would paradoxically mean that longer successful cartel will be more profitable than shorter infringements as the turnover limit is equally applied regardless of any other considerations including thus the duration of the cartel.

3788 See also D. J. WALSH, “Carrots and sticks - leniency and fines in EC cartel cases”, 2009 (30-1) ECLR, 30-35, at 34. See further supra section 5.4 of this Chapter.
3791 See also reaching a similar conclusion M. MARINIELLO, “Do European Union fines” 7. This author indeed concludes that ‘current deterrents against cartels are insufficient, and suggests that fines should be increased’.
3792 See also M. MARINIELLO, “Do European Union fines” 7.
Moreover, excessively high fines are at odds with the principle of proportionality which constitutes an important limit to the European Commission’s discretion.\(^{3793}\) If the Commission would start setting higher fines that are deemed disproportional by the European Courts and thus reduced after judicial review, the credibility of the Commission’s fining system would be jeopardised, and may not be deemed credible, especially if they are reduced after judicial review.\(^{3794\ 3795}\)

This explains why Member States are increasingly focused on adopting (administrative and/or criminal) sanctions for individuals.\(^{3796}\) The exclusives focus of the Commission’s sanctioning system on fines for undertakings (and not on natural persons) is most likely one the main hindrance for the effectiveness of the Commission’s system.\(^{3797}\)

There is no doubt that fines for companies are absolutely necessary to guarantee the effective enforcement the antitrust rules. The threat of being fined motivates undertakings to monitor their employees and thereby discover and prevent illegal behaviour. Without corporate fines, firms will have little motivation (if at all) to encourage compliance among its employees.\(^{3798}\) Yet, the analysis in this chapter suggests that even if fines could be further increased as it occurred during the last decades, managers and other employees (who are left unpunished) would still not be deterred from committing new infringements. In the words of D. GERADIN ‘independently of the amount of fines imposed on an undertaking, the “agency problem” is not solved’.\(^{3799}\)

In this line with this reasoning, specific sanctions for individuals may constitute an appropriate means to address principal agent problems which arise in the context of a cartel when an undertaking cannot ensure that its employees do not engage in cartels. Whereas in these circumstances firms must still be fined to ensure that they use their best efforts to (try to) guarantee compliance among their staff, it is submitted that sanctions for individual persons directly influence the employee’s

\(^{3793}\) Proportionality is a general principle of EU law, applying as such to all measures adopted by European institutions. According to well established case-law ‘by virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued’. Judgment of the Court of 13 November 1990, Case C-331/88, The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others [1990] ECR I-4023, para 13. The principle of proportionality is also included in Article 49(3) of the Charter of Fundamental Rights of the EU stipulating that ‘the severity of penalties must not be disproportionate to the criminal offence’.

\(^{3794}\) See further W. WILS, “Optimal Antitrust Fines” 20-23; H. GILLIAMS “Proportionality of Fines”; N. CALVINO, “Public enforcement”

\(^{3795}\) In addition, it is generally accepted that imposing higher fines, may entail substantial social costs. See e.g. M. MARINIELLO, “Do European Union fines” 7; W. WILS, “Is Criminalization” 31; D. GINSBURG AND J. WRIGHT, “Antitrust Sanctions” 18; D. GERADIN, “The EU Competition Law Fining” 15-16. According to this last author ‘[t]hese costs will often be felt by three groups of stakeholders which are not involved in the infringing behaviour at all: the undertaking’s employees, shareholders, and even the undertaking’s customers. […] High fines may also affect shareholders and deter investments by affecting the value of the shares of the company that has been fined while shareholders generally have not participated in – or had knowledge of – the infringement, and could not have done anything to prevent or deter it’.


\(^{3798}\) Ibid 16.
personal incentives to break the law and may thus be a more effective means to fill the deterrence gap.\footnote{See sharing this point of view E. M. MICHELS, “The Real Shortcoming” 59.}

These reflections lead us to the questions underlying the final (sub-)part of this study: (how) can the deterrence shortcomings of the Commission’s fining system be improved? Can the Commission’s fining system for undertakings be improved (on the basis of the NCAs’ experience or should it also be complemented by other types of sanctions?
Guided significantly by economics and game theory, the European Commission has succeeded in designing a fining system and implementing a leniency programme that arguably function quite effectively in practice. While the leniency programme leads to the detection of a great majority of cartels in the European Union, the Commission pursues the deterrence objective through the imposition of significant fines on undertakings.

The proper functioning of the Commission’s detection and sanctioning instruments is clearly connected to the increasing role of economic analysis in the field of competition law. The significant evolution of the Commission’s enforcement system in line with economic theory and deterrence considerations, is well illustrated by the development of its method to calculate fines for European antitrust infringements. In line with the conclusions of Chapter 10, it can be affirmed that the 2006 Guidelines are founded on sound economic principles that appropriately reflect the harm and gains produced by infringements. Those are indeed the correct parameters to calculate fines according to economic theory.

Despite the increased effectiveness of the Commission’s sanctioning approach, the assessment conducted in Chapter 10 has also demonstrated that the Commission’s fining policy suffers from a number of shortcomings. Although substantial fines are indeed frequently imposed on undertakings, the ability of the Commission to design a calculation method that is appropriate in terms of deterrence, is limited by the 10% ceiling established in Article 23 of Regulation 1/2003. Therefore, even if the 2006 fining methodology is a generally suitable (although imperfect) method from an economic and legal point of view, capping fines at such a level inevitably limits the deterrent effect of the sanctions imposed by the Commission.

The limitations of the Commission’s fining practice are also well illustrated by a more notable problem, namely the rather frequent level of recidivism among cartelists. In its 2006 Fining Guidelines, the Commission attempted to (at least partially) tackle the issue of recidivism by announcing that fines would be doubled, tripled, etc. depending on the number of previous infringements. Applying this rule proved, however, unfeasible in practice. Not only would this strict approach normally lead to fines exceeding the 10% turnover limitation, but most importantly, justifying such high increases would also be problematic from both a legal and an economic point of view.

Notwithstanding the question ‘which punishment is appropriate for undertakings involved in repeated infringements’, the high rate of repeated violations suggests that the Commission’s antitrust sanctions are not always sufficiently deterrent. Still, in accordance with the reflections made in Chapter 10, imposing ever increasing fines on corporations may not be the most appropriate solution. First of all, there is evidence suggesting that increased fines do not necessarily enhance

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3801 See Chapter 8.
Moreover, even higher corporate fines may once again raise proportionality issues.\textsuperscript{3804}

As discussed in Chapter 10, the primary reason to fine undertakings relates to the fact that, in the absence of detection and punishment, cartel infringements are beneficial for undertakings, in the sense that they (may) increase profits, reduce losses, or even prevent market exit.\textsuperscript{3805} On the other hand, it is precisely the exclusive scope of application of corporate fines that appears to constitute one of the main deficiencies of the European sanctioning system. Given the intrinsic limitation of corporate sanctions to be an optimal deterrent, there is a strong argument to introduce penalties against natural persons that can complement corporate fines and enhance deterrence.\textsuperscript{3806} Moreover, given that individuals act on behalf of companies, it makes sense to try to deter those individuals directly by threatening them with penalties, and effectively imposing such sanctions if they act against the law. Since the deterrence level of corporate fines is not optimal, it may be assumed that fines for undertakings also provide insufficient incentives for a corporation to effectively supervise its agents and, thereby, prevent them from engaging in competition law infringements and from putting the corporation at risk of being fined. In addition, it is questionable whether a corporation will always be in a position or have the means to monitor its agents and deter them from unlawful practices.\textsuperscript{3807}

Finally, the need to discourage individuals from engaging in collusive activities is (more indirectly) illustrated the field of leniency. As pointed out in Chapter 8, there is intrinsic tension between the fact that the benefit of immunity is given to an undertaking as applicant, and the fact that the cooperation obligation – which is key to obtain immunity – can only be satisfied by the individuals who were involved in the cartel.

Against this background, the next part of this work focuses on the question whether and if so, how, the current Commission fining policy can be improved on the basis of the experience of Member States in the enforcement of European competition law. This question will be analysed with respect to (i) the Commission’s sanctioning system based on administrative fines for undertakings and (ii)

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\textsuperscript{3804} See also W. Wils, “Is Criminalization” 31, of the online version of this contribution. This author elaborates on the negative effects of very high fines and explains that ‘[i]f such high fines were really imposed, many of the companies concerned would be forced into bankruptcy. However, this would entail undesirable social costs because, in the absence of perfect markets, it would hurt not only managers and shareholders, on whom the bankruptcy may be considered to have a desirable deterrent effect, but also all other stakeholders in the firm: employees, suppliers, customers, creditors and tax authorities. Even if they remain below the level of inability to pay, the imposition of such high fines is likely to be costly’.


\textsuperscript{3806} See generally OECD, Cartel Sanctions against Individuals; see also stressing this aspect D. Geradin, “The EU Competition Law Fining” 15-16.

\textsuperscript{3807} OECD, Cartel Sanctions against Individuals 7.
\end{footnotesize}
to other sanctioning mechanisms available at the Member State level that may have the potential to complement the Commission’s fining policy.

The reasoning underlying this approach is connected to the ongoing process of soft convergence that has been going on during the last decade in the light of the modernisation reforms. In line with the conclusions established in Chapters 5 and 6, the Commission fulfils an important role as leader in this process of soft harmonisation. The process of convergence testifies that there is an increasing degree of homogeneity with regard to sanctioning preferences, as NCAs are generally equipped with powers to impose sanctions on undertakings and associations of undertakings. However, as regards the methodology to calculate fines, some NCAs follow the methodology used by the Commission to calculate fines, while other deviate from such approach in more or less significant ways. Arguably, such divergences may have the potential to improve (the deficits) contained in the Commission’s fining system.

According to the same line of reasoning, the question whether the NCAs divergent sanctioning preferences may also be used to complement the central system of fines for undertakings, will be examined as well. Furthermore, if effective (divergent) trends can be identified at the Member State level, it can certainly not be excluded that such sanctioning mechanisms could evolve into a model for other Member States, thereby giving rise to Member State-driven convergence.

For the purpose of this analysis, three Member States have been selected, namely Germany, the United Kingdom and Belgium. This selection has the benefit of comparing three jurisdictions that have an entirely different background of competition law and policy. Germany and the United Kingdom have robust traditions of antitrust enforcement and these jurisdictions generally end up high in rankings of effective competition authorities. The German legislator created the first European administrative agency authorized to regulate through licensing, membership control and threat of dissolution the activities and commercial activities of cartels in 1923. In the UK, the first statutory intervention came in 1948 in the aftermath of the Second World War, with the enactment of the Monopolies and Restrictive Practices (Inquiry and Control) Act. Given the solid competition law tradition of both jurisdictions, it is likely that these Member States are more likely to have incorporated divergent sanctioning mechanisms, which may be considered potential models for inspiration for other Member States. This is indeed the case of the UK which is known

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3809 Ibid, paras 68-76.
3810 Such rankings are provided by Global Competition Review. Global Competition Review is a journal and news service owned by Law Business Research Ltd. It brings out yearly ‘star rating’ of competition authorities from across the globe. The ‘elite’ authorities are awarded five stars, ‘very good’ authorities are awarded 4 stars, ‘good’ authorities are awarded 3 stars, and ‘fair’ authorities are awarded 2 stars. In the ranking of 2015, the German competition authority (i.e. the Bundeskartellamt) was awarded five stars, the UK competition authority (i.e. the Competition and Markets Authority) was awarded four stars, and the Belgian competition authority was awarded two stars. See “Rating Enforcement 2015: the annual ranking of the leading competition authorities”, 2015 (18–6) Global Competition Review.
3811 Verordnung gegen Missbrauch wirtschaftlicher Machtwürde, Nov. 2, 1923 (Kartell Verordnung) [1923] Reichsgesetzblatt 1, 1067. The Kartell Verordnung was subsequently amended by the Decree of June 14, 1932, (1932) Reichsgesetzblatt I, 289, and by the statute relating to the change of the Cartel Decree, July 15, 1933 [1933] Reichsgesetzblatt 1, 487. C. HARDING AND J. JOSHUA, Regulating 73. See further supra Chapter 1.
as one of the most notable European jurisdictions to have criminalised cartels. Belgium, on the other hand, is a relatively young and less experienced jurisdiction. This implies that there might be a greater tendency to be influenced by or to follow other enforcement trends if they have proved effective.

This comparative analysis is structured as follows. Chapter 11 generally aims at identifying elements of the national fining policies for undertakings that have the potential to improve the Commission’s system. After a brief overview of the substantive law provisions and the most important features of the enforcement framework is provided, the system of sanctions for undertakings is analysed, from both a theoretical and a more practical perspective. This analysis will specially focus on the convergent and divergent aspects of the national sanctioning methods with respect to the Commission model. Once the divergent aspects have been identified, their potential to improve the Commission’s fining policy will be further assessed. In Chapter 12, sanctions other than fines for undertakings will be explored in theory and practice for each Member State. To the extent that this is necessary, individual leniency programmes will also be considered. Based on the analysis of the NCAs’ experience, finally Chapter 13 will be put forward an number of arguments which are meant to answer the main question underlying this analysis, namely whether (and if so how) the Commission’s fining system for undertakings should be complemented by reference to the (divergent) national enforcement trends.
CHAPTER 11. Improving the Commission’s fining system

Member States play an essential role in the enforcement of the EU competition rules (Chapter 5). Since 2004, the NCAs are fully empowered by Regulation 1/2003 to apply the EU antitrust rules alongside the Commission. While the Commission can be seen as the leader of the ECN, the contribution of NCAs to effective enforcement should not be underestimated. This innovative role of NCAs is most apparent taking into account that Regulation 1/2003 focused on giving the NCAs the power to fully (co-)enforce the EU competition rules but did not address the instruments or means by which such rules apply (enforcement tools, fining powers, leniency programmes, etc …). This lack of harmonization as regards the means and instruments by which NCAs apply the EU competition rules cannot but enhance the innovative potential of Member States (and their respective NCAs) to boost the deterrent effect the Commission’s sanctioning system by (i) improving the Commission’s fining system and (ii) complementing it with other sanctioning tools.

This Chapter will focus on the former objective. Namely, it will analyze to which extent the NCAs fining policies for undertakings contain elements that may increase the deterrent effect of the Commission’s 2006 fining guidelines. This analysis will be conducted from both a theoretical and practical point of view for each selected jurisdiction. Before conducting this assessment, it is however necessary to provide some general background as to the general structure and functioning of each individual Member State.

1. Key features of competition law (enforcement)

1.1. Germany

1.1.1. Substantive law covering cartels

The legal basis for cartel enforcement in Germany is the Act against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen or “GWB”).3813 The relevant provisions regarding cartel agreements are contained in Sections 1 and 2 of the GWB. These Sections constitute the national equivalents of the competition rules set out in Article 101 TFEU.

Section 1 GWB, corresponds to Article 101(1) TFEU and broadly prohibits all (vertical and horizontal) agreements, concerted practices or decisions by associations of undertakings3814 that have as object or effect a restriction of competition. In contrast to Article 101(1) TFEU, Section 1 GWB does not specify the type of anti-competitive behavior that normally falls under this prohibition.

Section 2(1) GWB reflects the content of Article 101(3) TFEU in the sense that it exempts agreements from the prohibition of section 1 GWB when such agreements, taken as a whole, have

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3813 Gesetz gegen Wettbewerbsbeschränkungen, as amended by the 8th Amendment to the GWB which entered into force on 30 June 2013. An English version of the GWB can be found at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html

3814 It is interesting to mention that since the 6th amendment of the GWB dating from 1998, not only anti-competitive agreements between undertakings are prohibited, but also ‘decisions by associations of undertakings and concerted practices’. This is certainly remarkable taking into account that the original version of the GWB was adopted in 1957.
a positive effect on the economy. In particular, such agreements must contribute to the improvement of the production or distribution of goods or help to promote technical or economic progress, while allowing customers a fair share of the resulting benefit. In addition, the agreements in question may not impose restrictions that are not indispensable to attain these objectives, or enable undertakings to eliminate competition in respect of a substantial part of the products.

Pursuant to section 2(2) GWB, EU block exemption regulations also apply to restrictions of competition within the meaning of section 1 GWB.3815

Section 3 GWB exempts – under certain conditions – restrictions of competition between small and medium-sized undertakings.3816

Cartel agreements are covered by the prohibition contained in the GWB when they are capable of producing (appreciable) anticompetitive effects in Germany.3817 In line with the so-called effects doctrine,3818 the GWB also applies when the conduct has taken place abroad in so far the effects can be felt in Germany.3819 This implies, however, that agreements that are concluded in Germany but have effects only outside of Germany are not covered by this provision.3820

The prohibitions contained in the GWB are generally regarded as having an administrative nature. There is, however, one important exception for bid-rigging (or collusive tendering), which constitutes a criminal antitrust offense.

In case of a public tender for the supply of goods or commercial services of public authorities, bid-rigging may be prohibited both under Article 101 TFEU and the German Criminal Code

3815 Before the 7th amendment of the GWB in 2005, the exceptions to the prohibition were not in line with European competition law. After the reform, section 2 GWB states that the ‘[EU block exemption regulations] shall apply mutatis mutandis’.

3816 In addition to the exemptions for small or medium-sized enterprises, exemptions also exist in the agricultural sector (Section 28 GWB.), in the press sector (Section 30 GWB) and for the water supply business (Section 131 (6) GWB).

3817 In Germany, early case law settled that the likelihood of an “appreciable” effect was sufficient, and there was no need to show a likelihood of “substantial” restrictive effects (BGH 23.2.1988 WuW/ BGH 2469, at 2470 “Brillenfassungen”; BGH 14.1.1960 WuW/E BGH 369, at 373 “Kohlenplatzhandel”). Nowadays, the European rules on appreciability apply to Section 1 GWB, which have been incorporated into the German system through a de-minimis guidelines (Bagatellbekanntmachung) Notice No. 18/2006 which entered into force in March 2007. (The Notice is available at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Bekanntmachungen/Bekanntmachung%20 Bagatellbekanntmachung.pdf?__blob=publicationFile&v=6). Accordingly, under German law, the European principles are applied to infringements falling under Section 1 GWB, even if such infringements are not capable of affecting trade between Member States and thus do not fall under the convergence rule contained in Article 3(2) of Regulation 1/2003. See also stressing this aspect I. LIANOS et. al. “An Optimal” 161.

3818 This is the so called effects principle or Auswirkungsprinzip. See Section 130 (2) GWB. See also C. BECKER in U. LOEWENHEIM, K. M. MEESEN, A. RIESENKAMPEF (eds.), Kartellrecht (Grauer Kommentar), Band 2: GWB, Verlag C.H. Beck, München 2005/2006, 1402 p., at 48 (hereafter: ‘C. BECKER in U. LOEWENHEIM’).


3820 In this regard it has been argued that ‘[t]he FCO (Federal Competition Office) tends to interpret [effects rule] broadly and it asserts jurisdiction even in cases with little or only indirect effects in Germany. […] Depending on the individual facts, however, export cartels may have at least potential effects in Germany and can in such cases be covered by the prohibition’. T. SIEBERT AND M. WESTRUP, “Germany, Cartels & Leniency 2016”, International Comparative Legal Guides, available at http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/germany (hereafter: ‘T. SIEBERT AND M. WESTRUP, “Germany”’).
In the context of the *Strafgesetzbuch*, bid-rigging can be prosecuted both as fraud pursuant to section 263 of the *Strafgesetzbuch* and, since 1998, under section 298, a special provision against bid rigging.

It is important to stress that these criminal provisions only apply to the individual(s) responsible for having rigged the bid, while the administrative framework applies to both individuals and undertakings. Given the limited scope of criminal enforcement to bid-rigging cases in Germany, the main focus of competition law enforcement has traditionally been administrative enforcement.

As regards the jurisdictional scope of this criminal antitrust offense, due to the fact that the jurisdictional reach of the StGB is generally confined to the German territory, Sections 263 and 298 of the StGB are applicable to all criminal offenses committed in Germany. In general terms, an individual can be prosecuted under these provision when tender offers have been made by German public authorities and when private tenders for goods or commercial services are supplied in Germany.

Section 22 of the GWB contains a provision regarding the relationship between the application of the GWB and Article(s) 101 (and 102) TFEU. According to section 22(1) GWB, the provisions of the Act ‘may also be applied to agreements between undertakings, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU, which may affect trade between the Member States of the European Union within the meaning of that provision’.

### 1.1.2. The responsible enforcement authorities

Since the coming into force of the GWB on 1 January 1958, the public enforcement of (European) competition law has been shared by various institutions.

According to Section 48(1) GWB, the German cartel authorities are: (i) the Federal Cartel Office (Bundeskartellamt), (ii) the Federal Ministry of Economics and Technology, and (iii) the supreme federal state authorities (or Landeskartellbehörden) that are competent according to the laws of the respective federal state. Section 50(1) GWB stipulates that, to the extent these authorities are competent to apply national competition law, they will also be responsible for the application of European competition law within the meaning of Article 35(1) Regulation 1/2003. Or

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3822 As further analysed below, the most important difference between bid-rigging under Article 101 TFEU and bid-rigging under the *Strafgesetzbuch*, is that the focus of the criminal rules lies on the offer based on the bid agreement rather than on the anticompetitive agreement itself.


3824 In this situation, Article 3(1) of Regulation also applies. See supra Chapter 5.

3825 The Federal Ministry of Economics and Technology (or Bundesministerium für Wirtschaft und Technologie) is only competent to grant an authorisation for a concentration prohibited by the Bundeskartellamt if in the case at hand the restraint of competition is outweighed by advantages to the economy resulting from the concentration, or if the concentration is justified by an overriding public interest. GWB Section 42.

3826 The supreme Land authorities (Landeskartellbehörden) are usually part of the State Ministry of Economics (Landeswirtschaftsministerium).

3827 All these authorities will be jointly referred to as ‘German authorities’, or ‘German competition authorities’.

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in other words, these authorities are the designated authorities responsible for the enforcement of both German and European competition rules.\textsuperscript{3828}

The Bundeskartellamt is always the competent authority to enforce the cartel prohibition when the anti-competitive effects of the conduct in question extend beyond the territory of one federal state. When such effects only affect one single federal state, the Landeskartellbehörden will be competent.\textsuperscript{3829} Given that the application of EU competition law implies that anticompetitive cartel agreements are likely to affect trade between Member States, the Bundeskartellamt will normally be responsible for the enforcement of Article 101 TFEU. In practice, the Bundeskartellamt plays a far more important enforcement role than the Landeskartellbehörden.

1.1.2.1. The Bundeskartellamt (Federal Competition Office)

As pointed out above, in Germany, the responsibility for the enforcement of competition law, including the cartel prohibition, lies mainly with the Bundeskartellamt, which is located in Bonn.\textsuperscript{3830} The Bundeskartellamt is an independent higher federal authority\textsuperscript{3831} assigned to the Federal Ministry of Economics and Technology.\textsuperscript{3832}

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\textsuperscript{3828} In addition, although the public prosecutor has not been designated as a national competition authority in the sense of Article 35 of Regulation 1/2003, he/she plays a significant role in the enforcement (European) competition law. In fact, the public prosecutor takes over the case from the Bundeskartellamt or Landeskartellbehörden when fine proceedings are appealed and adopts an autonomous decision as regards whether the case should or not be pursued. In practice, the public prosecutor commonly decides to pursue the case and only rarely proceedings are terminated (M. J. Frese, Sanctions 139-140 of the original version of this dissertation, referring to R. Raum in E. Langen and H.-J. Bunte (eds), Kommentar zum deutschen und europäischen Kartellrecht Kommentar Zum Deutschen Und Europäischen Kartellrecht, 2011, 4176 p., at Section 81 (hereafter: ‘R. Raum in E. Langen’). M. Frese, correctly criticises the fact that the public prosecutor is not considered a designated NCA and observes that [t]his sits oddly with Regulation 1/2003, especially because it means inter alia that an institution other than an NCA applies Articles 101 and 102 TFEU’.

\textsuperscript{3829} The Bundeskartellamt was originally located in Berlin. In 1999, its official seat was transferred from Berlin to Bonn as part of the relocation programme of the government.

\textsuperscript{3830} Or selbständige Bundesbehörde. This notion, flows from the German Constitution (Grundgesetz), according to which the federal legislator may create independent federal authorities for purposes falling within the former’s scope of competences. Article 87(3) Grundgesetz.

\textsuperscript{3831} Section 51(1) GWB. The term ‘independent’ refers to the authority’s independence with respect to the Federal Ministry of Economics and Technology. The Bundeskartellamt adopts its decisions based only on competition arguments (compare supra Chapter 3). According to the Bundeskartellamt itself ‘[i]t processes and decides individual cases independently, i.e. without external instructions. The Federal Ministry of Economics and Technology only has the right to give it general instructions (Section 52 of the GWB). However, it rarely makes use of this, the last general instruction was issued 30 years ago’. The Bundeskartellamt stresses that its ‘independence is particularly important given that the competition system is not self-supporting but is constantly threatened by individual interests. Al though the general public benefits from a competition system, there are always incentives for individual companies or sectors to avoid competition, especially in times of economic crises and to claim special rules for themselves. If in such situations the Bundeskartellamt were expected to base its decisions on criteria other than competition (e.g. social aspects), the competitive system would be in danger of being undermined’. Bundeskartellamt, “The Bundeskartellamt in Bonn Organisation, Tasks and Activities” (September 2011), at available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Brosch%C3%BCren/Brosch%C3%BCren%20-%20About%20the%20Bundeskartellamt.pdf?__blob=publicationFile&v=19. See further commenting on this independency e.g. M. J. Frese, Sanctions 139-140 of the original version of this dissertation; P. Jung, “National Report for Germany” in D. Cahill (ed), The Modernisation of EU Competition Law Enforcement in the EU: FIDE 2004 National Reports, Cambridge, Cambridge University Press 2004, at 195; F. Rittner and M. Dreher, “Europäisches und deutsches Wirtschaftsrecht: eine systematische Darstellung”, Heidelberg, CF Müller 2008, 728 p., at 628 et seq; C. Becker in U. Loewenheim 52.

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The GWB allocates decision-making powers in individual cases to special units within the Bundeskartellamt. In particular, the Bundeskartellamt is organised into 12 independent units or divisions. Nine divisions are responsible for the general application of the antitrust rules and merger control provisions in specific industry sectors and product markets. Three decision divisions deal exclusively with the cross-sector prosecution of hard-core cartels. A special unit for combating cartels (Sonderkommission Kartellbekämpfung or SKK) provides technical assistance to the three specialised cartel divisions. The main purpose of this unit is to assist the decision divisions during the investigative phase, in particular in the preparation, execution and evidence assessment of search operations in cartel proceedings. Moreover, the SKK is also the contact point for firms which intend to apply for leniency in cartel proceedings.

1.1.2.2. Landeskartellbehörden (State Cartel Offices)

Apart from the Bundeskartellamt, there are also competition authorities at the level of the different federal states (Landeskartellbehörden). The Landeskartellbehörden are integrated within the infrastructure of the respective state’s ministry for the economy.

The Landeskartellbehörden may also apply Article 101 (and Article 102) TFEU. However, given that the respective state only prosecutes infringements the effects of which are limited to the specific state in question, enforcement actions by these State Cartel Offices under Articles 101 (and 102) TFEU are rather exceptional.

3833 Section 51(2) GWB.
3834 In the decision divisions, each case is decided upon by a collegiate body consisting of the respective division's chairman and two associate members. All decisions have to be majority decisions. The Decision Divisions are autonomous and not subject to instructions in their decision-taking. See Sections 51(3) and 51(4) ARC. See also Pilot field study on the functioning of the national judicial systems for the application of competition law rules. Final Report 2014. DG Justice under Multiple Framework Contract JUST/2011/EVAL/01, at 250, available at http://ec.europa.eu/justice/effective-justice/files/final_report_competition_and_eu_28_member_states_factsheets_en.pdf (hereafter: “Pilot field study”); R. SIEGERT AND S. HIRSBRUNNER, “Germany” in The handbook of competition enforcement agencies 2013, GCR, at 103.
3838 The state legislator from the federal Land is entitled to establish the Landeskartellbehörden and to regulate their administrative procedures (Grundgesetz, Article 84).
3839 The integration of the authority within the infrastructure of the state department is in stark contrast with the stressed functional and organization independency of the Bundeskartellamt. See also pointing out this aspect R. BECHTOLD, Kartellgesetz (Gesetz gegen Wettbewerbsbeschränkungen), 5th edition, CH Beck 2008, 1040 p., at 48 (hereafter: ‘R. BECHTOLD, Kartellgesetz’); M. J. FRESE, Sanctions 141 of the original version of this dissertation. Comparing the Bundeskartellamt to the Landeskartellbehörden this last author points out that “[t]he resources devoted to competition law enforcement on state level cannot be compared to the resources of the B KartA. Dependent on the respective state administration, competition issues will be managed by anything ranging from a small team to a single part-time official’.
3840 Given that NCAs are generally required to apply European competition law in parallel to national law (Article 3 of Regulation 1/2003), it is only logical that the Landeskartellbehörden are generally empowered to apply the European provisions, even if their role is more limited in practice. In this regard, M. FRESE adds that “[t]he allocation of enforcement competences to the L KartBs was mainly motivated by the objective to secure their role in the context of national competition law”. M. J. FRESE, Sanctions 141 of the original version of this dissertation. See also commenting on this aspect R. STURM, “Wettbewerbspolitik: Die Fortschritte ihrer Europäisierung” in E. BOS AND J. DIERINGER (eds) Die Genese einer Union der 27: Die Europäische Union nach der Osterweiterung, Wiesbaden: VS Verlag für Sozialwissenschaften 2007, 418 p., at 121.
Finally, the regional offices of the public prosecutor (Staatsanwaltschaften or “StA”) investigate and prosecute criminal cartel offenses (bid rigging) under the Strafgesetzbuch. The public prosecutor will make his/her accusation only on the basis of the offense of the StGB, which takes precedence over the administrative infringement. When a bid rigging case is being prosecuted by the Staatsanwaltschaft, simultaneously, the Bundeskartellamt remains competent for the prosecution of legal persons and associations of persons, and may impose a fine under the administrative procedure. In this situation, the investigation is closely coordinated with the public prosecutor.

a. The proceedings

In Germany, two different administrative proceedings can be followed for competition law infringements. On the one hand, minor infringements that only require a cease and desist order are dealt with in an administrative process, which is largely regulated by the GWB (Verwaltungsverfahren). On the other hand, in cases of severe infringements that may lead to the imposition of fines (i.e. penalty proceedings or Bußgeldverfahren), the proceedings are governed by the Act of Regulatory Offenses (Ordnungswidrigkeitengesetz or “OWiG”) and the Code of Criminal Procedure (Strafprozessordnung). In cartel cases, which constitute particularly severe restrictions of competition, the competition authority commonly opens administrative offence (fine) proceedings.

b. Key procedural steps between the opening of an investigation and the imposition of sanctions

The decision making process will depend on the circumstances of the case. The cartel authority in charge, most commonly the Bundeskartellamt, may initiate an investigation when there are reasonable grounds to believe that an infringement of (European) competition law has occurred. This is normally the case following third-party complaints and/or an application under the leniency system by one of the companies involved. The initiation of proceedings can be done by the

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3841 OWiG Section 21(1). See also BGH 4. 11. 2003, Frankfurter Kabelkartell, WUW/E DE-R 1233 (at 1234), NJW 1539 (at 1540); C. STADLER, “Handbook on Multijurisdictional” 28-29.

3842 Section 82 GWB; OWiG § 30(4)(2).

3843 For example, inspection are often carried out jointly. Generally, the Bundeskartellamt asks for a warrant to search the premises of the undertaking, while the Public Prosecutor seeks a warrant to search the individuals who allegedly formed the bid-rigging agreement. The key initiatives dedicated to the investigation are these flexibly agreed upon by both authorities. ICN, Anti-Cartel Enforcement Template, Cartels Working Group (Subgroup 2: Enforcement Techniques) Germany, at 5, available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Leaflet-ICN_Anti-Cartel_Enforcement_Template.pdf?__blob=publicationFile&v=8 (hereafter: ‘ICN, Germany Anti-Cartel Enforcement Template’). These practical arrangements as regards the competences have, however, been criticised precisely because of their informality. See e.g. C. STADLER, “Handbook on Multijurisdictional” 28-29.

3844 In addition to these administrative proceedings as pointed out above, criminal prosecutors are competent to investigate bid rigging cases which are a criminal offense (see Section 298 of the Criminal Code).

3845 Sections 32 et seq GWB.

3846 It may occur that a procedure which started as a Verwaltungsverfahren develops into a Bußgeldverfahren and the other way around. Verwaltungsverfahren are mainly directed to the undertakings that actually committed the infringement. Bußgeldverfahren, on the other hand, are principally followed for natural persons responsible for the infringement. M. J. FRESE, Sanctions 139 of the original version of this dissertation.
authorities acting *ex officio* or upon application. The *Bundeskartellamt* will then undertake fact finding activities, which may include sector enquiries and/or the exercise of other investigative powers such as requests for information, the interview of witnesses and seizing of information. The parties concerned will be given an opportunity to be heard. A statement of objections will be issued specifying the facts of the case, the alleged infringements, and its legal assessment. Around the same time, those subject to the investigation will be given access to the file and have the opportunity to express their allegations. The cartel authority can choose – on its own initiative or on application – to hold a public hearing. The investigation is concluded with the adoption of the decision.

**c. Limitation period**

According to Section 81(8) GWB, proceedings for the administrative competition law offences become time-barred after the expiration of the statutory limitation period of five years. This period may, however, be interrupted by the enforcement actions listed in Section 33 OWiG (such as by a hearing, an inspection, a statement of objections). The enforcement actions which trigger the interruption of the limitation period also concern actions undertaken by the Commission and other NCAs. After an interruption, the limitation period starts running anew. However, interruptions may not extend the total duration of the limitation period to more than two times the limitation period (*i.e.* ten years).

**d. Legal review**

Decisions of the *Bundeskartellamt* can be appealed before the Higher Regional Court (*Oberlandesgericht* or “OLG”) in Düsseldorf. The terms of the appeal will differ, depending on

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3847 Section 54 GWB.
3848 Section 56 GWB.
3849 The applicable rules as regards the investigative powers will depend on the procedure followed by the competition authority *i.e.* “administrative proceedings”, or “administrative fines proceedings”. In the former case, the investigative powers are enumerated in Sections 57–59 of the GWB; while in the latter case, they follow from Section 81 GWB, Section 46 OWiG and a number of provisions of the Criminal Procedure Code (StPO), in particular Sections 94 et seq. of the StPO.
3850 See for the administrative proceedings Section 56 GWB; in the administrative fines proceedings: Section 81(10) GWB, Section 46 OWiG, Section 163a StPO.
3851 The final procedural step is the adoption of a formal decision by the FCO. In administrative proceedings, a non-confidential version of the decision will be published on the FCO website (www.bundeskartellamt.de). Fining decisions adopted under the Code on Administrative Offences are not normally published. However, the FCO will generally publish case reports which will describe the cases in some detail.
3852 See also describing these steps ICN, Germany Anti-Cartel Enforcement Template 5.
3853 Section 81(9) GWB.
3854 Section 33(3) OWiG. Still, the interruption of the limitation period is personal and therefore only applies to those persons subject to enforcement action. Section 33(4) OWiG.
3855 Section 33(3) OWiG.
3856 Section 83 GWB. Prior to any court action, the company or individual intending to challenge the decision must lodge a complaint with the competition authority for administrative review. Subsequently, the authority decides whether it maintains or withdraws its decision and in this context it may order or undertake further investigations and request statements concerning official observations, examinations and knowledge (Section 69(2) OWiG). If the authority does not withdraw its decision, it must forward the file via the public prosecution office to the Local Court (Section 69(3) OWiG and 83(1) GWB). All the facts of the case must be cleared up in the light of the evidence taken during the proceedings. See also describing the appeal process *e.g.* M. J. FRESE, *Sanctions* 139 of the original version of this dissertation.
the type of proceedings followed. In fine proceedings, the OLG undertakes a full merits review.\footnote{See Section 77(1) OWiG. In this respect it should be noted that the limitation period extends to the appeal proceedings before the Higher Regional Court (Sections 31-33 OWiG, see further infra). This implies that this Courts should therefore issue a judgment imposing fines within 10 years from the termination of the infringement.} The OLG must base its judgment on the findings reached in the proceedings. For this purpose, the Court may order the collection of evidence and may hear (expert) witnesses.\footnote{Section 71(2) OWiG. This could for instance mean that leniency applicants and authors/proprietors of incriminating documentary evidence are heard.} New facts and evidence can thus be introduced. In other words, the OLG issues a ruling on the enforcement decision, but at the same time, it renders a wholly autonomous decision, vesting ‘original’ rights and obligations.\footnote{In this sense, the decision of the competition authority has a mere guiding role and might be best described as an opinion or reflection.} When the OLG upholds a fining decision of the Bundeskartellamt, it may decrease or increase the amount of the fine.\footnote{It should however be noted that according to Section 72(3) OWiG, if the main proceedings have not been opened and the OLG decides by way of an order, the OLG cannot reach a decision that is more burdensome for the parties involved than the original enforcement decision. This means that in this situation the OLG cannot decide to impose a fine. This may be for instance be the case when the Bundeskartellamt orders interim measures.} Judgments by the OLG may be appealed on questions of law to the Federal Supreme Court (Bundesgerichtshof or BGH’). This is in particular the case when a legal issue of fundamental importance must be decided, or when a decision of the BGH is necessary to develop the law or to ensure uniform court practice.\footnote{Section 74(1)(2) GWB.}

For the Landeskartellbehörden, competition decisions can be appealed in first instance to the Oberlandesgericht of the district in which the Landeskartellbehörde has its seat.\footnote{Sections 63(4) and 83 GWB.} Further, an appeal on points of law can also be lodged with the Bundesgerichtshof.

Finally, the regional offices public prosecutors investigate and prosecute criminal cases (bid rigging). These cases are typically decided by the high regional courts (Landgerichte or “LG”) and an appeal on legal questions is possible to the BGH.

1.2. The United Kingdom

1.2.1. Substantive law covering cartels

Competition law in the UK provides for both civil and criminal enforcement. While the civil enforcement mechanism is mainly regulated by the Competition Act 1998, the criminal enforcement system is set out in the Enterprise Act 2002.\footnote{These Acts replaced the competition rules of the Fair Trading Act 1973, the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the Competition Act 1980. See also analyzing the UK’s competition law enforcement system e.g. D. WENT, “United Kingdom” in Handbook on Multijurisdictional Competition Law Investigations, available at \url{http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/treatises/united_kingdom.pdf} (hereafter: D. WENT, “United Kingdom”).}

The civil enforcement regime is only applicable to undertakings and constitutes the primary antitrust regime in the UK. The criminal enforcement system can, in contrast, only be applied to natural persons. The civil and criminal proceedings can, and in practice do, operate in parallel. This implies
that while civil action may be taken against undertakings, criminal proceedings can simultaneously be instituted against individuals.\textsuperscript{3864}

1.2.2. Civil regime

The main civil enforcement competition law provisions are contained in the Competition Act 1998,\textsuperscript{3865} which establishes an administrative fines regime for companies.

Chapter 1 of the Competition Act is the equivalent of Article 101 TFEU.\textsuperscript{3866} Section 2 (of Chapter 1) of the Competition Act 1998 sets out the so-called ‘cartel prohibition’. In particular, Section 2 prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that may affect trade within the UK and have as their object or their effect the (appreciable) prevention, restriction or distortion of competition within the UK. This Section contains a non-exhaustive list of practices that commonly fall under the Chapter I prohibition including agreements, decisions or practices that ‘(a) directly or indirectly fix purchase or selling prices; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts’.\textsuperscript{3867}

Agreements resulting in appreciable restrictions of competition may, however, benefit from an individual legal exemption\textsuperscript{3868} or from a block exemption.

According to Section 9 of the Competition Act 1998, to benefit from an individual exemption, the agreement must (i) contribute to improving production or distribution or promoting technical or economic progress, (ii) allow consumers a fair share of the benefit, (iii) not impose any indispensable restrictions, and (iv) not eliminate competition as regards a substantial part of the relevant products.

In addition, agreements are also exempted from the Chapter I prohibition if they fall under the European Block Exemption Regulations.\textsuperscript{3869} The Competition Act 1998 however clarifies that

\textsuperscript{3864} The decision to open a case is made in accordance with the 2014 prioritisation principles of the Competition and Markets Authority (the “CMA”, \textit{infra}) (see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf). Still, the CMA will always consider opening a criminal investigation if there are reasonable grounds to believe that the cartel offence has been committed.

\textsuperscript{3865} The 1998 Competition Act’s main provisions entered into force on 1 March 2000. Regulation 1/2003 was implemented in the United Kingdom by the Competition Act 1998 and Other Enactments (Amendment) Regulation 2004.

\textsuperscript{3866} Chapter 2 prohibition in the Competition Act is the equivalent of Article 102 TFEU.

\textsuperscript{3867} It should be noted that certain types of agreement do not fall under the scope of application of the Chapter I prohibition. This is, for instance, the case of agreements relating to the production or trade of agricultural products and of agreements which are scrutinised under specific regulation such as the Financial Services and Markets Act 2000, the Broadcasting Act 1990 and the Communications Act 2003. In addition, the Secretary of State is entitled to order that the Chapter I prohibition does not apply on the basis of exceptional and compelling public policy reasons. See S. HOLMES AND P. GIRARDET, “UK, Cartels & Leniency 2016”, \textit{International Comparative Legal Guides}, available at http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/united-kingdom (hereafter: ‘S. HOLMES AND P. GIRARDET, “UK, Cartels”’).

\textsuperscript{3868} See Sections 4 and 9 of the 1998 Competition Act.

\textsuperscript{3869} Section 10 of the 1998 Competition Act.
agreements which contain hard-core restrictions (i.e. price fixing, market sharing, or output limitation) will not benefit from an individual or block exemption, even if such restrictions are only ancillary to the agreement.\textsuperscript{3870}

Sections 39 and 40 of the Competition Act 1998 provide limited immunity from financial penalties for small agreements in relation to infringements of the Chapter I prohibition (and for conduct of minor significance in relation to infringements of the Chapter II prohibition). This immunity does not apply to any infringements of Articles 101 or 102 TFEU or to infringements of the Chapter I prohibition consisting in price-fixing agreements.\textsuperscript{3871}

Cartel agreements are prohibited by the Competition Act when they are capable of producing (appreciable) anticompetitive effects. In assessing this question, the approach taken by the European Commission in its Notice on Agreements of Minor Importance is followed.\textsuperscript{3872}

Moreover, in accordance with Section 2(3) of the Competition Act 1998, which regulates the extra-territorial application of UK competition law, the prohibition of Chapter I applies only where an agreement is, or is intended to be, implemented in the UK.\textsuperscript{3873}

As regards the application of European competition law, Article(s) 101 TFEU (and 102 TFEU) must also be applied when the Competition Act is applied to agreements that may affect trade between EU Member States (or to abuses of a dominant position).\textsuperscript{3874} In determining whether this is the case, the principles established by the Commission in its Guidelines on the “effect on trade” concept\textsuperscript{3875} are considered.

\textbf{1.2.3. Criminal regime}

As mentioned above, UK competition rules are as of yet founded on a combination of civil and criminal law. Not only may administrative proceedings be brought against undertakings that have violated Article 101 TFEU and/or Chapter I of the Competition Act 1998. Since 2003, individuals engaged in cartel agreements may violate the criminal cartel offence introduced in the Enterprise Act 2002.

Section 188 of the Enterprise Act 2002\textsuperscript{3876} set out the criminal enforcement provisions. In contrast to the civil enforcement system of the Competition Act, which only applies to undertakings and relates to a whole catalogue of unilateral and collective anticompetitive conduct, criminal

\textsuperscript{3870} Ibid.

\textsuperscript{3871} See Section 39(1) and 39(9) of the 1998 Competition Act.

\textsuperscript{3872} Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (De Minimis Notice) [2014] OJ C 291/01.

\textsuperscript{3873} Please note that the “UK.” here refers to England, Wales, Scotland and Northern Ireland, together with subsidiary islands, but excluding the Isle of Man and the Channel Islands.

\textsuperscript{3874} See supra Chapter.

\textsuperscript{3875} Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ([2004] OJ C 101/81).

\textsuperscript{3876} The original version of the Enterprise Act (“EA”) dates from 2002. As it will be examined bellow, the Enterprise and Regulatory Reform Act 2013 which was adopted on 25 April 2013, made significant amendments to the criminal cartel offence.
enforcement only concerns the so-called “cartel offence” and pertains only to the conduct of individuals.

Furthermore, and more remarkably, the UK criminal cartel offence was conceived as a stand-alone offence, entirely separate from the administrative prohibition of Chapter I of the Competition Act 1998 and from Article 101 TFEU. Given the stand-alone nature of the offence, its application does not require proof of a violation of Article 101(1) TFEU or of its national equivalent. As is further discussed below, this unfortunate approach had (and still has) important practical consequences.

Under Section 188 of the Enterprise Act (as recently amended), an individual is guilty of a criminal offence if he agrees, together with one or more persons, to make or implement, (or to cause to be made or implemented), certain types of arrangements relating to at least two undertakings, including price fixing, limitation of production or supply, market sharing, or bid rigging (provided that none of the exclusions or defences apply). The arrangements must be horizontal (i.e., between operators at the same level of the supply chain), reciprocal, and must be such as to have an impact on prices, production, or supply of a product or service in the UK.

The cartel offence applies when individuals agree that undertakings will engage in any prohibited cartel activities affecting the supply or production of goods or services in the UK. The offence is committed in respect of agreements concluded in the UK, regardless of whether steps have been taken to implement the agreement in question or whether the agreement has in fact been implemented.

If the agreement between individuals to affect supply or production in the UK is concluded outside the UK, proceedings may be brought only where some steps were taken to implement the agreement, either as a whole or in part in the UK. For agreements concluded abroad, a mere intention to implement the agreement is therefore not sufficient in such cases. In practice, this condition may, for instance, be fulfilled with a simple telephone call to a firm in the UK giving instructions to act in a certain way.

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3877 This separate nature was in fact based on a recommendation of the OFT, i.e. the competition authority back then. See OFT 365, “Proposed criminalisation of cartels in the UK”, A report prepared for the OFT by A. HAMMOND AND R. PENROSE, November 2001. See also Cartel offence prosecution guidance (CMA9), 12 March 2014, para 3.4.


3879 The Enterprise and Regulatory Reform Act 2013 not only made significant amendments to the criminal cartel offence with a view to improving its effectiveness as a deterrent. In addition, it established the new Competition and Market Authority (infra).

3880 Subsection 188(3) EA.

3881 Section 190(3) EA.

3882 The CMA has also published prosecution guidelines clarifying the principles it will apply when determining in any case whether proceedings for the offence should be instituted. See Cartel offence prosecution guidance (CMA9), 12 March 2014.

3883 This may occur, for instance, as part of a global cartel. See D. WENT, “United Kingdom” 34.

3884 Section 190(3) EA. See also Cartel offence prosecution guidance (CMA9), 12 March 2014, para 4.5.

3885 Section 190(3) EA.

3886 D. WENT, “United Kingdom” 34.
Prior to 1 April 2014, the criminal cartel offence required that an individual had “dishonestly” agreed with one or more other persons to engage in cartel activities. Following a revision of the system, the dishonesty element was removed and replaced with a number of statutory exclusions and defenses.

1.2.4. The responsible enforcement authority

Since 1 April 2014, the Competition and Markets Authority (CMA) is the principal authority responsible for the enforcement of administrative competition law specifically, the prohibition of anti-competitive agreements under the Competition Act 1998, and Article 101 TFEU.

The establishment of the new CMA, was the most significant competition law development of the last few years in the UK.

By way of background, the UK Government initiated a plan of wide-ranging reforms to the competition, consumer protection and consumer credit regimes in 2011. This involved the transition of the functions of the Office of Fair Trading’s (OFT) and the Competition Commission’s (CC) to a number of successor organizations. The Reform Act 2013 (the Act)

3887 The amended offence only applies to agreements made on or after 1 April 2014, so dishonesty will continue to be a feature of cases concerning conduct prior to that date. In particular, under the former cartel offence two specific elements regarding dishonesty had to be proved. (i) The need to prove that the defendant’s behaviour was dishonest according to the ordinary standards of reasonable and honest people (the objective element); and (ii) the need to prove that the defendant himself must have realised that his behaviour was by those standards dishonest (the subjective element). The “dishonesty” element is further discussed below.

3888 See generally Enterprise and Regulatory Reform Act 2013, Section 47, amending Section 188 of the Enterprise Act 2002. The elements of the revised cartel offence as discussed below in more detail infra Chapter 2, section 2.

3889 The reform of the UK competition system was preceded by a consultation under which the UK government observed that the element of dishonesty in criminal cartel cases was particularly difficult to prove which weakened the deterrent effect of the offence and was not a requirement in other economic offences which carry a similar or higher maximum sentence. See for the consultation, Department for Business, Innovation & Skills published a consultation document and accompanying impact assessment on 16 March 2011 entitled ‘A Competition Regime For Growth: A Consultation On Options For Reform’, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192722/12-growth-and-competition-regime-government-response.pdf. See also commenting on this point e.g. V. BROPHY, M. EVANS, F. LIBERATORE AND M. LAVEDAN, “The UK’s New Civil and Criminal Antitrust Enforcement Regime”, 2014 (3) GCLR, 159-167, at 162-163; S. HOLMES and P. GIRARDET, “UK, Cartels”. According to E. LINDSAY, Director of Criminal Enforcement of the Competition and Markets Authority, ‘one of the CMA’s strategic goals is to deliver a step change in the UK’s enforcement against cartels’. E. LINDSAY, “Key features of cartel enforcement in the UK – what you need to know”, (19) February 2015 Competition Policy International, available at https://www.competitionpolicyinternational.com/from-collusion-to-competition-19th-issue/


3889 In 2012, the United Kingdom's Department for Business, Innovation and Skills published a number of proposals to improve the enforcement of competition law in the United Kingdom. Cf. supra.

3890 The Office of the Director of Fair Trading, which later became the OFT, was established by Part II of the Fair Trading Act 1973.

3891 The Competition Commission, replacing the Monopolies and Mergers Commission, was established by the Competition Act 1998 (Section 45 of the Competition Act 1998). Schedule 7 of the Competition Act 1998 as amended by Schedule 11 of the Enterprise Act 2002 laid down the provisions regarding the CC.

3892 The OFT and the CC both ceased to exist on 31 March 2014.
created the CMA, which formally took up its powers on 1 April 2014. Furthermore, certain OFT consumer functions were transferred to other organizations and responsibility for consumer credit was transferred to the Financial Conduct Authority.\textsuperscript{3895}

The CMA is a corporate body established under section 25 of the Enterprise and Regulatory Reform Act. It is an independent non-ministerial government department. The CMA is supported by, and works with, the Department for Business, Innovation and Skills (BIS) - the department for economic growth.\textsuperscript{3896} As a non-ministerial department, the CMA has discretionary power to prioritize its resources and its activity. The CMA has full operational freedom to make independent case decisions, in line with the revised legal framework.

With regard to the area of cartel enforcement, the CMA specifically states in its Annual plan 2015-2016 that “[c]artel enforcement remains a particular priority for the CMA in 2015/16. With additional Treasury funding, we are now investing further in our capacity and capability to increase the number and speed of cartel cases that we can pursue, and expect to begin to see important benefits from this in the year to come. Our dedicated investigation and intelligence functions include a number of senior investigators and intelligence officers with extensive experience. We are also growing our expert criminal prosecution, civil cartel enforcement and case support teams and have appointed three additional Directors – of Criminal Enforcement, Intelligence and Digital Forensics – into our Cartels and Criminal Group. Additional funding is also being used to enhance our digital forensics and intelligence capability."\textsuperscript{3897}

A number of sectoral regulators have concurrent powers with the CMA to apply and enforce the Chapter 1 and Chapter 2 prohibitions in the Competition Act as well as Articles 101 and 102 TFEU within their respective regulated sectors. The regulated sectors include \textit{inter alia} OFCOM (communications); OFGEM (electricity and gas); OFREG NI (energy and water and sewerage in Northern Ireland); OFWAT (water and sewerage); CAA (civil aviation); ORR (railway services); and Monitor (healthcare services in England). In addition, the Financial Conduct Authority has full concurrent powers as from April 2015 – along with the new Payment Systems Regulator - with regard to financial services and payment systems respectively.\textsuperscript{3898 3899}

\textsuperscript{3895} Although the CMA has retained certain consumer protection powers, most of the OFT’s functions in this field have been transferred to other bodies, including local Trading Standards departments, Citizens Advice and the new Financial Conduct Authority. In this regard, it has been pointed out that “[t]he decision to strip out most of the OFT’s consumer protection functions marks another break with UK enforcement tradition, which had previously favoured combining consumer protection and competition law enforcement within the same body”. B. MCGRATH AND J. LOVE, “United Kingdom” in \textit{The handbook of competition enforcement agencies}, available at http://www.lexology.com/library/detail.aspx?g=edd0a0cd-72e2-450c-949a-93dd4c829eaf, at 343 (hereafter: ‘B. MCGRATH AND J. LOVE, “United Kingdom”’).


\textsuperscript{3897} See B. MCGRATH AND J. LOVE, “UNITED KINGDOM” 343.

\textsuperscript{3898} The function and position of the concurrent regulators was also modified by the Enterprise Act 2013. Most notably, concurrent regulators are now specifically required to consider whether it would be more appropriate to use their competition law competences instead of taking action under sector-specific regulation powers. Still, the CMA is entitled to determine which authority will act in relation to a case in a regulated sector (namely, the CMA or the concurrent regulator), and may take over a case from a concurrent regulator. In addition, the Enterprise Act 2013 provides the Secretary of State for BIS with the power to remove the competition enforcement powers from concurrent regulators (with the exception of Monitor, the regulator for healthcare), and may effectively do so when these powers are not effectively used. As a result of these reforms, the enforcement activity of concurrent regulators (including anti-cartel enforcement) has increased. See S. HOLMES AND P. GIRARDET, “UK, Cartels”; B. MCGRATH AND J. LOVE, “UNITED KINGDOM” 343.
Pursuant to Section 190(2) Enterprise Act, prosecutions of cartel offences may be brought by the Serious Fraud Office (‘SFO’) or the CMA. The SFO is an independent governmental department that investigates and prosecutes serious or complex fraud. Commonly, the initial investigative measures are taken by the CMA, while the SFO will normally bring the case to court and lead the prosecution. The CMA has thus both civil and criminal law enforcement competences in relation to cartels.

The interactions between the CMA and the SFO in the context of the investigation and prosecution of the criminal cartel offense are further specified in a dedicated Memorandum of Understanding (MOU). The Memorandum between the CMA and SFO entered into force in April 2014 and sets out the basis on which the CMA and SFO cooperate in the investigation of criminal cartel cases where serious or complex fraud is suspected. It covers key aspects of CMA and SFO cooperation, including intelligence and information exchange, which department will conduct the investigation and when and how the CMA will refer a case to the SFO.

In Scotland, the decision to prosecute is made by the Crown Office and Procurator Fiscal Service (“COPFS”). The CMA also entered into a new Memorandum of Understanding with the Scottish Crown Office in July 2014, which builds on the MOU entered into by the OFT and the Scottish Crown Office in June 2009. The Memorandum sets out the basis for cooperation and interaction between the CMA and the Scottish Crown Office in cartel offence matters.

1.2.5. Key procedural steps between the opening of an investigation and the imposition of sanctions

The CMA (or a sectoral regulator with concurrent jurisdiction) opens an investigation based on three main sources of information: (i) its own market information; (ii) following a complaint; or (iii) following a leniency application. The CMA can use its powers of investigation if there are ‘reasonable grounds for suspecting’ that a Chapter I/Article 101 or Chapter II/Article 102 has been infringed. The CMA has wide discretion as to whether to open an investigation, and it does not take on every case that comes to its attention. In deciding which cases to investigate, the CMA will take into account its “prioritisation principles”.  

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3900 In England, Wales and Northern Ireland, prosecutions will be conducted by the competent authority with the consent of the CMA. Section 190(2) EA.  
3903 In July 2014, the CMA and the COPFS entered into a memorandum of understanding on the subject of co-operation in relation to the investigation and/or prosecution of individuals in respect of the cartel offence, where this offence may have been committed within the jurisdiction of the Scottish Courts. Cartel offence prosecution guidance (CMA9), 12 March 2014, paras 1.4-1.5.  
3905 See CMA(16), Prioritisation Principles, April 2014. These principles include the likely direct effect on consumer welfare of the alleged infringement, its strategic significance, the likelihood of a successful outcome, and the resource implications of opening an investigation. In cases
In civil cases, when the CMA has in its view collected enough evidence to prove the suspected cartel, it will issue a statement of objections, specifying the facts of the case, its provisional conclusions, and its intended action (i.e. the imposition of fines in cartel cases). The addressees of the SO then get access to the CMA’s investigation file, to consequently make written submissions and attend an oral hearing to react to the allegations made in the statement of objections. If, after having considered the parties’ (written and oral) arguments, the CMA is of the view that it has sufficient evidence to prove the alleged cartel, it will issue an infringement decision for all the cartel participants imposing fines.\footnote{See CMA(8), Guidance on the CMA investigation procedures, March 2014. A non-confidential version of the decision will be published on the CMA’s website.}

When there are reasonable grounds to suspect that a cartel offence has been committed, the CMA also has the power to launch a criminal investigation under the Enterprise Act. As pointed out above, the CMA shares its responsibilities for investigating the criminal cartel offence with the SFO. The CMA/SFO will normally commence criminal proceedings when they believe that they have sufficient evidence to bring a successful prosecution.

A criminal investigation under the Enterprise Act can thus also be conducted in parallel with a civil investigation under the Competition Act 1998. In this situation, two types of investigation must be kept separated because different rules apply as regards the collection, and limitation on the further use of evidence. Therefore, a separate investigation team is formed and strict disclosure rules between the different CMA investigation teams apply.\footnote{When the CMA obtains new information about a potential cartel, it may be unclear whether the case will involve criminal prosecution of individuals, whether it will lead to an administrative procedure against the undertakings, or whether both procedures will be followed. In order not to compromise criminal investigations, the CMA will where appropriate follow the procedures required by the Police and Criminal Evidence Acts criminal standards and its associated Codes of practice from the outset. R. WHISH AND D. BAILEY, Competition Law, Oxford, Oxford University Press 2015, 1176 p., at 460 (hereafter: ‘R. WHISH AND D. BAILEY, Competition Law’).}

The first criminal investigation of the cartel offence in \textit{Marine Hoses} was conducted in parallel with an investigation under Article 101 TFEU. In this case, the (former) OFT set up two different case teams, one to investigate the criminal case, and a second team to help the Commission in carrying out its inspection and exercising its powers of investigation. Although both teams coordinated their efforts to ensure that the investigations were conducted successfully, the structure of the parallel procedures and the separate nature of the investigations implied that some sort of ‘Chinese walls’ were created between the staff on the different cases.\footnote{See also commenting on this aspect e.g. ‘E. MORGAN, “Criminal Cartel Sanctions”’ 72.}

When an infringement of the cartel offence has been committed, the case has to be tried before a criminal court. The offense may be tried in the Magistrates’ Court or, more commonly, before the Crown Court by means of a jury trial.\footnote{See for more information on the proceedings before the Crown Court, U. SMARTT, Criminal Justice, London, Sage Publications 2006, 232 p., at 88 \textit{et seq.} At the Crown Court, trials are heard by a judge and a 12 person jury.}
1.2.6. Legal review

Decisions of the CMA (or a concurrent regulator) establishing an infringement of the Chapter I Prohibition and/or Article 101 of the TFEU and imposing a penalty, can be appealed in first instance before the Competition Appeal Tribunal (‘CAT’). The CAT is a specialised competition law tribunal, established under the Enterprise Act 2002.

An appeal before the CAT is a full appeal, which will be determined on its merits. Therefore, not only points of law arising from the infringement decision can be challenged. A full merits review entails the CAT inquiring into the findings of facts and the appraisal or assessment of those primary facts in the contested decision. In its role of primary decision-reviewer, the CAT may, for instance, decide to confirm or set aside the contested decision and impose, withdraw or adjust the penalty or establish liability where the competition authority did not.3910 3911

Decisions of the CMA (or a sectoral regulator) can be challenged, depending on the situation, by way of judicial review proceedings before the CAT.3912 On the basis of a judicial review challenge a judge assesses whether a public body has acted in accordance with its legal obligations and if not, it can invalidate a decision taken. In the context of this procedure, there is normally no need to require an assessment of fresh evidence. In judicial review cases, the CAT may dismiss the appeal or quash in whole or in part of the decision.3913 In the last hypothesis, the matter can be referred back to the CMA.3914

The judgments of the CAT may be appealed either on points of law3915 or, where applicable, as regards the amount of the penalty.3916 While the competent appeal court in Scotland is the Court of Sessions, in the rest of the UK appeals may be lodged to the Court of Appeal.3917 Any subsequent appeal beyond the Court of Appeal is to be made to the Supreme Court of the United Kingdom,3918 with the permission of either the Court of Appeal or the Supreme Court.

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3911 According to Section 46(4) of the Competition Act, an appeal against the imposition, or as to the amount of any penalty, suspends the obligation to pay the penalty fine until the appeal is determined.
3912 Regardless of the question whether the review was a full merits review or a judicial review the appeal courts will be able to rule on the ‘governing principles clause’ laid down in Section 60 of the Competition Act 1998. The purpose of this provision is to ensure that questions arising under Part I of the 1998 Competition Act are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law.
3913 Schedule 8, para 3A(3)(a) of the 1998 Competition Act.
3914 Schedule 8, para 3A(3)(b) of the 1998 Competition Act.
3915 Section 49(1)(c) of the 1998 Competition Act.
3916 Section 49(1)(a) of the 1998 Competition Act.
3917 Section 49(3) of the 1998 Competition Act. It should be noted, the permission of either the CAT or the Court of Appeal is required for an appeal to be heard before the Court of Appeal (Section 49(2)(b) of the 1998 Competition Act). It has been argued that such permission is only sparingly granted (R. WHISH AND D. BAILEY, *Competition Law* 449).
3918 Until 2009, the Supreme Court was named the House of Lords.
1.3. Belgium

1.3.1. Substantive law covering cartels

Competition law in Belgium is primarily enforced through the civil law regime which is currently based on the 2013 Belgian Competition Act.

The original Belgian Competition Act was adopted in 1991 and was subsequently revised in 1999. In July 2006, the 1999 Act was replaced by two new Acts. First, the Protection of Economic Competition Act of 10 June 2006, which regulated the actual Belgian competition rules. Second, the Establishment of a Competition Authority Act of 10 June 2006. These Acts were subsequently merged, forming the Belgian Act on the Protection of Economic Competition of 15 September 2006. In 2013, the 2006 Competition Act was again replaced with the adoption of the Belgian Competition Act of 3 April 2013.

The Belgian Competition Act, entered into force on 6 September 2013 and sets out the law and enforcement regime for cartels in Belgium. The Act integrates the Belgian competition law rules into the Belgian Code of Economic Law (the CEL) by introducing a “Book IV on the Protection of Competition”.

The 2013 Competition Act abrogated most of the provisions of the 2006 Belgian Act on the Protection of Economic Competition. As examined below, the reform of the Belgian Competition Act introduced a new enforcement structure for the competition authority. Moreover, a number of important (procedural) changes were also adopted, namely (i) a new (and) more efficient procedure for interim measures procedure, (ii) a settlement procedure, comparable to the Commission’s system and (iii) the possibility to impose administrative fines on natural persons involved in hardcore cartel infringements and the possibility to appeal investigative measures by the College of Competition Auditors, which oversees the investigative phase. In addition to these modifications, the 2013 Act introduced a number of rules to further shorten the proceedings. Such rules concern in particular issues such as orders for inspections which have to be awarded by a investigating judge; recognition of confidentiality of documents; access to the investigation file which is limited to the defendants; formalized state of

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3920 BS 29 June, 2006, 32,746.
3921 This was done by way of a Royal Decree of 15 September 2006.
3922 Wet tot bescherming van de economische mededinging. BS 29 September 2006, p. 50.613. The 2006 Competition Act came into force on 1 October 2006. A number of Royal and Ministerial Decrees were adopted on 31 October 2006 implementing the Competition Act and entered into force retroactively on 1 October 2006. These Decrees contained the procedural details on how the Competition Act was to be applied (see Royal Decree of 31 Oct. 2006 on the rules of procedures; Royal Decree of 31 Oct. 2006 on the filing of complaints and requests in accordance with Article 44, §§ 1, 2 and 3 of Competition Act; Royal Decree of 31 Oct. 2006 concerning the issuing of copies of files in accordance with Competition Act; Ministerial Decree of 31 Oct. 2006 on the method of transmitting the Competition Tribunal’s file to the Brussels Court of Appeal; Ministerial Decree of 31 Oct. 2006 on the method of transmitting the proceedings file from the sectoral regulatory authority to the Competition Tribunal.
3923 Wet van 3 april 2013 houdende invoeging van Boek IV “Bescherming van de mededinging” en van Boek V “De mededinging en de prijsevoluties” in het Wetboek van Economisch Recht en houdende invoeging van de definities eigen aan Boek IV en aan Boek V en van de rechtshandhaveningsbepalingen eigen aan Boek IV en aan Boek V, in Boek I van het Wetboek van Economisch Recht (BS 26 april 2013, p. 25.216) en wet van 3 april 2013 houdende invoeging van de bepalingen die een aangelegenheid regelen als bepaald in art. 77 van de Grondwet, in Boek IV “Bescherming van de mededinging” en in Boek V “De mededinging en de prijsevoluties” van het Wetboek van Economisch Recht (BS 26 april 2013, p. 25.248).
3924 More precisely, a request for interim measures is now introduced directly with the President and no longer subject to a two-stage procedure: first before the auditor and only afterwards before the President.
play meetings with access to file as well as limited possibility to introduce new documents before the College and a strict timetable for procedures.\textsuperscript{3925}

The importance of the influence of the European Union’s antitrust regime on Belgium’s system is clearly reflected in the (wording of) Belgian competition rules, which have traditionally been based on the European competition rules.\textsuperscript{3926} First, Article IV Section 1 of the CEL, which is similar to Article 101(1) TFEU, distinctly prohibits cartels.

Article IV.1 Section 1 provides that all agreements between undertakings, all decisions by associations of undertakings and all concerted practices, which have as their object or effect an appreciable prevention, restriction or distortion of competition in the Belgian market concerned, or in a substantial part of that market, are prohibited. This is specifically the case for practices that directly or indirectly fix purchase or selling prices or any other transaction conditions, limit or control production, markets, technical development or investments, share markets or sources of supply.\textsuperscript{3927}

Article IV.1 Section 3 of the CEL specifies that the prohibition in Article IV.1 Section 1 of the CEL may be declared inapplicable to agreements, decisions or concerted practices that fulfil certain conditions. In this regard, Article IV.1 contains the same legal exemption rules as Article 101(3) TFEU. In particular, the prohibition contained in Article IV.1 Section will not apply when the activities in question (i) contribute to improve production or distribution, promote technical or economic progress, or enable small and medium-sized undertakings to assert their competitive position, (ii) while enabling users to benefit from a fair share of the resulting benefits, but (iii) without imposing disproportionate restrictions and without eliminating competition for a substantial part of the affected products. Given the need to interpret national competition law consistently with European law, and in line with the conclusions drawn in Chapter 5, this situation will not arise in connection with hardcore cartels.

As Article IV.1 Sections 1-3 illustrate, the content and structure of these rules are indeed substantively comparable to Article 101 TFEU.

The 2013 Act introduced, however, an important divergence or innovation with respect to European (competition) law. Article IV.1 Section 4 adds a new provision prohibiting natural persons to participate in certain restrictions of competition. More specifically, individuals may not negotiate or


\textsuperscript{3926} In fact, the Belgian legislator explicitly stated in the original Competition Act of 1991 that the European system constitutes the key point of reference to interpret Belgian competition law. (See Parl. St. Kamer 1989-90, no. 1282/1-89/90, p. 9 (elaborating on the now abrogated Law of 5 Aug 1991 on the protection of economic competition, BS, 11 October 1991, p. 22,493). In addition, the (former) Competition Council (“Raad voor de Mededinging”) has also firmly stated that it adheres to the case law of the European Court of Justice as well as the decisional practice of the Commission when applying Belgian competition law. Beslissing nr 2002-P/K-45 van 19 juni 2002 - Marc De Smet / Beroepsinstituut van Vastgoedmakelaars - BS, 12 februari 2003, p. 7222.

\textsuperscript{3927} According to Article IV.1 §2 of the CEL, agreements or decisions prohibited under Article IV.1 §1 of the CEL are automatically void. Pursuant to Article IV.2 CEL any abuse by one or more undertakings of a dominant position within the affected Belgian market or in a substantial part of it shall be prohibited. Article IV.2 CEL provides for the same examples of abuse of dominant position as Article 102 TFEU.
make agreements in name and for the account of an undertaking or association of undertakings with competitors to decide about (i) the price fixing at the sale of products or services to a third party, (ii) limitation of production or the sale of products or services, (iii) the allocation of markets.\footnote{As it will be analysed below, the new Act also introduces the possibility for individuals to lodge a personal leniency application.}

Book IV CEL is, therefore, generally applicable to all economic activities. After the 2013 reform, Belgian competition law applies not only to undertakings and trade associations but also to individuals.

It should also be noted that although the 2013 Act does not contain sector specific legislation, some legislative instruments contain provisions that are applicable to undertakings which operate in regulated sectors, such as the financial sector, the energy sector or the telecommunication sector. For example, the Belgian Telecommunications Act of 13 June 2005 establishes that the industry regulator will monitor the prices applied in the market.\footnote{See the general rules about price monitoring contained in Book V CEL. See for an interesting comment of these rules H. SWENNEN, “Boek V van het Belgische wetboek van economisch recht: de mededinging en de prijsevoluties” in A. TALLON (ed), Le nouveau code de droit économique - Het nieuwe wetboek van economisch recht, Bruxelles, Larcier 2014, 225 p., at 105-124. See also Pilot field study 250.}

In addition to the provisions laid down in the 2013 Competition Act, Article 314 of the Belgian Criminal Code (Strafwetboek/Code Pénal) prohibits agreements among competitors to rig bids.

The provisions contained in the Competition Act only apply to activities which prevent, restrict or distort competition on the relevant Belgian market or a substantial part thereof. This implies that the cartel prohibition only concerns practices that have an anti-competitive effect in Belgium and not conduct whose effects are only felt outside Belgium.\footnote{Article IV.1 §1. Agreements concluded in Belgium, but whose the effects of which are exclusively felt outside of Belgium, will in principle thus not be caught by the BPC. See also T. DE MEESE, “Belgium Cartels”; see in this regard I. VAN BAEEL AND M. FAVART, “Anti-Cartel Enforcement in Belgium” in M. DABBAH AND B. E. HAWK (eds) Anti-Cartel Enforcement Worldwide, Cambridge, Cambridge University 2008, at 150-152 (hereafter: ‘I. VAN BAEEL AND M. FAVART, “Anti-Cartel Enforcement”’). The principle of extraterritoriality applies to Book IV CEL to the extent that anticompetitive behaviour by an individual, undertaking or trade association that has its residence or registered offices outside Belgium is punishable under Book IV CEL provided that such behaviour has an actual or potential effect on the Belgian market concerned or a significant part thereof.}

Furthermore, the Belgian cartel prohibition contained in Articles IV.1 Section 1 and Section 4 apply only when a given practice restricts competition to an appreciable extent. This stems from the wording of Article IV.1 Section 1, which explicitly requires a significant effect on competition. In order to assess whether the appreciable effect requirement is satisfied, regard is to be had to the European interpretation of this test and thus to the Minimis Notice guidance published by the Commission.\footnote{I. VAN BAEEL AND M. FAVART, “Anti-Cartel Enforcement” 150-152; I. M. RAHMAN AND W. VANDENBERGHE, “Competition Law Enforcement in Belgium” in Handbook On Multijurisdictional Competition Law Investigations (December, 2011), available at http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311000_treatise_belgium.authcheckdam.pdf (hereafter: ‘I. M. RAHMAN et al., “Competition”’) referring to Court of Appeal of Brussels, Mar. 7, 2006, NV Power Oil v. NV D.D.D. Invest, unpublished.}
Finally, since the entry into force of Regulation 1/2003 in May 2004, Belgium – like all other Member States – is bound to apply European competition law together with the Belgian equivalents when the restrictive practices in question have an (appreciable) effect on trade between Member States.\textsuperscript{3932} If the practices at hand affect the Belgian market exclusively, then only Belgian substantive law applies.\textsuperscript{3933}

1.3.2. The responsible enforcement authority

On 6 September 2013, the new Belgian Competition Authority (BCA) was provided with the responsibility to promote and protect the competitive process in Belgium. Since then, the BCA has not only been empowered to enforce Belgian competition law rules but is also the designated national authority responsible for applying Article 101 TFEU pursuant to Article 35 of Regulation 1/2003.\textsuperscript{3934}

The BCA replaces two former separate bodies - the Competition Council (\textit{Raad voor de Mededinging/Conseil de la Concurrence}) and Directorate-General for Competition (\textit{Algemene Directie Mededinging/Direction générale de la concurrence}) which had been established under the 2006 Act.\textsuperscript{3935} The simplification of the structure of the institutions responsible with the investigation and enforcement of competition law in Belgium was one of the most important innovations introduced by the 2013 Act.\textsuperscript{3936}

The former Competition Council was characterized by a dual structure, with an institutional separation between investigation (Directorate-General for Competition/College of Competition Prosecutors) and adjudication (Competition Council). This dual enforcement structure was one of the most important divergent aspects between Belgian competition law and the EU system.\textsuperscript{3937}

\textsuperscript{3932} See further \textit{supra} Chapter 5, section 2.2.2.
\textsuperscript{3933} For a deeper analysis of the relationship between Belgian and European competition law see A.-M., VAN DEN BOSSCHE, “Parallèle toepassing nationaal en Europees mededingingsrecht” in A.-M., VAN DEN BOSSCHE (ed) \textit{Mededinging}, Brussels, Larcier 2016 (Volume 1), 1136 p., at 79-82. See also I. VAN BAEL AND M. FAVART, “Anti-Cartel Enforcement” 146. See further \textit{supra} Chapter 5, section 2.2.2.
\textsuperscript{3934} See Article IV.16. CEL Section 3.
\textsuperscript{3935} See for a deeper analysis of the former structure of the Belgian competition authority I. VAN BAEL AND M. FAVART, “Anti-Cartel Enforcement” 148-149; I. M. RAHMAN et al., “Competition” 2-3. These authors argued that the (former) dual enforcement structure whereby investigation and enforcement were conducted by two distinct institutions within the Belgian competition authority, was one of the aspects which differentiated the Belgian competition law from the EU system.
\textsuperscript{3936} See also elaborating on these reforms \textit{e.g.} A.-M., VAN DEN BOSSCHE, “Boek IV van het Belgische wetboek van economisch recht: bescherming van de mededinging”, (10) 2013 SEW, 414-429 (hereafter: ‘A.-M., VAN DEN BOSSCHE, “Boek IV”’); H. GILLIAMS, “Het nieuwe Belgisch” 480-483.
\textsuperscript{3937} The dual structure was mainly designed to guarantee the impartiality of final decisions and, thereby, safeguard the procedural rights of the companies concerned. Nevertheless, this dual structure arguably contributed to increasing the total length of cartel proceedings. D. ARTS, K. BOURGEOIS AND M. DE DEYGERE, “Belgium” in N. PARR AND R. SANDER (eds) \textit{Cartels: Enforcement, Appeals & Damages Actions, Global Legal Group}, 2015 (third edition), at 39, available at http://www.alenovery.com/SiteCollectionDocuments/Global_Legal_Insights_Cartel_3rd_edition_DIAR_KARB_Feb_15.PDF (hereafter: ‘D. ARTS et al., “Belgium”’). In this regard, it has been pointed out that while the ‘dual’ administrative model, previously also existed in a number of Member States, they have all moved to the single administrative model. In fact, it appears that over the past decade, six authorities, namely Belgium, Estonia, France, Luxemburg, Malta and Spain have departed from the dual administrative model and have instead opted for a single administrative model. S. ALVES, J. CAPIAU AND A. SINCLAIR, “Principles for the Independence of Competition Authorities”, 2015 (11-1) \textit{Competition Law International}, 13-27, at 19.
The (reformed) BCA now has both prosecutorial and decision making competences which are exercised by functionally differentiated organs within a single and independent administrative body. The former Competition Council’s administrative tribunal (Raad voor de Mededinging/ Conseil de la Concurrence) has been abolished and the decision-making powers are entrusted to the new Competition College (Mededingingscollege/ Collège de la Concurrence). The main objective of the 2013 Belgian Competition Act was thus to create a more efficient “unified” competition authority while maintaining a functional separation between investigative and decision taking powers.

The BCA is composed of: (i) the President, representing the Authority; 3938 (ii) the Competition College (het Mededingingscollege/Le Collège de la concurrence) in charge of decision-making,3939 (iii) the College of Competition Prosecutors (Auditoraat/L'Auditorat), headed by the Prosecutor-General, in charge of leading the investigations;3940 and (iv) the Management Committee, composed of the President, the Prosecutor-General, the Chief Legal and the Chief Economist, in charge of the management of the BCA and the setting of its overall priorities.3941

1.3.3. Key procedural steps between the opening of an investigation and the imposition of sanctions

According to Article IV.41. CEL Section 1 investigations can be opened ex officio, following a complaint or following a request or instruction to the Chief Prosecutor by the competent Minister or a sector regulator.3942 The investigation is conducted by the team of investigators under the direction of the Prosecutor and the Chief Prosecutor.3943

If the investigation reveals the existence of an infringement, the Chief-Prosecutor will submit a statement of objections (“SO”) informing the undertakings and/or individuals involved about the alleged infringement. The addressees of the SO are given access to the evidence on which the SO relies, including the information gathered during the investigation, and dispose of one month’s time to reply.3944

Next, the Prosecutor submits a draft decision which is then submitted to the Competition College together with the procedural file.3945

3938 The President of the BCA is appointed by the Federal Government (Article IV.20 Section CEL).
3939 This body is composed of the President of the BCA and two Assessors that are appointed on a case-by-case basis by the President (Article IV.22 Section 1 CEL).
3940 See Article IV.27 CEL. This body is headed by the Auditor-General (Auditeur-Général/Auditeur-Generaal). The Auditor-General is appointed by the Federal Government. The Auditors are appointed by the Management Committee of the BCA.
3941 This committee consists of the President of the BCA, the Auditor-General, the Head of Legal Affairs and the Chief Economist (Article IV.24 Section 1 CEL). The Head of Legal Affairs and the Chief Economist are appointed by the Federal Government.
3942 See also describing the steps from the opening of the investigation until the final decision is taken Pilot field study 23-24; T. DE MEES, “Belgium Cartels” 39-40; D. ARTS et al., “Belgium” 39-40.
3943 See Article IV.27 Section 1 CEL. See further commenting on the main innovations in the context of the investigation following the 2013 reform A.-M., VAN DEN BOOSCHE, “Boek IV” 414-429; H. GILLIAMS, “Het nieuwe Belgisch” 484.
3944 Article IV.42 Section 4 CEL.
3945 Article IV.42 Section 5 CEL. The Prosecutor will send a copy of the draft reasoned decision to the undertakings and individuals investigated. The complainant will be informed of the fact that a draft reasoned decision has been issued (Article IV.45 Section 1 CEL). The Competition College can, however, decide to send a non-confidential version of the draft decision to the complainant and to third parties demonstrating a sufficient interest to be heard at the oral hearing.
Simultaneously, the parties that are investigated are given full access to the procedural file and to the investigative file (i.e. the non-confidential versions of all documents and information gathered during the investigation). The parties have two months, as of the moment the undertakings investigated have had access to the file, to submit their written observations and add documents to the procedural file.

Following the submission of the written observations, the President organises an oral hearing during which the parties and the Prosecutor are heard. Following the hearing, the Competition College is required to issue a decision within one month.

1.3.4. Limitation period

In Belgium, an investigation may only be opened if the facts underlying the investigation have not prescribed. This is the case when the facts have occurred more than five years before. This period is calculated as from the date on which: (i) the Prosecutor-General formally decides to open an investigation; or (ii) a complaint is filed. In the case of “continuing or repeated infringements”, this period starts to run from the date on which the infringement ceased. Once an investigation has been opened, the investigative and decision-making procedure may in principle not last longer than five years (as from the date the investigation was opened).

A limitation period of five years also applies to the imposition of sanctions. However, this limitation period is interrupted by any action by the College of Competition Prosecutors or the Competition College or, in the case of the application of Articles 101 and 102 TFEU, of an NCA with a view to investigating or instituting proceedings for the infringement. The limitation period starts to run again from each interruption. The total (extended) limitation period cannot, however, exceed 10 years.

1.3.5. Legal review

The applicable rules regarding judicial review against decisions of the BCA can be found in Article IV.79 CEL.
An appeal can be lodged with the Brussels Court of Appeal (Hof van Beroep/Cour d’Appel) within 30 days following the notification of the Competition College’s decision.\textsuperscript{3956} The Brussels Court of Appeal has full jurisdiction when hearing an appeal against decisions of the Competition College. This means that the Court is competent to decide on issues regarding both facts and points of law and, as such, is entitled to issue a decision substituting that of the Competition College.\textsuperscript{3957} Nevertheless, if the BCA adopts a decision that there are no grounds for action, and in appeal the Brussels Court of Appeal does not share this view, the court can only annul the decision and not find an infringement (in this situation, the BCA will then have to adopt a new decision).

2. Improving the Commission’s fining policy: fines for undertakings in the Member States

2.1. Germany

In Germany, the competition authorities are empowered to impose fines on undertakings and associations of undertakings for (European) competition law infringements. In contrast to the Commission’s system, the liability regime of legal persons under German law can be qualified as being of secondary nature, in the sense that such responsibility derives from the liability of the individuals who committed the administrative offence. Consequently, penalties for being involved in administrative competition law offences focus most frequently on the responsible natural persons.\textsuperscript{3958} Despite the primary responsibility of individuals, undertakings cannot escape liability for their participation in competition law infringements and can be subject to strict fines.\textsuperscript{3959}

Under Section 30 OwIG, corporate liability is activated when a representative of a corporation commits an offence by which the duties pertaining to the corporation were violated or which benefited or should have benefited the corporation.\textsuperscript{3960} Moreover, corporate liability under this Section is also activated if a representative connives criminal or administrative offences, or knows of them but does not (try to) prevent them. In this scenario, the corporation is indirectly responsible for the acts of the employee that commits the criminal or administrative offence. Section 30 OwIG clarifies that the concept of representative basically refers to executive directors, members of the (supervisory) board or managing partners.\textsuperscript{3961, 3962} This provision indeed indicates that in order to

\textsuperscript{3956} The appeal may be lodged by the undertakings concerned, the complainant, the Belgian Minister responsible for economic affairs or by any third party who can demonstrate sufficient interest and who has asked to be heard by the Competition College. During the appeal proceedings, the BCA will be represented by its President, assisted by the Chief Legal. In this regard it is interesting to note that under the former Competition Act, the Competition Council did not have the possibility to be represented before the Brussels Court of Appeal in actions brought against its decisions. As discussed in Chapter 5, section 2.2.4.1., the ECI found in its Vebic ruling that Article 35 of Regulation 1/2003 precludes national rules which do not allow a national competition authority to participate as a defendant in such proceedings (Case C-439/08, VEBIC VZW [2010] ECR I-12471). This issue has been remedied by the reform of the (now) BMA, which is now an administrative body instead of a tribunal. See also commenting on this point D. ARTS et al, “Belgium” 42-43. In that respect, Article IV.20 Section 1 4° provides that the President is responsible for representing the BCA before the Brussels Court of Appeal.

\textsuperscript{3957} Article IV, 79, Section 2 CEL.

\textsuperscript{3958} This aspect is further analysed below.

\textsuperscript{3959} See also commenting on this aspect M. J. FRESE, Sanctions 202 of the original version of this dissertation.


\textsuperscript{3962} The complete wording of Section 30 OwIG is however more elaborated. This section describes the meaning of the term representatives as referring to someone acting (i) as an entity authorised to represent a legal person or as a member of such an entity, (ii) as chairman of the executive committee of an association or as a member of such committee, (iii)
activate corporate liability, a certain degree of responsibility within the company is needed. Subordinated employees are, in principle, not liable for competition law infringements.

It should, however, be noted that although the liability of a legal person for an infringement of (European) competition law is intrinsically linked and follows from the administrative offence committed by a natural person, the competition authority is also entitled to only fine the undertaking. This is in particular the case when regulatory fining proceedings or criminal proceedings for bid rigging cases are not commenced or are discontinued, or if imposition of a criminal penalty is dispensed. This approach is not only desirable but also necessary to guarantee that undertakings are punished for the violation even in a case in which a natural person is eventually not fined.

With respect to bid rigging cartels which constitute a criminal offence, it should be noted that in principle, legal entities cannot be held liable for such criminal offense because German criminal law only applies to natural persons. Section 82(1) GWB corrects this shortcoming by empowering the competition authorities to initiate administrative proceedings against companies engaged in criminal bid-rigging cartels. This type of cartels may, therefore, lead to two separate enforcement proceedings. On the one hand, criminal proceedings may be undertaken by the public prosecutor against the responsible natural persons and, on the other hand, the relevant companies may be investigated in accordance with the administrative procedure initiated by the competition authorities.

2.1.1. The statutory framework

Under the German system, sanctions have to be set within the statutory framework. The lower limit of the statutory framework for sanctions for undertakings (or associations of undertakings) amounts to five euros. Under Section 81(4) GWB, the upper limit of the framework of fines for serious intentional cartel administrative offences amounts to 10% of the total turnover achieved in the business year preceding the authority’s decision. For offences committed out of negligence, the maximum fine amounts to 5% of the total turnover achieved. The fact that different statutory maximum limits are applied depending on the negligent or intentional character of the infringement constitutes an important difference with respect to the Commission’s fining system. However, such

as a partner authorised to represent a partnership with legal capacity, or (iv) as the authorised representative or in a managerial position as procura-holder or the authorised representative with a commercial power of attorney of a legal person or of an association of persons (v) as another person responsible on behalf of the management forming part of a legal person, or of an association of persons, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position. As M. FRESE correctly points out “this laborious approach alone shows that liability of legal persons is somewhat atypical under German law”. M. J. FRESE, Sanctions 202 of the original version of this dissertation. According to R. RAUM the system of fines for undertakings for infringements of competition law was mainly inspired by the powers of the Commission, R. RAUM in E. LANGEN Section 81, para 1.

Section 30(4) OWiG. According to this provision there is, however, one exception. Namely, the independent adoption of a regulatory fine against the legal person or association of persons is precluded when the criminal offence or the regulatory offence cannot be prosecuted for legal reasons.

As discussed above, a single bid-rigging cartel may be prohibited both under Article 101 TFEU and (mainly) Section 298 of the German Criminal Code (Strafgesetzbuch). The most important difference between bid-rigging under Article 101 TFEU and bid-rigging under German criminal law, is that the criminal provision concerns the offer based on an anti-competitive agreement rather than the underlying agreement itself. See further assessing this point infra Chapter 12, section 1.4.
difference has little relevance for this discussion given that cartels are generally considered intentional infringements.

The 10% upper limit for intentional infringements was introduced into the GWB in 2005 with the 7th amendment, which was mainly meant to harmonise German competition law with the European competition system. Prior to the introduction of this modification, fines for infringements of competition law could not exceed a specified absolute amount of € 500,000 or three times the additional turnover caused by the infringement.

The original version of the GWB dates of 1957 and has been in force since 1 January 1958. The GWB of 1957 provided that the fine for intentional competition law infringements had to be set at the highest of the following amounts: (i) Deutschmark (DM) 100,000 or (ii) three times the additional turnover derived from the infringement. Although a number of subsequent legislative modifications made some adjustments to this provision, its essence remained much the same until 2005. The most important change took place with the fourth amendment of 1980. As a result of this amendment, the maximum fixed amount for infringements was raised from DM 100,000 to DM 1 million (approximately €500,000).

In the original bill the government (only) proposed to increase the absolute amount of € 500,000 to €1 million, and to continue applying the existing additional-turnover framework as described above. After a consultation with experts, the Parliament’s Economic Committee pointed out that (i) in the light of the modernization reforms and the system of parallel competences, German undertakings would in any event be subject to a 10% turnover cap if their case was to be handled by the Commission, (ii) the assessment and determination of the additional turnover created substantial uncertainty which prevented the imposition of sufficiently deterrent fines and (iii) the absolute amount of €500,000 (or, as proposed, €1 million) was “utterly insufficient” to deter serious infringements (ibid). The Economic Committee therefore proposed to align the statutory limit for fines with the Commission’s regime.

The pre-2005 approach was thus not fully appropriate as it required competition authorities to engage in a complex analysis of the illegal gains or, alternatively, to impose a fine that would...

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3968 Section 38(3) of GWB of 27 July 1957, Bundesgesetzblatt Part I 1957, p. 1081. Section 38(3) also provided that for negligent infringements, the fine would be the higher of (i) Deutschmark (DM) 30,000, or (ii) twice the additional turnover derived from the infringement.


3971 See first and second sentence of Section 38(4) GWB 1980 (4th Amendment to the GWB of 26 April 1980, Bundesgesetzblatt Part I 1980, p. 458). The government explained in its memorandum for the 1980 amendments that this revision was necessary to impose adequate sanctions on severe infringements. Furthermore, it stressed that the Bundeskartellamt had imposed in practice fines of a million DM or even higher in accordance to the additional-turnover scheme. However, it was acknowledged that the calculation of the additional turnover was a very complex exercise which often presented difficulties. Bundestags-Drucksache 8/2136 of 27 September 1978, p. 27.


3973 See Economic Committee, 9 March 2005, Bundestags-Drucksache 15/5049, p. 50.

3974 Ibid, at 42. See also discussing this reform I. LIANOS et al. “An Optimal” 156-157; M. J. FRESE, Sanctions 205 of the original version of this dissertation.

3975 According to the case law the “additional turnover” was defined as the difference between the actual turnover and the counterfactual turnover that would have resulted in the absence of the infringement. Bundesgerichtshof BGH, 19 June 2007 – KRB 12/07, NJW 2007, 3792, WuW/E DE-R 2225, para. 10 – Papiergroßhandel; BGH, 25 April 2005 –
most likely produce little deterrence. The revised fining framework based on the 10% turnover limit inspired by the Commission’s regime, corrected this shortcoming and enhanced the effectiveness of the German fining system.

With respect to the question ‘whose sales are taken into account’ to determine the turnover, Section 81(4) GWB for a long time merely referred to the turnover of the “undertaking”, without further specifying how this term should be interpreted. This led to an intense discussion of whether this concept should be understood as referring to the company’s turnover, the turnover of the single economic unit, or the turnover of the entire corporate group. In this regard, the legislator clarified in 2007 that the relevant turnover should be interpreted, in accordance with European law, as the worldwide turnover of all the natural and legal persons acting as a single economic unit.

2.1.2. The interpretation of the 10% turnover threshold

Despite the similarity between the wording of the German and the European 10% turnover limit rules, it is important to emphasize that the interpretation of this provision in Germany differs from the interpretation of the rule contained in Article 23 of Regulation 1/2003 for constitutional reasons. In particular, it was argued that the interpretation of the 10% threshold rule as a cap – in accordance with European law and as was intended by the revision – rendered the determination of the fine insufficiently certain and therefore would run counter to the constitutional guarantee of nulla poena sine lege certa.

The main arguments put forward to support this view were that the interpretation of the 10% threshold under Section 81(4) GWB as a cap, in line with the European approach, would imply that


See recognising such difficulties Bundestags-Drucksache 8/2136 of 27 September 1978, p. 27. See also I. LIANOS et. al. “An Optimal” 151.

As to the problematic interpretation of the 10% turnover limit see further infra.


Article 1 no. 17 of the Preismissbrauchsnovelle of 18 December 2007. Bundesgesetzblatt Part I 2007, p. 2966. This aspect is now also specifically stated in the 2013 Guidelines which set out that the turnover taken into account is worldwide turnover of the undertaking i.e. the single economic entity, which may comprise several legal and/or natural persons. Para. 13 of the Guidelines with the accompanying Explanatory Note 4. See also BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861, Grauzement, paras. 66-70, in which the BGH held that such declaration only had a mere declaratory value because the interpretation of the term undertakings contained in 81(4) GWB should be interpreted in line with the European concept. See also in this regard I. LIANOS et. al. “An Optimal” 187-188; K. OST “From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence”, 2014 (5-3), Journal of European Competition Law & Practice, 125-136, at 127 (hereafter: ‘K. OST “From Regulation 1”’).


a fine of 10% of the turnover could be imposed not only for the most harming and serious violations, but also for less serious infringements. Moreover, the application of the cap at the same level (i.e. 10%) for all the participants of the violation would not observe the general rules on sanctions for criminal and administrative offences, according to which the sanction must be proportionate to the offence, and only the most serious cases justify the highest possible fine.  

In 2013, the Bundesgerichtshof confirmed this view in its famous judgement on the ‘cement cartel’ and held that the principle of legal certainty, which forms an integral part of German constitutional law, requires this provision to be construed as an absolute upper limit of a substantive fining framework and not as a mere cap (of an otherwise unlimited fine). This interpretation implies that fines cannot ever exceed the 10% limit, not even during the application of the different steps of the calculation methodology. From a practical perspective, a fine may only approach that limit in case of the most severe infringements.

2.1.3. Disgorgement measures

In addition to facing fines, undertakings responsible for (European) competition law infringements may also confront disgorgement remedies. This measure constitutes an important departure or innovation with respect to the European sanctioning system.

Illegal gains can be disgorged as a part of the administrative fine proceeding or in the context of a separate decision. This measure is regarded as purely administrative.

Section 81(5) GWB in combination with Section 17(4) OWiG permits the competition authorities to fix the amount of the fine with a view to disgorge the illegal gains related to the infringement if the statutory maximum does not suffice for that purpose. It is important to keep in mind that...
illegal gains can only be skimmed-off once. In addition, under Section 17(4) OWiG, the total revenue without the deduction of costs may be skimmed.

Although no statistics or full decisions are available providing more information on the application of these measures, it appears that the Bundeskartellamt makes use of this possibility in practice. For instance, in Liquefied Petroleum Gas, the fines of LPG were calculated on the basis of additional proceeds which led to high fines due to the long period of the infringement. According to the summary decision of this case, the additional proceeds were not calculated on the basis of a separate comparable market but on the basis of a comparative standard within the affected market. The Bundeskartellamt used the regional prices of suppliers who were not involved in the cartel as benchmark of hypothetical competitive prices.

This measure allows the German competition authorities to pursue two different objectives in the application of their fining policy: a punishment objective on the one hand and a deterrence objective on the other. Outside the field of competition law, German administrative fines generally pursue the objective of exceeding the illegal gains resulting from violations and have, therefore, an intrinsic deterrent effect. In contrast, in the field of competition law, fines are designed solely to punish. According to the government, the emphasis on the punishment objective of the German competition law system was mainly driven by the need to align the fining system with the Commission’s fining practice, which in their (incorrect) view only had a sanctioning character. It is however well-settled case law that the Commission’s fining policy has two key objectives. Firstly, sanctioning undertakings for their participation in competition law infringements and secondly, realizing general and specific deterrence.

One of the most important consequences of the application of the disgorgement measure in the context of an administrative fining procedure is that the amount of the fine may exceed maximum fine limit of 10% of the worldwide turnover after the application of the disgorgement remedy.

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3989 G. GREEVE, “Korruptionsbekämpfung” in C. E. HAUSCHKA (ed.) Corporate Compliance, Verlag C.H. Beck, Munich 2007, 1980 p., at 488. It should also be noted that the economic benefits to be disgorged not only consist of the revenue generated by the infraction, but also the financial value of other potential benefits such as the improvement of an undertaking’s market position. I. LIANOS et. al. “An Optimal” 16; V. EMMERICH in U. IMMENGA AND E. J. MESTMÄCKER (eds) Wettbewerbsrecht (GWB), 2009, Section 34 para. 9. See for a thorough assessment of this system in the United States see E. ELHAUGE, “Disgorgement as an Antitrust Remedy”, 2009 (76) Antitrust Law Journal, 79-95.


3992 This can indeed be deduced from the wording of Section 81(5) GWB which states the following: ‘[section] 17(4) of the German Administrative Offences Act shall be applied to the setting of the fine, with the provision that the economic benefit which was derived from the administrative offence may be disgorged by the fine pursuant to paragraph 4. If the fine is imposed for reasons of punishment only, this must be taken into account in setting the amount of the fine’. This provision seems to indicate that the illegal gains deriving from the infringement should not be disgorged when the competition authority only aims at punishing the undertaking in question.


3994 See supra Chapter 10, section 2.1.

3995 Section 17(4) OWiG. See also M. J. FRESE, Sanctions 206 of the original version of this dissertation; A. MUNDT, “Die Bußgeldleitlinien des Bundeskartellamtes”, 2007 (57-5) Wirtschaft und Wettbewerb, 458-470, at 463-464.
This disgorgement remedy can only be adopted to the extent that the economic benefits have already been disgorged by payment of damages or the imposition of a fine. This competence can only be exercised when it has been established that the infringement has been exercised intentionally or out of negligence.  

2.1.4. The calculation of the fine

2.1.4.1. General principles

In fixing the amount of the fine Section 81(4) GWB provides, just like Article 23 Regulation 1/2003, that the gravity and duration of the infringement form the basis for calculating the fine.

In addition to these criteria, the calculation of the fine must respect the general principles of domestic law, according to which the calculation of the fine should consider a number of factors such as market impact, affected commerce, economic conditions of the undertakings involved and the period between infringement and fine. The essence of such factors is reflected in Section 17(3) OWiG, which requires to take account of (i) the nature of the offence and (ii) the culpability of the offender and (iii) the financial circumstances of the offender.

The criteria enumerated in Section 81(4) GWB and in Section 17(3) OWiG are used to pinpoint the appropriate level of the fine within the statutory framework, from € 5 to 10% of the turnover.

2.1.4.2. The Fining Guidelines of the Bundeskartellamt

According to Section 81(7) GWB, the Bundeskartellamt is explicitly entitled to issue guidelines on the exercise of its discretion with regard to fines for competition law infringements. The first Fining Guidelines for undertakings (Busgeldleitlinien) were adopted in September 2006. These Guidelines were replaced by ‘Guidelines for the setting of fines in cartel administrative offence proceedings’ of 25 June 2013.

3996 Section 34(2) GWB.
3997 See also M. J. FRESE, Sanctions of the original version of this dissertation; R. RAUM in E. LANGEN paras 160-168.
3998 The insertion of Section 81(7) GWB in 2005 was meant to confirm the authority of the Bundeskartellamt to publish fining guidelines. It is indeed generally accepted that administrative authorities may publish self-binding guidelines to enlighten how they will exercise their discretion. Therefore, the authorization contained in Section 81(7) GWB must be regarded as being of mere declaratory nature. I. LIanos et. al. “An Optimal” 158, Still, a number of authors have commented that the high level of fines that are imposed in competition cases required legislative authorization. In this regard it has even been claimed the general principles for the fine calculation should not be subject to the discretion of the competition authority, but that these principles need to be defined by the legislator itself. See e.g., R. BECHTOLD, GWB – Kommentar Section 81, para. 34.
3999 Bekanntmachung Nr. 38/2006 über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 des Gesetzes gegen Wettbewerbsbeschränkungen [GWB] gegen Unternehmen und Unternehmensvereinigungen – Bußgeldleitlinien, 15 September 2006. For an analysis of the 2006 fining methodology see e.g. C. Vollmer, “Die Bußgeldleitlinien des Bundeskartellamts”, 2007 Zeitschrift Für Wettbewerbsrecht (ZWER), 168-181. This author emphasised the important similarities between the German calculation method and the Commission’s 2006 Fining Guidelines. The most important divergence between both methodologies concerned the absence of the “entry fee” under German law and the fact that under the German Guidelines period shorter than a year have the same impact as full years in the fine calculation.
Under the Bundeskartellamt Fining Guidelines of 2013 the determination of a fine in a specific case is set by reference to two key criteria: the gain and harm potential on the one hand and the total turnover of the company on the other. In essence, three key steps are followed.  

The Bundeskartellamt first calculates a gain and harm potential of 10% of the undertaking’s domestic value of sales to which the infringement relates during the entire period of the antitrust infringement. This amount is used as a starting point. In a second step, a multiplication factor (between 2 and 6) is applied to the established gain and harm potential in order to take into account the size of the undertaking.

The result of this calculation is not the actual fine, but instead it represents the level above which a fine would generally no longer be appropriate. This limit will only be applicable if it remains under 10% of the annual turnover of the undertaking. Otherwise, the statutory limit of 10% of the firm’s global turnover in the preceding business year will apply.

Finally, the concrete fine is determined in accordance with aggravating and mitigating factors, which include offence-related criteria (e.g. the type and duration of the infringement and its qualitative effects) and offender-related criteria (e.g. the role of the company within the cartel and its position on the market that is affected). Below, a closer look is taken at each calculation step.

a. The starting amount of the fine

Under the 2013 Guidelines, the relevant starting point is of 10% of the domestic sales of products or services related to the infringement over its entire duration. This measure refers to a general assumption of the “gains and harm potential”. This concept is described in the Guidelines as ‘the possibilities of the company to gain competitive advantages from the offence and cause disadvantages for third parties or for the economy as a whole’. As is further analysed below, the harm and gains potential of 10% of the relevant turnover can be compared to the Commission’s rule to calculate the basic amount, according to which a proportion of the value of sales is be set at a level of up to 30%.

According to the 2013 Guidelines, if the gain and/or harm potential of the infringement is obviously higher, the proportion of the relevant turnover may exceptionally be set above 10%. The 2013 Guidelines do, however, not clarify how this aspect can be ascertained in practice.

In order to calculate the relevant turnover, the Bundeskartellamt considers the turnover achieved by the undertaking from the supply of goods and services connected with the infringement, after the deduction of expenses and value-added tax.

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4001 Each step of calculation is assessed in more detail below.
4002 This constitutes the main difference compared to the former fines calculation methodology. ECN, Competition brief 3/2013, “Germany: The Bundeskartellamt publishes new Fining Guidelines”.
4003 Bundeskartellamt Fining Guidelines 2013, points 9-11, and 15.
4004 Ibid, point 4.
4007 See Section 38(1) GWB referring to Section 277(1) of the Handelsgesetzbuch (Commercial Code, HGB). These are rules used to calculate turnover in the context of merger control. According to this rule the turnover is the revenue from the sale or lease of products and goods that are typical for the usual activities of the corporation, and from services that
When the expected turnover was not achieved due to the nature of the infringement or an unforeseen development, the turnover that would have been achieved in the ordinary course of events is used as a point of reference. The 2013 Guidelines explain that the nature of the infringement may prevent the undertaking in question from obtaining any turnover in a market-sharing cartel. The Guidelines provide an example of a situation in which the expected turnover may not be achieved due to an unforeseen development. This may namely be the case if a third party is awarded the contract in the context of collusive tendering or when the tendering process is not carried out. This rule is meant to avoid that unsuccessful violations remain unpunished.

b. The duration of the infringement

As observed above, the turnover ‘over the entire duration of the infringement’ is considered, which implies that the duration of the infringement is already integrated in the relevant turnover. This feature also differs to some extent from the Commission Fining Guidelines, under which the preceding financial year’s turnover is multiplied by the number of years. However, it should be kept in mind that when such a year was not representative, the Commission has used other figures in order to ensure that the turnover figure that was chosen properly reflects the economic capacity of the undertaking.

Furthermore, it is important to note that under the Bundeskartellamt Guidelines, periods shorter than 12 months are considered a full year period of 12 months. The last 12 months before the infringement ceased, are thus equally relevant for calculation purposes.

c. The multiplication factor according to the size of the undertaking

The next step in the Bundeskartellamt’s fine calculation is not as such provided under the Commission’s fining system. In particular, a multiplication factor is applied to the relevant (10%) turnover (i.e. the “gain and harm potential”) to take into account the size of the company at stake. In its Guidelines the Bundeskartellamt explains that a fine which (significantly) exceeds “the gain and harm potential” can be appropriate for deterrent purposes. Given that large companies are less sensitive to punishment, the maximum fine possible must be higher in this type of cases.

The precise multiplication factor is determined by the total aggregate annual turnover. If the turnover is below €100 million, a factor of 2-3 is applied; if it is between €100 million and €1 billion, the

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4008 Bundeskartellamt Fining Guidelines 2013, point 11.
4009 See Example 1 in the explanatory note accompanying para. 11, third sentence, of the Bundeskartellamt Fining Guidelines 2013. This example appears to presume that the undertaking in question was allocated a market share outside Germany.
4010 See Example 2 in the explanatory note accompanying para. 11, third sentence, of the Bundeskartellamt Fining Guidelines 2013.
4011 See for a full assessment supra Chapter 10, section 5.
4012 Bundeskartellamt Fining Guidelines 2013, point 12.
4013 Ibid., point 13.
4014 Ibid., point 13 and accompanying note 2.
factor is 3-4; between €1 billion and €10 billion, the factor is 4-5; between €10 billion and €100 billion, the factor is 5-6; and above €100 billion, the factor is set higher than 6.\footnote{4015}

d. Establishing the limit for the maximum fine

If the amount resulting from steps one and two (\textit{i.e.} the relevant domestic turnover multiplied with the total global turnover based multiplier) is lower than the statutory limit of 10\% of the undertaking’s annual worldwide turnover, this amount will define the maximum fine.\footnote{4016} Otherwise, the statutory limit of 10\% of the undertaking’s annual worldwide turnover applies.\footnote{4017} Put otherwise, the lowest result will constitute the maximum fine. This point clearly constitutes the most significant difference between the fining policy of the \textit{Bundeskartellamt} and that of the Commission.

e. Setting the fine within the specific range

Within the statutory framework of fines between €5 and the applicable upper limit, (namely the lower of (i) 10\% of the overall global turnover, or (ii) 10\% of the relevant sales in Germany multiplied by a factor that depends on the overall global turnover), the \textit{Bundeskartellamt} assesses the aggravating or mitigating effect of the factors related to the offence itself and to the offender to determine the actual fine.\footnote{4018} To this end, the Guidelines provide a non-exhaustive list of examples of offence-related and offender-related factors.

The first offence-related criteria are the type of infringement and its duration. The Guidelines stress in this context that ‘[i]n the case of price-fixing and quota cartels, territorial and customer agreements and other similarly serious horizontal competition restraints, the fine will usually be set in the upper range’.\footnote{4019} As discussed above, the element of ‘duration’ is explicitly taken into account in the calculation of the relevant turnover. Therefore, it can in principle be assumed that this factor is no longer to be considered in order to determine the specific amount of the fine.\footnote{4020} The nature of the agreement, on the other hand, may have a significant impact on the determination of the fine.

The second criterion concerns the quantitative effects of the infringement, namely the size of the geographic markets affected and the significance of the companies that participated in the violation. Once again, the criterion regarding the size of the geographic market is already taken into account in the determination of the relevant turnover. Although this factor is unlikely to have a major impact on the determination of the final fine, it can certainly not be excluded that an infringement affecting a large geographic area will be more fiercely penalized than smaller infringements; the combined market shares of the participants will most likely carry significant weight in this assessment.

The third factor pertains the importance of the markets (\textit{e.g.} type of product affected by the infringement) and the degree of organisation among the parties involved. While the type of product is no longer a factor explicitly mentioned in the \textit{Bundeskartellamt}’s Guidelines, the criterion

\footnotetext{4015}{\textit{Ibid}, point 13.}
\footnotetext{4016}{\textit{Ibid}, point 14 and accompanying example 1 in the Explanatory Notes.}
\footnotetext{4017}{\textit{Ibid}, point 14 and accompanying example 2 in the Explanatory Notes.}
\footnotetext{4018}{\textit{Ibid}, point 16. See also Section 81 (4) sentence 6 GWB and Section 17 (3) OWiG.}
\footnotetext{4019}{Bundeskartellamt Fining Guidelines 2013, point 16.}
\footnotetext{4020}{See also I. LIANOS \textit{et. al.} “An Optimal” 199. According to these authors the Bundeskartellamt should avoid “double counting”.}
regarding the organisation of the agreement is certainty related to (the effectiveness of) its implementation, and thus duly taken into account in German competition law.\footnote{4021}

Taken as a whole, these offense-related factors can certainly be compared to the criteria used by the Commission to assess the gravity of infringements under the 2006 Guidelines. The Commission indeed considers (i) the nature of the infringement, (ii) the combined market share of all the undertakings concerned, (iii) the geographic scope of the infringement and (iv) whether or not the infringement has been implemented to set the specific percentage of the relevant sales within the range 0\% to 30\%.\footnote{4022}

With regard to offender-related criteria, the German Fining Guidelines also list a number of examples namely: (i) the role of the company within the cartel, (ii) the position of the undertaking in the market affected, (iii) the extent of intention or negligence of the offender, (iv) previous infringements and, finally, (v) the company’s financial capacity.\footnote{4023}

In the context of the recidivism factor, it is interesting to note that the Higher Regional Court of Düsseldorf explained in Grauzement (2009) that although prior infringements had not been considered in the past by the Court (conversely to the Bundeskartellamt’s approach), it was eager to pay attention to this factor in the future.\footnote{4024}

Even if such resolutions are welcome, it is important to take into account that under German law, prior infringements are subject to the strict time-limitations. In accordance with Section 153(6) of the Trade Regulations Act (Gewerbeordnung, GewO), infringements that have been entered into the Commercial Register but have expired,\footnote{4025} cannot be taken into account. Generally, violations expire after a period of 5 years, and are deleted from the register one year later.\footnote{4026} Although European fining decisions are not registered, this expiration rule applies equally.\footnote{4027} Such relatively short expiration period certainly limits the discretion of the Bundeskartellamt to take into account the fact that certain firms may have a tendency to commit competition law infringements.

It is true that the offender-related criteria are not explicitly qualified as aggravating or mitigating circumstances. However, it is difficult to deny that such factors (excluding the company’s financial capacity) are intrinsically linked to the conduct of the undertaking concerned and as such can be

\footnote{4021} It should, however, be recalled that under the system preceding the 1998 Fining Guidelines of the Commission, this factor was frequently mentioned in its fining decisions.

\footnote{4022} See further \textit{supra} Chapter 10, section 5.2.1.2.

\footnote{4023} It is important to note that under German law there is no general duty to cooperate as there is under Regulation 1/2003 in the European Union. This implies that a potential refusal to cooperate cannot be considered as an aggravating factor. On the other hand, cooperation in the investigation can be considered a mitigating factor. See OLG Düsseldorf, 26 June 2009, VI-2a Kart 2 - 6/08 OWi, available at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/2009/V1_2a_Kart_2_6_08_OWiurteil20090626.html, paras 414-420. Furthermore, it is argued that given the absence of a duty to cooperate under German law, it is easier than in European law to reach the threshold to obtain a lower fine in this context. I. LIANOS et. al. “An Optimal” 158.

\footnote{4024} See OLG Düsseldorf, 26 June 2009, VI-2a Kart 2 - 6/08 OWi, para 409, available at https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/2009/V1_2a_Kart_2_6_08_OWiurteil20090626.html.

\footnote{4025} See \textit{supra} section 1.1.2.2(c) of this Chapter.

\footnote{4026} Section 153(1) no 2, (5) GewO.

equated with the aggravating or mitigating considerations taken into account by the Commission under its Fining Guidelines.4028

The undertaking’s financial capacity, on the other hand, does not constitute a mitigating or aggravating factor. At the European level, such criterion can be compared to the inability to pay policy, which is also applied by the Commission as a final step in its fine calculation.4029

Finally, the Guidelines elaborate on two last aspects. Namely, the possibility for the Bundeskartellamt to skim off the economic benefit either in the fining proceedings or in separate proceedings4030 and the application of further reductions on the basis of the leniency notice or the settlement notice.4031

2.1.5. A brief discussion of the Bundeskartellamt’s fining practice

In the period between 1993 and 2010, the Bundeskartellamt imposed fines on 563 legal persons. The average fine imposed per undertaking throughout these years amounted to €4.6 million.4032

However, since the start of the new millennium, the Bundeskartellamt has intensified and improved the prosecution of market sharing and price fixing agreements. This new focus on fighting cartels was also the result of the creation of the Special Unit for Combating Cartels (SKK) in March 2002.4033 As the figure below shows, the enhanced enforcement efforts of the Bundeskartellamt are well reflected in the increasing amount of fines (for both undertakings and natural persons) imposed after 2002. Given the tendency to impose strict sanctions in the last years, it is very likely that the average fine imposed on undertakings is nowadays significantly higher than the amount of €4.6 million mentioned above.

4029 See supra section 1.1.2.2(c) of this Chapter.
4030 Bundeskartellamt Fining Guidelines 2013, point 17. See also Section 32 GWB, Section 34 GWB.
4031 Ibid, point 18.
4033 According to the Activity Report 2001-2002, the SKK combines special material and personnel resources necessary for effectively preparing and carrying out on-the-spot cartel investigations and processing their results. See Bundeskartellamt Activity Report 2001/2002, at 22. It should be noted that the Activity Report of the Bundeskartellamt concerns as a rule two years.
Unfortunately, the *Bundeskartellamt* does not publish its full decisions imposing fines. Still, its Activity Reports as well as the Press Releases provide some interesting insights on the *Bundeskartellamt*’s enforcement activity and, in particular, on the use of its fining powers.

In its Activity Report from 2001/2002, the *Bundeskartellamt* commented that it had conducted several administrative fine proceedings, directed against those directly involved in such agreements and those exercising supervisory functions in the companies during the relevant period. In several cases fines were imposed on the companies concerned. The total amount of fines imposed was approximately € 21.8 million in 2001, of which € 21.5 million was imposed on companies. In 2002, fines amounting to € 4.5 million were imposed, of which € 4.2 million was imposed on companies.\(^4034\)

In 2003 and 2004, the *Bundeskartellamt* conducted 18 national searches in 337 undertakings and 24 private premises. As a result of these inspections, a number of cartel agreements was uncovered. The *Bundeskartellamt* opened administrative fine proceedings both against those directly involved in the agreements, those having supervisory duties in the companies and, in several cases fines were also imposed on the respective undertakings involved. The total amount of fines imposed (on undertakings and natural persons) was just over 717 million Euro in 2003 and approximately 58 million Euro in 2004.\(^4035\)

According to the report of 2005/2006, the Bundeskartellamt further uncovered a number of cartel agreements and again conducted several administrative fine proceedings directed both against those directly involved in the agreements and those with supervisory responsibilities in the companies. In several cases, fines were also imposed on the companies involved. The total amount of fines imposed in 2005 was €163.9 million, of which €160.7 million was imposed on companies. In 2006, the imposed fines amounted to €4.5 million, of which €3.4 million was imposed on companies.\textsuperscript{4036}

The level of fines imposed by the German competition authority continued to be very high in 2007-2008. While in 2007 fines totaling €434.8 million were imposed (of which €433 million was imposed on companies), in 2008 the total sum of the fines amounted to €313.7 million (€311 million of which was imposed on companies).\textsuperscript{4037}

In 2009, the Bundeskartellamt collected fines totaling €178 million, of which €176 million had been imposed on undertakings. In 2010, the Bundeskartellamt also collected fines for €124 million in total, while €122 million of this amount was paid by undertakings.\textsuperscript{4038}

In its activity report 2011-2012, the Bundeskartellamt stressed its ongoing focus on illegal cartel activity and stated that it had uncovered and fined numerous cartels during the reporting period. The fines imposed in 2011 reached €189.8 million in total (of which €187.4 million was imposed on companies). In a similar fashion, fines amounting to €316 million were imposed in 2012, of which 314.4 million euros was to be paid by companies.\textsuperscript{4039}

In the last published Activity Report of 2013/2014 the Bundeskartellamt comments that it carried out 21 searches in 141 companies and 24 private residences in the context of cartel prosecution. The fines imposed in 2013 reached a total of €244.5 million (of which €241.6 million was imposed on companies) and in 2014, the total sum of the fines even amounted to €1.12 billion (of which €1.11 billion was imposed on the undertakings that had been involved). The Bundeskartellamt explained that the exceptionally high level of fines in 2014 compared to previous years, was due to the finalization of three cartel proceedings involving very large undertakings, namely the sugar, beer and sausage cartels.\textsuperscript{4040}

As this short overview has underscored, fines started peaking from 2003 onwards. Some of the most remarkable cases are commented below.

The highest cartel fine ever imposed by the Bundeskartellamt was in the Cement cartel case (2002). The fining decision was adopted in July 2002 and the fines amounted to €660 million in total for the six largest German cement manufacturers (namely, Alsen AG, Dyckerhoff AG,

\textsuperscript{4036} Bundeskartellamt Activity Report 2005/2006, at 43. In this report, the Bundeskartellamt also stressed it ‘attached great importance to the prosecution of price, market allocation and quota cartels’. Its anti-cartel enforcement activity were reinforced by the creation transformation of the 11th Decision Division was transformed into a division dealing exclusively with cartels in June 2005.


\textsuperscript{4038} Bundeskartellamt Activity Report 2009/2010, at 37 et seq. In this Report the Bundeskartellamt also stressed the importance of the creation of the 12 dedicated division in 2008, which was created to also exclusively with the prosecution of hardcore cartels.

\textsuperscript{4039} Bundeskartellamt Activity Report 2011/2012, at 28.

\textsuperscript{4040} Bundeskartellamt Activity Report 2013/2014, at 23.
HeidelbergCement AG, Lafarge Zement GmbH, Readymix AG and Schwenk Zement KG). These undertakings operated market allocation and quota agreements since the 1970s until 2002. The cartel affected four regional cement markets eastern Germany, Westphalia, northern Germany and southern Germany. The (now former) President of the Bundeskartellamt, Ulf Böge, attributed the detection of the cartel mainly to the German leniency programme and to the establishment in 2002 of the SKK.\footnote{The Press Release further elucidates that ‘[f]ollowing information obtained from the construction industry the Bundeskartellamt carried out a nation-wide search of 30 cement companies in July 2002. This was followed in January 2003 by further searches of eight small and medium-sized cement manufacturers in the southern German area. The evidence seized during the searches and the confessions by the large manufacturers, some of which fully confessed, confirmed the existing suspicions’. Bundeskartellamt, Press Release of 14/04/2003, “Bundeskartellamt imposes fines totaling around €338 million on 11 breweries, a trade association and 14 individuals, which had been involved in price agreements for their draught and bottled beer. The fines for the 12 undertakings amounted to €334 million. These fines included substantial discounts granted under the leniency programme and the settlement procedure.”}

Mr Böge explained the fact that ‘the Bundeskartellamt levied by far the highest fines in its history in these proceedings’ given the long duration of the cartel and the great harm caused to consumers. In Böge’s words ‘[p]rices could thus be raised to a level that would have been unattainable under competitive conditions. Buyers of cement and consumers have thus been massively harmed. In addition, there is the damage caused to the economy as a whole by artificially keeping up outdated market structures’.\footnote{See Bundeskartellamt, Press Release of 14/04/2003, “Bundeskartellamt imposes fines totaling approx. €380.5 million on 21 sausage manufacturers (as well as 33 individuals) involved for concluding illegal price-fixing agreements. In this case, sausage manufacturers regularly met over a time period of several decades to discuss market developments and prices. Since 2003, they jointly implemented price increases for the sale of sausage products to the retail trade.”}

In the appeal proceedings, the OLG of Düsseldorf (\textit{i.e.} the Higher Regional Court) considered that the Bundeskartellamt had inter alia overestimated the profits made by the cartel members and reduced the fines to approx. €380.5 million.\footnote{See Bundeskartellamt, Press Release of 14/04/2003, “Bundeskartellamt imposes fines totalling approx. €380.5 million on companies in the cement sector on account of cartel agreements”.} The case was subsequently brought to the Bundesgerichtshof, which further be it slightly reduced the fine. Even after all reductions applied, significant fines were still imposed on the undertakings involved in the cartel. For instance, a fine of €162 million was imposed on HeidelbergCement AG, a fine of €66.5 million was imposed on Schenk Zement AG and a fine of €50 million on Dyckerhoff AG. Other lower fines included €23 million for Lafarge Zement GmbH, €14 million for Holcim Deutschland AG, and €12 million for ReadyMix, (today CEMEX Deutschland AG).\footnote{BGH, 26 February 2013 – KRB 20/12, WuW/E DE R 3861 – Grauzement. The BGH further reduced the fines of the appellants by 5% because of the long duration of the appeal process caused by the delay in preparing the prosecutor’s response to the appeal.}

After the Cement decision, the highest Bundeskartellamt fines were imposed in 2014. For instance, in the “Sausage cartel”, in which the Bundeskartellamt imposed fines totaling approx. €338 million on 21 sausage manufacturers (as well as 33 individuals) involved for concluding illegal price-fixing agreements. In this case, sausage manufacturers regularly met over a time period of several decades to discuss market developments and prices. Since 2003, they jointly implemented price increases for the sale of sausage products to the retail trade.\footnote{BGH further reduced the fines of the appellants by 5% because of the long duration of the appeal process caused by the delay in preparing the prosecutor’s response to the appeal.}

In the Rail track cartel (2012), overall fines of €222 million were imposed on 12 companies which had taken part in the cartel. The highest fine (of €103 million) was imposed on ThyssenKrupp, while lower fines of €4 million, €4.5 million and €13 million were imposed on other participants.\footnote{BGH, Nr. 63/2013, available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&Sort=3&nr=63747&pos=0&anz=63; see also I. LIANOS \textit{et. al.} “An Optimal” 163-164.} This case illustrates that the distribution of fines between undertakings fluctuates significantly.

At the beginning of 2014, the Bundeskartellamt imposed fines totalling around €338 million on 11 breweries, a trade association and 14 individuals, which had been involved in price agreements for their draught and bottled beer. The fines for the 12 undertakings amounted to €334 million. These fines included substantial discounts granted under the leniency programme and the settlement procedure.\footnote{See press release of the BGH, Nr. 63/2013, available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&Sort=3&nr=63747&pos=0&anz=63; see also I. LIANOS \textit{et. al.} “An Optimal”.}
In the Sugar cartel (2014), the Bundeskartellamt imposed fines of €280 million on three major German sugar manufacturers (Pfeifer & Langen, Südzucker and Nordzucker). These undertakings had operated a cartel fixing sales areas, quotas and prices, dating back to the mid ‘90s. Südzucker self-reported that its own fine amounted to €195.5 million.4048 Such a high fine is remarkable, certainly when taking into account that discounts for leniency and settlements had already been included in that amount.4049

2.1.6. Assessment: (how) can the Bundeskartellamt’s Fining Guidelines contribute to improve the Commission’s system?

This section has shown that an important number of elements of the Bundeskartellamt fining policy converge with the Commission’s fining system. Such convergence is reflected, for instance, in the (interpretation of) the term undertaking, the fact that only negligent and intentional infringements can be fined and the importance attached to the duration and the gravity of the infringement in the context of the fine calculation.

However, the analysis above has also demonstrated that a number of important elements of the Bundeskartellamt’s approach differ significantly from the Commission’s fining policy.

The first substantial difference between both fining regimes is intrinsically linked to the nature of the German (competition law) fining system for undertakings. In Germany, (EU) antitrust violations are punished through fines that are imposed on natural persons, and only derivatively also on undertakings. In fact, in order to impose fines on undertakings it is necessary to identify the natural persons who are (directly or indirectly) responsible for the infringement. While the Commission seems to struggle at times to identify the undertakings responsible for cartel infringements, the German approach is far more nuanced and not only identifies undertakings involved in competition law infringements but also the individuals accountable for such behaviour. Still, this does not mean that the whole European system of fines for undertakings should move into the background. Undertakings are generally best placed to prevent antitrust infringements in the most cost-efficient way and if quick and active enforcement activity is more effective from a deterrence point of view than few cases with exemplary sanctions, there is a clear case for focusing on sanctions for undertakings.4051

In addition to the “derivative” nature of fines for undertakings, the fine calculation methodology of the Bundeskartellamt for firms also contains considerable divergences compared to the Commission’s method of calculation.

The 2013 Bundeskartellamt Guidelines appear to follow what could be described as a hybrid calculation method, based on a fixed harm and gain assumption of 10% of the relevant sales in

4050 W. Wils, “Is Criminalization” 32, of the online version of this contribution. In particular, in W. Wils’s view ‘the logic of fining undertakings or companies for antitrust violations is that the threat of the corporate sanction, if sufficiently high, will induce the undertaking or company to try to make its agents respect the law. This shifting of the enforcement function from the authorities to the firm makes sense because in general the firm has a relatively good ability to influence the behaviour of its agents’.
4051 K. Ost “From Regulation 1” 134.
Germany.\textsuperscript{4052} If the Bundeskartellamt is the (only) NCAs to deal with a given cartel and it can only take into account its national turnover, the effectiveness of its fining policy may, arguably, be reduced when the cartel at operated and realised turnover beyond Germany.

In contrast, the Commission basically uses a proportion of up to 30\% of the turnover relating to the infringement within the EEA or beyond this area in global cartels when this is necessary to reflect the weight of each undertaking in the infringement.\textsuperscript{4053} In practice, the Commission sets the percentage between 17\% and 19\%, while only the most damaging cartels lead to a percentage above 20\%.\textsuperscript{4054} Such assessment is made on the basis of (i) the nature of the infringement, (ii) the combined market share of all the undertakings concerned, (iii) the geographic scope of the infringement and (iv) whether or not the infringement has been implemented.

The range between 1\% and 30\% of the value of sales allows the Commission to differentiate between infringements according to the damage caused by and the gains deriving from them. In addition, this wide range may also serve to take into account the low probability of detection. The flexibility embedded in the Commission’s method appears more appropriate than a fixed assumption of harm (for all infringements) of 10\% of the turnover, as is made under the Guidelines of the Bundeskartellamt. Although the percentage of the turnover relating to the infringement used by the Bundeskartellamt constitutes an appropriate proxy to (imperfectly) measure the harm and gains of the infringement, it seems obvious that not all competition law infringements result in the same harm or gains. Given that the Bundeskartellamt’s harm and gain potential is always 10\% of the turnover relating to the infringement, there is no margin to adjust the starting amount to the specificities of the violation. Hopefully, the Bundeskartellamt will make use of the possibility to (exceptionally) set the proportion of the relevant turnover above 10\%\textsuperscript{4055} in damaging cartel cases, if it establishes for instance that the agreement covers a large territory and was strictly implemented.\textsuperscript{4056}

With regard to the impact of the duration factor in the calculation of the fine, the Bundeskartellamt 2013 Guidelines use 10\% of the domestic sales of products or services related to the infringement \textit{over its entire duration}. Although this approach differs in practice from the rule contained in the Commission’s Guidelines,\textsuperscript{4057} both approaches are similar as regards their impact: both the Bundeskartellamt and the Commission take into account almost the entire duration of the infringement in the fine calculation. This approach is indeed fully appropriate from an economic perspective.\textsuperscript{4058} Moreover, the fact that the Bundeskartellamt considers periods shorter than 12 months as a full year\textsuperscript{4059} is not likely to have a major negative effect on the fine calculation.

\textsuperscript{4052} Bundeskartellamt Fining Guidelines 2013, points 9-11, and 15.
\textsuperscript{4053} Commission Fining Guidelines, point 18. See supra Chapter 10, section 5.3.1.4.
\textsuperscript{4054} See supra Chapter 10, section 5.3.1.4(b).
\textsuperscript{4055} Bundeskartellamt Fining Guidelines 2013, point 15 of the Guidelines, and Explanatory Note of the Fining Guidelines, Comment 2 accompanying para. 10 of the Guidelines.
\textsuperscript{4056} Compare supra Chapter 10, sections 4.4 and 5.4. Given that the Bundeskartellamt decisions are not published, this can unfortunately not be confirmed.
\textsuperscript{4057} The Commission considers a percentage in the range of 30\% of the sales during the last full business year of participation in the infringement (Fining Guidelines 2006, point 13) to then apply a multiplication factor to reflect the duration. See further supra Chapter 10, section 5.4.
\textsuperscript{4058} See further supra Chapter 10, sections 5.4.
\textsuperscript{4059} Bundeskartellamt Fining Guidelines 2013, point 12.
Another important difference relates to the absence of an entry fee as applied by the Commission in cartel cases under the Bundeskartellamt Guidelines. This entry fee is designed to consider the low probability detection and also consists of a percentage of the relevant sales. The absence of an entry fee in the Bundeskartellamt Guidelines logically diminishes the effectiveness of the Bundeskartellamt fines given the essential role of the probability of detection of the fine calculation.

On the other hand, the Bundeskartellamt’s applies a total-turnover-based multiplier to the amount representing the harm and gains potential. Such multiplier serves the same function as the deterrence multiplier under the 2006 Commission Guidelines. There are, however, three key differences. First, while the Bundeskartellamt applies the multiplier after the calculation of the 10% harm and gains potential, the Commission only applies the deterrence multiplier after the consideration of aggravating and mitigating factors. Second, the Bundeskartellamt uses full ciphers as multiplier, whereas the Commission only uses low percentages which commonly amount to 10% or 20% (i.e. 0.1 or 0.2). Finally, the Bundeskartellamt’s multipliers are applicable as a general rule depending on the turnover of the undertakings concerned, while the Commission’s deterrence multiplier is only used with regard to certain undertakings (such as multi-product undertakings) that have a large turnover. Although the Bundeskartellamt’s multiplier system is based on higher multipliers (compared to those used by the Commission) it is questionable that their whole impact on the fine calculation leads to more effective results. This is inter alia due to the fact that the Bundeskartellamt’s multiplier is (only) applied to the 10% harm and gains potential. In fact, this practice may slightly remind us to the (much criticised) Commission’s turnover grouping practice applied under the 1998 Fining Guidelines. Arguably, the Bundeskartellamt’s application of a global turnover based multiplier as second step in the fine calculation breaks the link between the infringement and the harm and gains resulting from it. As a consequence, the amount of the fine will not appropriately reflect the harm and gains, which are the correct factors to assess the amount of fines. The Commission’s subsidiary approach to the deterrence multiplier is in essence thus more suitable.

The assessment and comparison between the Fining Guidelines of the Bundeskartellamt and the Commission show that important divergences exist between both calculation methods. Nevertheless, it is important to keep in mind that the comparisons made above are not fully accurate. As previously discussed, the calculation of the harm and gain potential multiplied by the turnover factor is only meant to establish a maximum limit for fines. Moreover, this limit is only applicable under German law if the 10% of the undertakings’ global turnover threshold is higher. The specific level of fines will finally be set within the applicable limit by reference to offense-related and offender-related factors. Arguably, the whole point in developing a fining methodology that (imperfectly) reflects the harm and gains of a competition law infringement is quite lost when such methodology is only used to establish a maximum fine. Given that the Commission’s fine is only capped when the amount of the fine exceeds 10% of the undertaking’s global turnover in the preceding business

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4060 Fining Guidelines 2006, point 25.
4061 See further supra Chapter 10, section 1.
4062 See further supra Chapter 10, section 4.3.2.
4063 See supra Chapter 10, section 5.4.
4064 See supra section 2.1.4 of this Chapter.
4065 Bundeskartellamt Fining Guidelines 2013, point 14 and accompanying examples 1 and 2 in the Explanatory Notes.
year, there is no need to say that also in this regard, the Commission’s system is more appropriate from an economic point of view. While it is true that the deterrent effect of the Commission’s fines may potentially be undermined when fines have to be capped, there is a significant number of cases in which fines remain under the 10% limit. In these cases, the Commission’s economic approach to fines will not lose its deterrent value. This can, however, not be stated about the Bundeskartellamt’s calculation method under which fines must be set within the applicable statutory limit. Only in the most detrimental cases, the final fine may be close to the maximum permissible sanction of 10% of the global turnover.

Finally, it could be interesting to take a closer look at the criteria used by the Bundeskartellamt to set specific level of fines within the applicable limit. As commented above, the so-called offence related factors resemble the parameters taken into account by the Commission to (i) establish the gravity of an infringement and select the applicable percentage in the range up to 30% of the relevant sales. The offender factors, on the other hand, can be compared to the Commission’s list of mitigating and aggravating factors under its 2006 Fining Guidelines. Unfortunately, a more detailed assessment of the final fine calculation cannot be made due to the unavailability of Bundeskartellamt decisions imposing fines. One aspect that is quite remarkable in the context of offender-related criteria, is the relative lack of impact of repeated infringements in the computation of the fine. Only in 2009 did the Bundeskartellamt stress its eagerness to pay attention to this factor in the future.\textsuperscript{4066} Regrettably, it cannot be confirmed whether this is currently the case and, if so, what the specific impact of recidivism is on the setting of the fine. In any event, given that the amount of the final fine in Germany is simply pinpointed within the applicable statutory limits (without following a more economically based method), it may be assumed that the Commission’s approach to recidivism is probably more accurate and potentially more effective.

The discussion above suggests that the Commission’s fining policy for undertakings can in principle not be improved by reference to the Bundeskartellamt 2013 fining system. There is, however, one important exception to this statement. In particular, the Bundeskartellamt has the possibility to impose a fine that exceeds the maximum fine limits when it intends to disgorge the illegal gains related to the infringement.\textsuperscript{4067}

The availability of disgorgement measures under the Bundeskartellamt fining system does not really constitute a novelty (in the strict sense of the word) with respect to the Commission’s fining regime. It should be kept in mind that, under the 2006 Fining Guidelines, the Commission may impose a deterrence multiplier in order to exceed the illegal gains deriving from the illegal agreement.\textsuperscript{4068} The real novelty resides in the fact that the Bundeskartellamt may impose fines surpassing the 10% turnover threshold after the application of the disgorgement remedy. In contrast, if the Commission intends to take into account the improper gains of the cartel, this calculation step is always applied before the fine is (potentially) capped in accordance with the 10% turnover ceiling. Although the Commission’s practice suggests that the illegal gains flowing from an anti-competitive agreement are extremely difficult to calculate – to the point it has never done so – it is regrettable that such a possibility is not available for the exceptional cases in which such gains can be calculated. The

\textsuperscript{4066} See OLG Düsseldorf, 26 June 2009, VI-2a Kart 2 - 6/08 OWi, para 409, available at https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/2009/V1_2a_Kart_2_6_08_OWiurteil20090626.html

\textsuperscript{4067} See Section 81(5) GWB and Section 34 GWB.

\textsuperscript{4068} See Commission fining Guidelines 2006, point 31.
German experience suggests, on the other hand, that calculating the gains may be easier than the Commission seems to imply. From this perspective, it can be affirmed that the German fining approach for undertakings contains a crucial element that has the potential to improve the Commission’s fining system.

2.2. The United Kingdom

In the UK, infringements of national or European competition law may lead to civil sanctions for undertakings and associations of undertakings.

Section 36(1) and (2) of the Competition act 1998 provides the (now) CMA with the power to require an undertaking to pay a financial penalty if it is responsible for an infringement of Chapter I of the Competition Act 1998 and/or Article 101 TFEU. The maximum fine may amount, in line with the European approach to the level of 10% of the undertaking’s worldwide turnover in the preceding business year.

2.2.1. General principles

As a prerequisite for the imposition of a financial penalty, Section 36(3) of the Competition Act 1998 provides that the CMA must have established that the infringement has been committed intentionally or negligently.

This condition has been broadly interpreted by the courts. In particular, the CMA does not have to decide whether the conduct was committed intentionally or negligently. It suffices to establish that the infringement was committed negligently or intentionally. Or in other words, an alternative qualification of the behaviour in question is sufficient to impose a financial penalty.

The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows: ‘an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.

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4069 Under the previous competition law system, no conduct was unlawful until after it had been proscribed by an order of the Secretary of State for Trade and Industry or after the firm concerned had given a legally binding undertaking to the competition authority (i.e. the former Director General of Fair Trading) that it would refrain from anti-competitive conduct. Hence, no sanctions could be levied for previous conduct, no matter how damaging to competition. See also D. PARKER, “Reforming Competition Law in the UK: The Competition Act 1998”, University of Bath School of Management, Centre for the Study of Regulated Industries, Occasional Paper 14, 2000, at 6, available at http://www.bath.ac.uk/management/cri/pubpdf/Occasional_Papers/14_Parker.pdf; I. LIANOS et. al. “An Optimal” 166.


4071 Napp Pharmaceutical Holdings Ltd v. Director General of Fair Trading, 1001/1/1/01 [2002], paras 453-455. See also commenting on this point I. LIANOS et. al. “An Optimal” 166.

4072 Argos Limited and Littlewoods Limited v Office of Fair Trading, 1014/1/1/03 [2005] CAT 13, at 221.
Intention may be deduced from internal documents or from deliberate concealment of the agreements or conduct in question.4073 In this regard, the (former) OFT also pointed out that intent and negligence do not require any knowledge on the part of the partners or principal managers of the undertaking. In the same line, action by a person who can act on behalf of the undertaking suffices.4074 The OFT has further indicated that the fact that a particular type of agreement or conduct has not previously been found in breach of Articles 101 and 102 TFEU or the national equivalents does not mean that the infringement cannot be committed intentionally or negligently.4075 This approach is indeed fully in line with European case law. As examined in Chapter 10, the same principles are followed by the Commission.

Although the distinction between intention and negligence is not relevant to establish an infringement, it should be kept in mind that such distinction can be taken into account as a mitigating factor in the context of the calculation of the fine.4076

The term undertaking is also interpreted in line with European competition law. Just like in Commission competition procedures, an undertaking comprises the concept of a single economic unit. Changes in the legal identity or ownership of an undertaking will therefore not prevent it or its component parts from being penalised. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.4077

The CMA may impose a financial penalty up to 10% of the worldwide turnover achieved by the undertaking concerned in its financial year preceding the date of the CMA's infringement decision.4078 The applicable turnover is limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities after reduction of taxes and sale rebates.4079

2.2.2. The (relatively) new emphasis on deterrence

Section 44 of the Enterprise and Regulatory Reform Act (ERRA) 2013 amended section 36 (penalties) of the Competition Act, by adding after subsection (7), subsection (7A). The new

4074 See OFT, “Guidance on commitments”, para 5.5.
4076 See Aberdeen Journals Ltd v. OFT, 1009/1/1/02 [2003] CAT 11, para 484.
4077 OFT, “Guidance on commitments”, para 5.42. It is interesting to note that this policy document even refers to the European case law defining the concept of undertaking (e.g. Cases 40–48/73, 50/73, 54–56/73, 111/73, 113/73 and 114/73 Coöperative Vereniging ‘Suiker Unie’ UA v Commission [1975] ECR 1663). See also Institute of Independent Insurance Brokers v Director General of Fair Trading, 1003/2/1/01 [2001] CompAR62, para 258. In this decision the CAT referred to all the relevant European case law concerning the definition of the term undertaking. See stressing the intense convergence in this regard between M. J. FRESE, Sanctions 217 of the original version of this dissertation.
wording of this provision puts more emphasis on the need for deterrence by stating that ‘[i]n fixing a penalty under this section the CMA must have regard to (a) the seriousness of the infringement concerned, and (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from (i) entering into agreements which infringe the Chapter 1 prohibition or the prohibition in Article [101](1), or (ii) engaging in conduct which infringes the Chapter 2 prohibition or the prohibition in Article [102] TFEU’. This additional emphasis on deterrence is fully in line with the objectives of the Commission’s fining policy, which is indeed meant to produce both general and specific deterrence.

In determining the specific level of fines, the CMA is required to take into account any penalty already been imposed by the European Commission or another national competition authority with respect to the same agreement or conduct.

It is also important to keep in mind that there is no prescribed limitation period for the CMA’s enforcement powers with regard to civil proceedings. The CMA has thus the possibility to use its fining powers regardless of when the infringement was committed.

2.2.3. The CMA Penalty Guidance

Section 38(4) of the Competition Act 1998 also requires the competition authority to publish guidance specifying how it determines the appropriate amount of the financial penalty imposed, which the (now) CMA has done in several occasions. In addition, the ERRA 2013 also modified Section 38 of the Competition Act by requiring the CAT to “have regard” to the guidance published by the CMA thereby stressing the general need to take into account deterrence objectives.

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4080 In practice, the need to deter infringements is also frequently stressed. For instance in a decision in commercial refrigeration (CE/9856-14) the CMA pointed out that it ‘makes its assessment on a case-by-case basis having regard to all relevant circumstances and the twin objectives of the CMA’s policy on financial penalties to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and to ensure that the threat of penalties will deter both the infringing undertaking and other undertakings from engaging in anticompetitive activities’. CMA decision in Commercial refrigeration (CE/9856-14), para 7.13, of the non-confidential version of this decision, available at https://assets.publishing.service.gov.uk/media/575a8f5eed915d3d24000003/commercial-catering-equipment-non-confidential-decision.pdf).

4081 Joined Cases 100–103/80, Musique Diffusion Française v Commission (Pioneer) [1983] ECR 1825. See further supra Chapter 10, section 2.1.

4082 Penalties Guidance 2012, point 2.24. See also Article 38(9) of the Competition Act 1998.

4083 In particular, in Quarmby Construction Company Limited and St James Securities Holdings Limited v Office of Fair Trading [2011] CAT 11, the CAT rejected the argument that the five-year limitation period applicable to the fining powers of the Commission under Article 25 of Regulation 1/2003 also applied under the Competition Act 1998.

4084 Section 36(8) of the Competition Act 1998. It has been suggested that this inclusion may have been triggered by CAT’s judgments in the construction cartel cases (nine judgments in the construction bid-rigging cartel and one judgment on the construction recruitment forum cartel, Eden Brown & Others v OFT [2011] CAT 8). In this case, despite the special emphasis on the need to achieve sufficient deterrence by the OFT, the CAT reduced the fines by 90%. See also in this context I. LIANOS et. al. “An Optimal” 171-172. These authors seem sceptical about the impact that this inclusion may have on the CAT’s approach.
The first Guidance on the methodology for setting financial penalties was published by the OFT in 2000, was subsequently revised in 2004, and most recently in September 2012. In the 2004 version of the Guidance, the (then) OFT followed in essence the same calculation steps as under the current Guidance. The most important difference is that under the former 2004 system, only 10% of the relevant turnover was used as a starting point to calculate the fine. As is examined below, this starting amount has now been raised to 30%, in line with the Commission’s fining Guidelines.

Under the currently applicable 2012 Guidance, the CMA adopts a two-step method of calculation of penalties. First, the starting point for the fine is set at a level in the range of 30% of the undertaking’s turnover affected by the infringement of the undertaking during the last business year. Once the starting point has been established, a number of adjustments are made on the basis of (i) duration, (ii) aggravating or mitigating circumstances, deterrence and proportionality, (iii) the maximum penalty cup, and (iv) finally leniency or settlement discounts. The essence of these fine calculations in the UK, have quite evolved and are now significantly aligned with the calculation method contained in the Commission’s 2006 Fining Guidelines. The CMA’s calculation steps are analysed in more detail below.

2.2.3.1. The starting amount

First of all, the 2012 Penalty Guidance stresses that the starting point for determining the level of the fine is calculated having regard to two key factors, namely the seriousness of the infringement and the relevant turnover of the undertaking. Such factors are also decisive in the European fine calculation.

Fully in line with the Commission’s 2006 Guidelines, the relevant turnover is described in the CMA Penalty Guidance as the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year. Such factors are also decisive in the European fine calculation.

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4085 Director General of Fair Trading’s Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000.
4087 Although the currently applicable Penalty Guidance was published by the OFT, the CMA has published the Guidelines of the OFT on its website, indicating that it will follow the same policy. See OFT’s guidance as to the appropriate amount of a penalty (September 2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oftright423.pdf (hereafter: ‘Penalty Guidance 2012’).
4088 Penalty Guidance 2012, para 2.3.
4089 See the competition law guideline market definition (OFT 403, December 2004) for further background information on the relevant product market and relevant geographic market. The OFT also notes in this context that the Court of Appeal in its judgment in the Toys and Kits appeals stated that: ‘neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty’ and that it was sufficient for the OFT to ‘be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement’. See Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318, at paras 169 and 170 to 173 respectively.
4090 Relevant turnover is calculated after deducting sales rebates, VAT, and other taxes directly related to turnover.
4091 With respect to the last business year, this period refers to the undertaking’s last financial year preceding the date in which the infringement ended. Penalty Guidance 2012, para 2.7. This introduces a modification with respect to the Penalty Guidance of 2004, which took into account the (overall less representative) year preceding the (former) OFT’s decision. See Penalty Guidance 2004, para 2.7. This modification has thus brought the fining method in the UK in line with the European fining policy.
The English Courts have explained (and acknowledged) that the relevant turnover criterion is by nature a hypothetical test. Or in other words, it is based on the assumed turnover, not on the real turnover. This means that the CMA is not required to conduct a formal analysis of the relevant product market. The test is satisfied when the CMA establishes on a reasonable and properly reasoned basis what is the relevant product market affected by the infringement.\textsuperscript{4092} It is possible for the CMA to determine the turnover for the starting point by considering not only the relevant product market directly affected by the infringement but also the turnover in related products which may reasonably be considered to have been affected by the infringement.\textsuperscript{4093} This view, is once again, fully aligned with the European case law, according to which ‘the size of the relevant market is not as a rule a factor which must be taken into account, but just one among a number of other factors for evaluating the gravity of the infringement and setting the amount of the fine’.\textsuperscript{4094}

The relevant turnover figures are normally based on the undertaking’s audited accounts except when such figures do not reflect the true scale of an undertaking’s activities in the relevant market. Such exception is particularly appropriate, for example, when the remuneration for services supplied is based on commission fees.\textsuperscript{4095}

This approach is indeed desirable taken into account that the undertaking’s audited accounts are not always fully trustworthy, especially in secret hardcore cartels. When there are signs that the undertaking’s economic performance does not correspond to its audited accounts, it is indeed appropriate to take a fuller look in order to use the appropriate turnover figure. This is in fact the reasoning followed by the Commission to calculate the relevant turnover.\textsuperscript{4096}

When the CMA enforces Article 101 TFEU (or 102 TFEU), the effects produced by the agreement in other Member State(s) may be taken into account in determining the starting point. To this end, the CMA may consider the turnover generated in another Member State when the relevant geographic market is wider than the UK.\textsuperscript{4097} In effect, even this rule can be considered as the national equivalent of point 18 of the Commission’s Fining Guidelines.\textsuperscript{4098}

2.2.3.2. Determining the specific turnover rate

As stated above, the starting point is expressed as a percentage rate of the undertaking’s relevant turnover of up to 30%, i.e, the same proportion used by the European Commission.\textsuperscript{4099} This

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\textsuperscript{4093}For instance, in Umbro the infringement concerned shirts but the OFT also included the turnover of socks and shorts. The OFT justified this approach by explaining that shirt prices had spill over effects on related products and they frequently all products were sold together as a set Umbro Holdings Ltd v. OFT [2005] CAT 22, para. 116.


\textsuperscript{4095}Penalty Guidance 2012, para 2.9. The Guidance specifies that the CMA considers a number of factors when deciding whether to depart from its general rule of using turnover from audited accounts. In particular, (i) whether the remuneration for the services is decided by the seller of the services or the client; (ii) whether the undertaking is purchasing inputs in order to supply a fresh product incorporating those inputs to its client; (iii) whether the person takes ownership of the goods and (iv) whether the person bears risks resulting from the operation of the business in question. Other particular circumstances may arise in the areas of credit, financial industries and insurance. See in this context Eden Brown Ltd and others v Office of Fair Trading [2011] CAT 8, paras 44-59.

\textsuperscript{4096}According to the Commission’s 2006 Fining Guidelines, point 15, ‘[i]n determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures’.

\textsuperscript{4097}In this situation, the CMA must have the express consent of the relevant Member State or NCA. Penalty Guidance 2012, para 2.10.

\textsuperscript{4098}Compare Commission’s 2006 Fining Guidelines, point 19.

\textsuperscript{4099}During the consultation leading to the adoption of the 2012 Guidelines, the (former) OFT suggested that a minimum starting point of 25% should be established for the most serious infringements. In particular, in the consultation
percentage range is meant to reflect adequately the seriousness of the infringement in question and, thereby, to deter the infringing undertaking and other undertakings generally from engaging in that particular practice or type of practice in the future.\textsuperscript{4100}

As is explained in the 2012 Penalty Guidance, the nature of the infringement is the decisive factor in determining the specific rate within the 30\% range. The more serious and widespread the infringement, the higher the starting point is likely to be.\textsuperscript{4101} In this regard the Guidance stresses that ‘[p]rice-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 101 and/or the Chapter I prohibition’.\textsuperscript{4102} For these cases, the CMA will use a starting point towards the upper end of the range.\textsuperscript{4103} This aspect appears to have been significantly inspired by the Commission 2006 Guidelines.\textsuperscript{4104}

In order to determine the applicable percentage of the relevant turnover a number of factors are taken into account. Such factors include, but are not limited to (i) the nature of the product, (ii) the structure of the market, (iii) the market share(s) of the undertaking(s) involved in the infringement, (iv) entry conditions and the effect on competitors, (v) third parties. Furthermore, the Guidance specifically underlines the importance of two additional considerations, namely (i) the need to deter other undertakings from engaging in such infringements in the future and (ii) the damage caused to consumers. The assessment will be made on a case-by-case basis for all types of infringement, taking account of all the circumstances of the case.\textsuperscript{4105}

\begin{thebibliography}{9}
\bibitem{4100} See stressing this point CMA decision in \textit{Commercial refrigeration} (CE/9856-14), para 7.29. See also Penalties Guidance 2012, para 2.5.
\bibitem{4101} Penalties Guidance 2012, para 2.4.
\bibitem{4102} Penalties Guidance 2012, para 2.4. See stressing the fact that horizontal cartels constitute the most serious infringements CMA decision in \textit{Property Sales} (CE/9827/13), para 6.20, available at https://assets.publishing.service.gov.uk/media/55841caee5274a15760000008/Property_sales_and_lettings_non-confidential_decision.pdf.
\bibitem{4103} This is in effect an important improvement compared to the former Guidance. Under the previous system, the starting point for the fine had to be set in a range up to 10\% of the undertakings relevant turnover. The OFT acknowledged that such starting amount resulted in far lower fines in the UK than the fines imposed in other jurisdictions for comparable infringements. See OFT, “An assessment of discretionary penalties regimes”, (OFT1132) Final Report, October 2009, at 61, available at http://londoneconomics.co.uk/wp-content/uploads/2011/09/30-An-assessment-of-the-UK-Discretionary-Penalties-Regime.pdf. In the context of average fines, this study notes that ‘[w]here firm sales in the relevant market are between €50m and €170m, UK fines [were] expected to be on average 65 per cent lower than comparable EU fines’. This study also pointed out that under the former Guidance ‘the base fine (as a proportion of firm sales in the relevant market) start[ed] at 9.3 per cent in the UK, 21.5 per cent in the EU and 20.0 per cent in the US. After initial adjustments the average fine increase[d] to 12.1 per cent in the UK, 26.5 per cent in the EU and 33 per cent in the US’.
\bibitem{4105} Cf. Commission Fining Guidelines 2006, point 23.
\bibitem{4104} Penalties Guidance 2012, para 2.6.
\end{thebibliography}
The CMA decision in CESP may clarify the question concerning the level of the starting amount in cartel cases.\textsuperscript{4106} In the CESP decision, the CMA concluded that the association of undertakings CESP (Consultant Eye Surgeons Partnership) infringed the Chapter I prohibition and Article 101(1) TFEU. In particular CESP coordinated the commercial conduct of its members (limited liability partnerships (LLPs)) by negotiating and agreeing Inclusive Private Patient Package prices (IPPP) on their behalf with PMI providers by facilitating the exchange of commercially sensitive information, including future pricing intentions. In the context of the calculation of the penalty, the CMA first commented on a number of general circumstances that had been taken into account, namely (i) the fact that the infringement was not completely secret, (ii) the fact that CESP LLPs used the IPPP agreements for around 20\% of all revenue put through the CESP LLPs, (iii) the limited scope of the infringement (which only covered the trading CESP LLPs, not the entire membership of CESP Limited) and (iv) the limited turnover directly generated through the IPPP.\textsuperscript{4107} In addition, the CMA’s assessment of the seriousness of the infringements also considered the following aspects: (i) the nature of the product/services was relevant and the price formed an important parameter of competition, (ii) the membership of CESP Limited was around 200 consultants in 2014, (iii) the national market share of all members of CESP Limited was at least 16\%, and their individual market share in local markets could be significantly higher, (iv) effect on trade between Member States had been affected, and (v) the infringements had a clear impact on the PMI providers and more indirectly on consumer and (vi) the need to deter other undertakings from engaging in such infringements. Taking the above in the round, the CMA applied a starting point of 20\% of relevant turnover for the IPPP infringement.\textsuperscript{4108}

The decision in Commercial Refrigeration, clearly reflects the importance of the nature of the infringement to calculate the starting point for the penalty. This case concerned vertical price fixing, which is considered a ‘hardcore’ restriction and a serious infringement of the Chapter I prohibition and Article 101 TFEU.\textsuperscript{4109} Therefore, the CMA stressed the strong need to deter the undertakings involved and other undertakings from engaging in such infringements in the future. However, it also noted that this type of infringements do not fall within the category of the “most serious infringements” (such as horizontal price fixing, market sharing and other cartel activities), which would normally attract a starting point towards the upper end of the 30\% range. In addition to the nature of the infringement, the CMA also took into account in assessing the seriousness that (i) price was an important competition parameter, (ii) the companies were important players in the market, (although in the last years intensity of competition amongst suppliers appeared to have increased), (iii) the market had seen new entry in recent years and (iv) the infringements reduced price competition and reduced downward pressure on the price of commercial refrigeration products. In view of these considerations, the CMA applied a starting point of 19\% of relevant turnover.\textsuperscript{4110}

The infringement in Bathroom fittings also consisted of a vertical ‘price fixing’ and thus a ‘hardcore’ restriction. However, the CMA again emphasised that such restriction does not belong to the most serious infringements of the Chapter I prohibition and Article 101 TFEU and, therefore, a

\textsuperscript{4106} See stressing this aspect the CMA decision in CESP (Case CE/9784-13), para 5.38, available at https://assets.publishing.service.gov.uk/media/5545989f40f0b609f000009/Conduct_in_the_ophthalmology_sectordecision_v2.pdf. ‘The starting point for each penalty in this case takes into account the fact that the IPPP infringement and the [PMI Provider 3] infringement are characterised as ‘price fixing’, which would generally be considered to be among the most serious infringements of the Chapter I prohibition and Article 101(1) TFEU’.

\textsuperscript{4107} CMA decision in CESP (Case CE/9784-13), para 5.39.

\textsuperscript{4108} This is the only case concerning hardcore horizontal conduct that has been fined under the 2012 Guidance. The rest of horizontal cases have all been fines under the 2004 Guidance. See e.g. decision of the CMA in Fuel Surcharges (Decision No. CA98/01/2012), para 436, available at https://assets.publishing.service.gov.uk/media/555de2a240f0b666a200001c/fuel-surcharges.pdf. In this case the penalty for BA for the infringement was based on a starting point of 8.5\%, which was below the maximum 10\% starting point under the 2004 Penalty Guidance.

\textsuperscript{4109} Although the decisions adopted in Commercial Refrigeration and Bathroom fittings concerned vertical price-fixing, the analysis conducted in these cases has a general clarifying value for cartels given that such restrictions are also considered hardcore violations.

\textsuperscript{4110} CMA decision in Commercial Refrigeration (CE/9856-14), paras 7.30-7.33, of the non-confidential version of this decision.
starting point towards the upper end of the 30% range was not needed. The assessment of seriousness of the infringements took account of the following aspects: (i) price was an important competition parameter, (ii) the relatively low market share in a fragmented market, (iii) the potential impact of the infringements on entry from other Member States and (iv) the clear impact of the infringement on resellers and the potential higher prices for consumers. Based on this assessment, the CMA applied a starting point of 18% of relevant turnover.\textsuperscript{4111}

The factors taken into account by the CMA to establish the specific percentage of the relevant turnover are not identical to those specified by the Commission in its 2006 Fining Guidelines. However, it should be kept in mind that the lists of factors provided by both competition authorities are not exhaustive. In addition, and more importantly, the (now) CMA decisions imposing fines, not only suggest that the consideration of such factors is generally meant to imperfectly measure the gains and the harm produced by the cartel,\textsuperscript{4112} the level of percentage applied in the CMA’s decisions is also quite comparable to the level commonly used by the Commission.\textsuperscript{4113}

2.2.3.3. Adjustments of the basic amount

a. Duration

The second step in the fine calculation in the UK is the adjustment for duration.\textsuperscript{4114} According to the Penalty Guidance, the amount of the fine is multiplied by not more than the number of years of the infringement. If the total duration of an infringement is more than one year, the CMA will normally round up part years to the nearest quarter year. If the total duration of an infringement is less than one year, the CMA will treat that duration as a full year.\textsuperscript{4115} In practice this rule is applied strictly.

For example, in Commercial Refrigeration, the CMA found that the infringements lasted from 6 January 2012 to 31 December 2014 (two years, 11 months and 26 days) and it accordingly applied a multiplier of three.\textsuperscript{4116}

In Bathroom Fittings, the infringements lasted from 7 February 2012 (at the latest) to 31 December 2012 (ten months and 24 days) and two of the infringements lasted from 1 February 2012 (at the latest) to 24 August 2014 (two years, six months and 24 days). Therefore, the CMA applied a multiplier of 2.75.\textsuperscript{4117}

In Property Sales the CMA also rounded up each party’s duration multiplier up to the nearest quarter year. In particular, three parties participated in the infringement from 20 July 2005 (at the latest) to 31 January 2014 (i.e. 8 years, 6 months and 12 days), and the starting amount was multiplied by 8.75. Other two undertakings participated in the infringement during 6 years and 1 month and during 1 year, 4 months and 18 days. The CMA applied an increase of 6.25 and 1.5 respectively.\textsuperscript{4118}

\textsuperscript{4111} CMA decision in Bathroom Fitting (Case CE/9857-14), paras 7.27-7.30, available at https://assets.publishing.service.gov.uk/media/573b150740f0b6155b00000a/bathroom-fittings-sector-non-conf-decision.pdf.
\textsuperscript{4112} Compare supra Chapter 10, section 5.4.
\textsuperscript{4113} As examined in Chapter 10, section 5.3.1.4, the most frequently imposed percentage of the turnover in cartel cases amounts to 17% to 19%. For the most damaging cases, such percentage was set higher.
\textsuperscript{4114} The duration of anticompetitive agreements or practices starts date of the agreement rather than the date in which the agreement comes into effect. Umbro Holdings Ltd v. OFT [2005] CAT 22, para 184.
\textsuperscript{4115} Penalties Guidance 2012, para 2.12.
\textsuperscript{4116} CMA decision in Commercial Refrigeration (CE/9856-14), para 7.35.
\textsuperscript{4117} CMA decision in Bathroom Fitting (Case CE/9857-14), para 7.32.
\textsuperscript{4118} CMA decision in Property sales (CE/9827/13), paras 6.23-6.24
The essence of the rule concerning duration is the same under the CMA Penalty Guidance as under the Commission’s 2006 Guidelines. There are however small differences when the infringement lasted less than a year. While the CMA tends to round up periods shorter than a year, the Commission as adapted its duration rule in practice to make it correspond to each month of participation in the infringement.\footnote{See supra Chapter 10, section 5.3.1.5.}

\textbf{b. Adjustment for aggravating and mitigating factors}

After adjusting the fine on the basis of the duration of the infringement, the resulting amount is subsequently increased where there are aggravating factors, or decreased where there are mitigating factors.

\textbf{(i) Aggravating factors}

Aggravating factors include: (i) persistent and repeated unreasonable behaviour that delays the CMA’s enforcement action, (ii) the role of the undertaking as a leader in, or an instigator of the infringement, (iii) the involvement of directors or senior management, (iv) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement, (v) continuing the infringement after the start of the investigation and (vi) repeated infringements by the same undertaking or other undertakings in the same group (recidivism).\footnote{Penalties Guidance 2012, para 2.14, footnote 23.} The most relevant factors are further examined below.

\textit{Persistent and repeated unreasonable behaviour}

Since the adoption of the 2012 Guidance, persistent and repeated unreasonable behaviour that delays the CMA’s enforcement action is treated as an aggravating factor. The Guidelines clarify that this sort of behaviour includes situations in which an undertaking persistently and repeatedly disrespects CMA time limits specified (for example, for providing representations on confidentiality) or otherwise persistently delays the CMA’s investigation. Nevertheless, the CMA also stresses that the full exercise of the party’s rights of defence will not be considered as unreasonable behaviour.\footnote{Penalties Guidance 2012, para 2.14.} Obstructive behaviour during the investigation is also taken into account by the Commission under its 2006 Guidelines.

\textit{Leader in or instigator of the infringement}

Just like the Commission the CAT has confirmed that the role of an undertaking as a leader in, or an instigator of, an infringement may be aggravating factor.\footnote{Case Nos 1114/1/1/09 etc Kier Group plc v OFT [2011] CAT 3, para 58.} In \textit{Property sales}, the CMA commented that certain parties played a leading role in driving forward the infringement. The increase in each case must be appropriate and proportionate in the particular circumstances of the case and adequately reflect the degree of the role of each party as a leader in, or an instigator of, the infringement. In this case, the CMA found evidence that three different
undertakings – Waterfoods, Castles and Hamptons International – were the leaders or instigators of the infringement. In particular, Waterfoods played a leading role in driving forward the infringement and was actively involved in its all aspects. In light of this, the CMA considered appropriate and proportionate to apply an increase of 10% to Waterfoods’ penalty. The other two leaders were only actively involved in certain aspects of the infringement and, therefore, the CMA only imposed a 5% increase.\textsuperscript{4123}

**Involvement of managers**

The fact that directors or senior managers – who have a significant degree of responsibility within the undertaking – are involved in the infringement also constitutes an aggravating factor. As further discussed below, the consideration of this circumstance differs from the Commission’s approach, which does not impose stricter fines for this factor. In contrast, in the UK the involvement of directors or senior managers is frequently taken into account in the calculation of the fine. The CMA normally applies an uplift of between 5 and 10% when it has evidence of director involvement in relation to a particular infringement.\textsuperscript{4124}

In *Price-fixing of Replica Football Kit*, the (former) OFT found that JJB pressurised Umbro into securing resale price maintenance because of its buyer power. Notwithstanding the pressure exerted on Umbro by JJB and MU, the OFT considered that JJB was an instigator in the infringements and consequently the basic amount of the penalty was increased by 10%.\textsuperscript{4125}

In the *UOP* decision, the OFT took the view that Mr Garry Ealing represented senior management of UKae and considered this as an aggravating factor.\textsuperscript{4126} Mr Ealing was Managing Director of UKae during the period of the infringement and was responsible for the day to day running of the business, although he was required to report to a Board.\textsuperscript{4127}

In the *Leeds Bus* case, the staff of both Arriva and FirstGroup who participated in the meetings at which the market sharing agreement was concluded, were all at senior level. The (former) DGT considered that the involvement of senior executives (including divisional directors) of two major public transport undertakings in the agreements was an aggravating factor and increased the penalties by 10 per cent.\textsuperscript{4128}

In *Price-fixing of Replica Football Kit*, senior management including Mr Whelan, chairman, and the late Mr Sharpe, then CEO, were involved in the infringements. This was treated as an aggravating factor and the basic amount of the penalty was further increased by 20%.\textsuperscript{4129}

\begin{footnotesize}
\textsuperscript{4123} CMA decision in *Property sales* (CE/9827/13), paras 6.28-6.34.
\textsuperscript{4124} Case Nos 1114/1/1/09 etc Kier Group plc v OFT [2011] CAT 3, para 59.
\textsuperscript{4126} Unfortunately, the percentage of increase was confidential.
\textsuperscript{4127} OFT decision No. CA98/08/2004 of 8 November 2004 (Case CE/2464–03), *Agreement between UOP Limited, UKae Limited, Thermoseal Supplies Ltd, Double Quick Supplyline Ltd and Double Glazing Supplies Ltd to fix and/or maintain prices for desiccant*, para 348, available at https://assets.publishing.service.gov.uk/media/555de4b6ed915d7ae5000160/uopdecision.pdf.
\textsuperscript{4129} See OFT decision in *Fixing of Replica Football Kit* (CA 98/06/2003), para 674 and the appeal proceeding in Umbro Holdings Ltd v. OFT [2005] CAT 22 (judgment on penalty), paras 62 and 203.
\end{footnotesize}
In *Bathroom fittings* the CMA applied increased the penalty by 10% for the involvement in the infringements of the Board, including Ultra’s Managing Director, [Managing Director], and its Chairman, [Director]. This decision specified that ‘the Board considered the Trading Guidelines on at least two occasions (before and after receipt of legal advice) and approved their implementation. It was also sent a slide pack about the trading guidelines prepared for internal sales meetings, and was updated on progress on at least two occasions after initial implementation. Further, the Managing Director of UFL at the time was involved in planning the Trading Guidelines. Further, [Director] (a director and the sole shareholder of UFGL at the time) was copied into Ultra’s email of 9 December 2011 concerning the introduction of the Trading Guidelines. Consequently, the CMA consider[ed] that not only were the senior directors of Ultra involved in the infringements but UFGL was, or should have been, aware of the Trading Guidelines’. 4130

In *Property sales*, the CMA also applied an increase of 10% to the penalty for the involvement in the infringement of the directors and senior management of Three Counties ([the Managing Director of Waterfords], acting as Director of Three Counties), Waterfords ([the Managing Director]) and Castles ([the Managing Director]). Each of the above individuals was engaged in important aspects of the infringement such as active participation in meetings, encouraging members to comply with the illegal agreement and actively enforcing the agreement and monitoring compliance.4131

In *Spacer bars*, the (former) OFT took the view that a number of managers had been directly involved in the infringement. For instance, the OFT found that Jim Sander represented senior management of DQS. Mr Sander was managing director of DQS at the time of the infringement and was responsible for the day to day running of the business. The OFT considered that even if he had relatively little knowledge of the workings of the business, his presence at the meeting of the parties during which the agreement was concluded, and the fact that at that time he did not publicly distance himself from that agreement, is sufficiently serious to warrant taking this into consideration as a further aggravating factor.4132

In the *Hasbro* case, the (former) DGT took the view that Hasbro’s senior management represented by David Bottomley was fully aware of what the Distributors’ agreements involved and actively encouraged their implementation. In this case, the DGT considered that ‘for management involvement to be an aggravating factor it is not necessary for the top management at main board director level to be involved. The involvement of senior management, especially where it was the driving force behind the infringement, is sufficiently serious to warrant taking this into consideration as an aggravating factor. Furthermore, Hasbro submitted that the fact that senior management ignored Hasbro’s compliance programme should lead the Director to conclude that senior management involvement is not an aggravating factor. The DGT, however, replied that it did not see how senior management expressly ignoring its company’s own compliance programme can lead to the consideration that the involvement of senior management is less serious. The DGT decided to apply an increase of 10%. 4133

4130 CMA decision in *Bathroom Fitting* (Case CE/9857-14), paras 7.34-7.37
4131 CMA decision in *Property sales* (CE/9827/13), paras 6.26-6.27.
4132 Unfortunately, the percentage of increase was not published in this decision. Decision of the OFT No. CA98/04/2006 of 28 June 2006, *Agreement to fix prices and share the market for aluminium double glazing spacer bars*, para 628, available at https://assets.publishing.service.gov.uk/media/555de4d0ed915d7ae500017a/spacerbars.pdf.
4133 Decision of DGF No. CA98/18/2002 of 28 November 2002 (Case CP/0239-01), Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games, paras 89-90, available at https://assets.publishing.service.gov.uk/media/555de4c3ed915d7ae200016b/hasbro.pdf.
Other cases in which this aggravating factor was also applied are *Flat-roofing* *(NER)*, and *Stock Checks Pads*.135 136

**Coercion**

Undertakings which use coercive means to “oblige” other firms to remain and implement the term of the illegal arrangement are also more severely punished. This factor is also in line with the Commissions 2006 Fining Guidelines.

For example, in *Price-fixing of Replica Football Kit*, the OFT observed that Umbro ‘punished’ other undertakings which did not cooperate with the price-fixing agreements or with it by refusing or delaying supplies to Sports Connection, JD and Sports Soccer. According to the OFT, this was a key part of Umbro’s role within the infringements. The retaliatory measures taken by Umbro were regarded as an aggravating factor and the basic amount of the penalty was subsequently increased.137

**Repeated infringements**

The concept recidivism is interpreted as the continuation or repetition of the same or a similar infringement by an undertaking after the CMA, one of the concurrent regulators or the European Commission has issued a decision that the undertaking had infringed Article 101 TFEU and/or the Chapter I prohibition (or 102 TFEU and/or the Chapter 2 prohibition). Such factor is, however, only taken into account when the prior infringement had an impact in the UK.138

The CMA considers that infringements are ‘the same or similar’ when they fall under the same provision of the Competition Act 1998 or equivalent provision of the TFEU. For instance, an infringement decision under the Chapter I prohibition or Article 101 TFEU could be counted as a ‘same or similar’ infringement when assessing the penalty for another infringement of Chapter I or Article 101 TFEU. The Guidelines clarify that the CMA does normally not apply an uplift for recidivism in respect of decisions adopted more than 15 years before the start of the infringement for which the current penalty is being set.139 Taken as a whole the CMA policy for repeated infringements is generally coherent with the European case law as well as with the Commission’s fining decisions.

With respect to the specific increase deriving from this sort of behaviour, the Guidelines note that the amount of the fine may be increased by up to 100% for each infringement established. The actual

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134 Decision of the OFT No. CA98/02/2005 of 16 March 2005 (Case CE/1777-02), *Collusive tendering for felt and single ply flat-roofing contracts in the North East of England*, para 294, available at https://assets.publishing.service.gov.uk/media/555de4beed915d7ae2000167/ner.pdf. (*The OFT is aware that there was involvement in at least some of the infringements on the part of a director of Briggs. The OFT considers this an aggravating factor and increases the penalty by [...] per cent*).
135 Decision of the OFT No. CA98/03/2006 of 31 March 2006 (Case CE/3861-04), *Price fixing and market sharing in stock check pads*, para 296, available at https://assets.publishing.service.gov.uk/media/555de4bced915d7ae5000166/stockcheckpads.pdf. (*The OFT has evidence that Kevan Winward, a director of Achilles, 278 was involved in the infringement. The OFT considers that this is an aggravating factor and increases the penalty by [...] per cent*).
136 These cases simply comment that this mitigating factor was applied without specifying the percentage of increase.
137 OFT decision in *Fixing of Replica Football Kit* (CA 98/06/2003), para 590.
amount of any such increase for recidivism is further determined on a case-by-case basis, having regard to all relevant circumstances.\(^\text{4140}\)

Unfortunately, the decisions of the CMA do not provide any indication as to the increase that is normally applied in practice for repeated infringements under the 2012 Penalty Guidance. Still, the current (potential) percentage of increase of up to 100% per infringement – which is fully aligned with the Commission’s approach – may lead to a far harsher policy than the previous 2004 Penalty Guidance. Although the former fining methodology only stated that repeated infringements were considered an aggravating factor (without further specifying the specific percentage of increase),\(^\text{4141}\) in practice the commission of multiple infringements was only slightly reflected in the fine calculation.

This is well illustrated by the *Flat-roofing contracts* (Scotland) decision. In this case the (former) OFT noted that the commission of repeated infringements constituted an aggravating factor and the magnitude of the penalty had to be adjusted to reflect the number of infringements of each party. The precise amount of the increase for multiple infringements, had to be, in the OFT’s view, fair and proportionate between all parties. In this assessment (i) the absolute frequency of infringements by each party, (ii) the relative frequency between the parties in relation to the relevant market and (iii) the qualitative differences between the infringements were taken into account. After this assessment, the OFT decided to increase the fines by multiples of 10% for each repeated violation. Following this rule, two previous infringements resulted in a 10% increase; three in 20% increase, four in 30%, and so on.\(^\text{4142}\)

(ii) Mitigating factors

The Guidelines also list a number of mitigating factors, including: (i) the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure, (ii) genuine uncertainty as to whether the agreement or conduct constituted an infringement, (iii) having taken adequate steps to ensure compliance with Articles 101 (and 102) TFEU and the Chapter I (and Chapter II) prohibition, (iv) termination of the infringement as soon as the CMA intervenes and (v) cooperation which enables the enforcement process to be concluded more effectively and/or speedily.\(^\text{4143}\) The most relevant and frequently applied factors are further discussed below.

*Role of the undertaking (acting under pressure)*

In contrast to the Commission’s policy, in the UK the fact that an undertaking decides to form a cartel or to continue in it as a result of pressure can be accepted as a mitigating factor. However, this mitigating circumstance is interpreted strictly given its great potential to be abused. The (now) CMA decisions imposing fines indicate that, while the pressure of the market conditions cannot lead to a reduction, pressure from other competitors to conclude an illegal agreement may lead to a fine reduction.

\(^{4140}\) Ibid.
\(^{4141}\) Ibid, para 2.15.
\(^{4142}\) Decision of the OFT No. CA98/01/2005 of 15 March 2005 (Case CE/1925-02), *Collusive tendering for mastic asphalt flat-roofing contracts in Scotland*, para 376, available at https://assets.publishing.service.gov.uk/media/555de4bae5274a74ca000145/scot.pdf
\(^{4143}\) See Penalties Guidance 2004, para 2.15.
For example, in *Leeds Bus*, Arriva claimed that its staff had been acting under duress or pressure. The (former) DGT, however, did not agree with this view and explained that internal pressure to achieve targets or the pressure from difficult market conditions could not be considered as pressure in within the meaning of this mitigating factor.\footnote{Decision of the DGT No. CA98/9/2002 of 30 January 2002 (Case CP/1163-00), *Market sharing by Arriva plc and FirstGroup plc*, para 66.}

In *Replica football kit price-fixing* this factor was accepted and the amount of the fine was reduced. In this case the (former) OFT accepted that, although Umbro had been an instigator of the infringements, this firm acted under commercial pressure from JJB (as a large customer) and MU (as an important licensor). The decision clarified that Umbro was a relatively small manufacturer and was more susceptible to this sort of commercial pressure. The OFT regarded its role as predominantly (although not exclusively) reactive and, therefore, decreased the basic amount.\footnote{OFT decision in *Fixing of Replica Football Kit* (CA 98/06/2003), para 594. Once again the percentage of reduction was deleted from the decision for confidentiality reasons.}

**Genuine uncertainty**

The CMA may decrease the penalty when the undertaking is genuinely uncertain as to the illegality of the agreement or conduct in question. This mitigating circumstance can be equated with the factor concerning authorization or encouragement by public authorities or by legislation, under the Commission’s 2006 Guidelines.\footnote{Commission Fining Guidelines 2006, point 29.} The (now) CMA, normally applies reductions in the range of 10%-15%.

In *Property sales*, the CMA decreased the penalty by 15% for four undertakings on account of this factor. In this case it appears that the undertakings’ uncertainty arose following certain communications between them and the (former) OFT in 2008. Given the particular circumstances of this case, the CMA considered that it would be appropriate and proportionate to apply a decrease.\footnote{CMA decision in *Property sales* (CE/9827/13), paras 6.39-6.40.}

Likewise, in CESP (*Privately funded ophthalmology*), the CMA considered that it was appropriate to decrease the penalty by 10% to reflect that there was genuine uncertainty among CESP Limited and its members as to whether the collective setting of prices under the IPPP infringed competition law.\footnote{CMA decision in *CESP* (Case CE/9784-13), paras 5.46-5.47. No further reasons as to the cause of such uncertainty were mentioned in this decision.}

**Compliance**

The Guidelines state that, in principle, the CMA position with regard to competition law compliance activities is neutral.\footnote{Penalties Guidance 2012, footnote 26.} Hence, the mere existence of compliance activities is not treated as a mitigating factor. Nevertheless, the CMA is willing to ‘consider carefully whether evidence presented of an undertaking’s compliance activities in a particular case merits a discount’.\footnote{Penalties Guidance 2012, footnote 26.} In particular, if an undertaking can demonstrate that its senior management has taken adequate steps to achieve a clear and unambiguous commitment to achieving a competition law compliance culture throughout the organisation, from the top down, this will likely be treated as a mitigating factor. The consideration of compliance programmes as a mitigating factor deviates from the model provided...
by the Commission’s 2006 fining policy, under which reductions have never been granted on the basis of this factor.\footnote{See supra Chapter 10, section 5.4.}

According to the CMA, the condition to show that adequate steps have been taken includes: (i) introducing or reviewing and changing compliance activities as appropriate in the light of the events that led to the investigation in question (ii) appropriate competition law risk identification, risk assessment, risk mitigation and risk review, and (iii) board level (or other senior management) commitment to and accountability for the resulting compliance programme.\footnote{Penalties Guidance 2012, footnote 26.}

On the other hand, the CMA acknowledges that in very exceptional cases the existence of compliance activities may be seen as an aggravating factor. This may occur, for example, when compliance activities are used to conceal or facilitate an infringement, or to mislead the OFT during its investigation.\footnote{The OFT has published guidance to assist businesses to achieve competition law compliance. See www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance}

In practice, this mitigating factor is frequently applied and the reductions in fines amount as a general rule to up to 10%.

The decision in Commercial Refrigerators stated that after the CMA’s investigation, ITW introduced a comprehensive competition law compliance programme, to which its Board had fully and publicly committed. The CMA stressed that the identified compliance activities of ITW demonstrated ‘a clear and unambiguous commitment to and accountability for competition law compliance by Board/senior management, in that they have engaged in appropriate steps relating to risk review’. In addition, the firm concerned provided evidence that senior managers would be trained in competition compliance. ITW also planned to submit a report to the CMA on its compliance activities every year, for the next three years. ITW committed to ensure that such culture of compliance would be disseminated throughout the whole group of companies. In the view of these circumstances, the CMA decreased the penalty by 10%.\footnote{CMA decision in Commercial Refrigeration (CE/9856-14), paras 7.40-7.44.}

\textit{In Bathroom fittings}, Ultra also introduced a comprehensive competition law compliance programme after the CMA’s investigation. After making similar observation as in Commercial Refrigeration, the CMA considered appropriate to decrease the penalty by 5%.\footnote{CMA decision in Bathroom Fitting (Case CE/9857-14), paras 7.41-7.45.}

\textit{In Property sales}, the CMA also found that the evidence submitted by the undertakings about their compliance activities satisfied the relevant conditions. Accordingly, the CMA decreased the fine by 5% for Waterfords and Hamptons International.

In CESP, the CMA decided to apply a 10% reduction for the introduction of a compliance programme. In this case, CESP introduced an organisation-wide competition law compliance programme after the CMA’s investigation. The CMA noted that the compliance programme adopted by CESP marked a significant change in CESP Limited and its members’ approach to competition law compliance. The CMA also stressed that CESP commitment to compliance set a good example for other membership organisations in the medical professions.\footnote{CMA decision in CESP (Case CE/9784-13).}

Interestingly, the decision in Leeds Bus, states that ‘[a] memorandum signed by Mr Wallace […], confirmed that he had received Arriva’s training with regard to the Act. Mr Harvey was also aware
of the Arriva Competition Compliance Programme under which the meeting on 14 March 2000 should have been reported. None of the staff reported the meetings of 14 and 17 March 2000 under their companies’ compliance programmes, although they reported other meetings with competitors on the relevant forms. Despite the fact that this illegal market sharing agreement was not reported in accordance with the (well known) compliance programmes, the DGT found that such genuine compliance systems appeared to be generally followed and adhered to. As a result the penalties would be reduced by 10 %.  

In Hasbro, the (former) DGT commented that the existence of the compliance programme which could lead to a reduction was offset by the fact that it was blatantly ignored at a very senior level within Hasbro. However, the Director also pointed that following the infringement, Hasbro organised a specific competition law training programme for its senior management and sales staff and training in competition law for new staff. This measure was considered as a mitigating factor and led to a 10% reduction.

The lack of effectiveness of certain compliance programmes is also illustrated by the UOP case. According to this decision, UOP underlined that it took compliance with competition law extremely seriously. This firm, however, acknowledged that the fact that the infringement took place highlighted deficiencies in the compliance programme. Therefore, it had taken steps to improve its competition law compliance programme after the commencement of the OFT’s investigation. Furthermore, this undertaking stressed that it had taken disciplinary measures and as remedial actions. Although the (former) OFT observed that failing to ensure compliance with regard to a small part of UOP’s business for several years was unacceptable, it still reduced the fine.

Other cases in which fines were reduced on the basis of this mitigating factor include inter alia, Stock Check Pads, Replica Football Kit, Flat-roofing (West Midlands) and Flat-roofing (North East England).

**Cooperation in the investigation**

Cooperation which enables the enforcement process to be concluded more effectively and/or speedily is in principle a mitigating factor for the CMA. The Guidance specifies that cooperation over and above respecting CMA’s time limits will be necessary, but still not sufficient to merit a reduction under this step. This mitigating factor is not applicable when an undertaking is benefiting

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4157 Decision of the DGT No. CA98/9/2002 of 30 January 2002 (Case CP/1163-00), Market sharing by Arriva plc and FirstGroup plc, para 16.
4158 Ibid, para 66.
4159 Decision of DGF No. CA98/18/2002 of 28 November 2002 (Case CP/0239-01), Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games, para 92.
4160 OFT decision No. CA98/08/2004 of 8 November 2004 (Case CE/2464-03), Agreement between UOP Limited, UKae Limited, Thermoseal Supplies Ltd, Double Quick Supplyline Ltd and Double Glazing Supplies Ltd to fix and/or maintain prices for desiccant, para 338. The reduction applied in this case is not mentioned.
4161 Decision of the OFT No. CA98/03/2006 of 31 March 2006 (Case CE/3861-04), Price fixing and market sharing in stock check pads, para 297.
4162 OFT decision in Fixing of Replica Football Kit (CA 98/06/2003), para 595. The reduction applied in this case is not mentioned.
4163 Decision of the OFT No. CA98/1/2004 of 16 March 2004 (Case CP/0001-02), Collusive tendering in relation to contracts for flat-roofing services in the West Midlands, para 403, available at https://assets.publishing.service.gov.uk/media/555de4b5ed915d7ae2000161/westmidlandsroofing.pdf This decision stated that ‘The OFT is aware of the remedial action taken by Apex since its discovery of the infringement. Apex has advised its directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme. The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by […] [C] per cent’.
from the leniency programme because continuous and complete cooperation is a condition of leniency.\textsuperscript{4165} Once again this mitigating factor is quite similar to the Commission’s approach.\textsuperscript{4166}

In practice, fines are frequently reduced on the basis of this mitigating circumstance. The most common reductions range from 5\% to 10\%.\textsuperscript{4167}

For example, in \textit{Commercial Refrigeration} the CMA found that ITW promptly made key staff available for voluntary interviews, attended meetings at the CMA’s offices and responded to requests for information and other communications from the CMA in a timely and constructive fashion. Such cooperation went beyond the minimum required by the CMA and enabled the enforcement process to be concluded more efficiently. Accordingly, a 10\% reduction was applied.\textsuperscript{4168}

The same reduction was applied in \textit{CESP}. This association of undertakings also made its key staff available for voluntary interviews and meetings at the CMA’s offices, responded promptly and comprehensively to all voluntary requests for information. In addition, it voluntarily submitted evidence which assisted in improving the CMA’s estimates of the size of the market. This behaviour enabled the CMA to conclude its process more efficiently.\textsuperscript{4169}

A lower reduction of 5\% was applied in \textit{Bathroom fittings} and \textit{Property sales}. In these cases the parties involved also made their staff available for meetings and interviews and responded promptly to all voluntary requests for information.\textsuperscript{4170}

This mitigating circumstance also led to the application of fine reductions in inter alia \textit{Space Bars},\textsuperscript{4171} \textit{Flat-roofing (North East England)},\textsuperscript{4172} \textit{Stock Check Pads},\textsuperscript{4173} \textit{Replica Football Kit}.\textsuperscript{4174}

\textsuperscript{4165} See, e.g., Umbro Holdings Ltd v. OFT [2005] CAT 22 (judgment on penalty), para. 333. See also Decision of the DGT No. CA98/9/2002 of 30 January 2002 (Case CP/1163-00), \textit{Market sharing by Arriva plc and FirstGroup plc}, para 67. This decision indeed stated that ‘[t]he Director is normally minded to give a reduction in a penalty when a party has cooperated with his investigation. However, as both Arriva and FirstGroup benefit from the leniency programme and as a condition of being granted leniency they both agreed to co-operate with the Director, he does not consider that there should be an additional reduction in the penalties under this head to reflect that co-operation’.
\textsuperscript{4166} Commission Fining Guidelines 2006, point 29.
\textsuperscript{4167} In this regard it is interesting to note that the Commission’s reductions can be at times relatively higher (see \textit{supra} Table 3).
\textsuperscript{4168} CMA decision in \textit{Commercial Refrigeration} (CE/9856-14), paras 7.38-7.39.
\textsuperscript{4169} CMA decision in \textit{CESP} (Case CE/9784-13), para 5.49.
\textsuperscript{4170} CMA decision in \textit{Bathroom Fitting} (Case CE/9857-14), paras 7.39-7.40; CMA decision in \textit{Property sales} (CE/9827/13), para 6.36.
\textsuperscript{4171} Decision of the OFT No. CA98/04/2006 of 28 June 2006, \textit{Agreement to fix prices and share the market for aluminium double glazing spacer bars}, para 592. The reduction applied in this case is not mentioned.
\textsuperscript{4172} Decision of the OFT No. CA98/02/2005 of 16 March 2005 (Case CE/1777-02), \textit{Collusive tendering for felt and single ply flat-roofing contracts in the North East of England}, para 310. The reduction applied in this case is not mentioned.
\textsuperscript{4173} Decision of the OFT No. CA98/03/2006 of 31 March 2006 (Case CE/3861-04), \textit{Price fixing and market sharing in stock check pads}, para 271. This decision stated that ‘[t]he Director is normally minded to give a reduction in a penalty when a party has cooperated with his investigation. However, as both Arriva and FirstGroup benefit from the leniency programme and as a condition of being granted leniency they both agreed to co-operate with the Director, he does not consider that there should be an additional reduction in the penalties under this head to reflect that co-operation’.
\textsuperscript{4174} OFT decision in \textit{Fixing of Replica Football Kit} (CA 98/06/2003), para 596. Although the reduction applied in this case is not mentioned, this decision clarified that ‘[OFT’s admissions] gave the OFT a more complete picture of events and this led partly to the issue of the Supplemental Rule 14 Notice as a result. The OFT relies on the admissions made as set out in detail in Part III above particularly in relation to the Replica Shirts Agreements’.

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Termination of the infringement

The CMA may decrease the penalty to reflect termination of an infringement as soon as the CMA intervenes. In line with the Commission’s view, this factor is as a general rule not applied in cartel cases.

*In Stock Check Pads*, one undertaking (Achilles) argued that this factor should be applied as it ceased its involvement in the infringement as soon as the (former) OFT intervened. The OFT, however, took the view ‘that in an infringement that involves horizontal price fixing and market sharing it is not appropriate to give a party a reduction in penalty merely because it ceases its involvement in the infringement following the OFT’s intervention’. 4175

2.2.3.4. Adjustment for deterrence and proportionality

The 2012 Guidance provides a fourth step which enables the CMA to adjust fines on the basis of specific deterrence and proportionality considerations.

The adjustment for specific deterrence and proportionality is mainly based on the size and financial position of the undertaking including, where they are available, total turnover, profits, cash flow and industry margins. In this context, the CMA pays attention to two different moments: the moment of imposing the sanction and the period during which the infringement was committed. 4176

The increase for deterrence is specifically designed ‘to ensure that the penalty to be imposed on a financially large undertaking will deter it from breaching competition law in the future’ (i.e. specific deterrence). 4177 The Guidelines clarify that the increase for deterrence is generally applied only in two types of cases. First, when an undertaking has a significant proportion of its turnover outside the relevant market. Second, when the CMA has evidence that the economic benefit deriving from the infringement surpasses or is likely to surpass the level of penalty. The CMA explains that its estimate of the gains would include any gains of the undertaking in the relevant market and in other product or geographic markets. 4178 This step in the calculation seems to correspond to the deterrence multiplier used by the European Commission after the consideration of mitigating and aggravating factors. 4179

In assessing the appropriate level of uplift for specific deterrence, the CMA must ensure that the increase does not result in a penalty that is disproportionate or excessive. 4180 If the CMA finds that the overall penalty is not appropriate or excessive it may decide to lower it. 4181 This proportionality assessment is conducted having regard to the undertaking’s size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking’s

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4175 Decision of the OFT No. CA98/03/2006 of 31 March 2006 (Case CE/3861-04), Price fixing and market sharing in stock check pads, para 298.
4176 Penalties Guidance 2012, point 2.16.
4177 Ibid, point 2.17.
4178 Ibid, point 2.18. In addition, there might be exceptional cases in which an undertaking's relevant turnover is very low or zero or in which the relevant turnover did not accurately reflect the scale of an undertaking's involvement in the infringement. In such “misleading” cases, the CMA may still exceptionally make deterrence adjustments.
4180 Penalties Guidance 2012, point 2.19.
4181 Ibid, point 2.20.
infringing activity on competition.\footnote{Ibid, point 2.20.} The proportionality assessment conducted by the CMA can be seen as a deviation from the Commission’s fining policy. In particular, the Commission relies on the 10% global turnover limit to ensure that fines are proportional. The CMA consideration of proportionality reminds us in a certain way of the interpretation of the 10% turnover limit by the Bundeskartellamt as a maximum fine, which should only be imposed in extremely serious cases.\footnote{See supra section 2.1.4.2 of this Chapter.} On the other hand, it should be kept in mind that the Commission exercised its margin of discretion under the 2006 Guidelines and reduced the fines of mono-product undertakings to prevent that such fines would systematically reach the 10% ceiling.\footnote{See e.g. Case COMP/39.452 — Mountings for windows and window doors [2012] OJ C 292/6, paras 518-523. See supra Chapter 10, section 5.3.1.11.}

In practice, the adjustment for deterrence and proportionality may, thus, result in either an increase or a decrease to the penalty.\footnote{This conclusion was reached on the basis of the impact of ITW’s infringing activity on competition. See supra Chapter 10, section 5.3.1.11.} While adjustments for deterrence are quite uncommon, in contrast, proportionality adjustments often made.

In \textit{Commercial Refrigeration}, the CMA considered that ITW’s penalty should be decreased for proportionality reasons.\footnote{See supra, para 7.45.} This conclusion was reached on the basis of the impact of ITW’s infringing activity on competition.\footnote{The amount of decrease was not mentioned in this decision.} In particular, the CMA noted that while ITW’s ability to advertise and sell products at discounted prices on the internet could intensify price competition, the proportion of sales of Foster products directly affected by the infringement, that is online sales, was low.\footnote{With respect to the rest factor that are relevant in the proportionality assessment, the CMA concluded that the financial position of ITW did not merit a reduction. The same was stated as regards the nature of the infringements (which was considered a serious breach), and as regards the role of ITW in the infringements (which was the leader of the infringement). CMA decision in \textit{Commercial Refrigeration} (CE/9856-14), para 7.47.} The proportionality test also led to a reduction of the fine of Ultra Group in \textit{Bathroom fittings}. In this case, the CMA found that the amount of the fine would be disproportionate with regard to the Ultra Group’s size and financial position. For example, the CMA noted that the unadjusted fine would: (i) amount to a substantial proportion of the Ultra Group’s total worldwide turnover (ii) be significantly in excess of the Ultra Group’s profit after tax, and (iii) be significantly in excess of the Ultra Group’s net assets.\footnote{The amount of decrease was not mentioned in this decision.} After this adjustment, the CMA finally concluded the adjusted penalty was appropriate to deter the Ultra Group from breaching competition law in the future without being disproportionate or excessive.\footnote{Ibid, paras 7.47-7.48.}

Similar considerations are found in \textit{CESP}. In this case the CMA also decreased the amount of the fine due to proportionality reasons, and, in particular, due to the specific financial position of \textit{CESP}.\footnote{These three considerations were made as regards the year ending 31 December 2014 and as an average over the last three financial years. The rest of the consideration would not have led to a “proportionality reduction” since the infringement was of serious nature and the Ultra Group was the leader of the infringement.}
2.2.3.5. Maximum fine adjustments and double jeopardy

The final amount of the penalty may not exceed 10% of the worldwide turnover of the undertaking in its last business year. The “last business year” is the one preceding the date of the CMA’s decision or, if figures are not available for that business year, the one immediately preceding it. This adjustment is made before the fine is further adjusted on the basis of leniency or settlement discounts. If an infringement committed by an association of undertakings (for example, a trade association) relates to the activities of its members, the fine should not exceed 10% of the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement. These rules concerning the maximum fine fully reflect the applicable rules at European level.

Furthermore, if a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State, the CMA must take that penalty or fine into account when setting its own fine. This adjustment is made to ensure that double jeopardy is avoided. Most frequently, no further adjustments are needed under this step.

2.2.4. A brief discussion of the CMA’s fining practice

A closer look at the fining practice shows that the UK Competition Authority imposes significant fines in some horizontal price-fixing and market sharing cartels. A number of recent and relevant cases are briefly discussed below.

A notable fine was imposed by the OFT in the Passenger Fuel Surcharges cartel. In this decision, the OFT concluded that the parties infringed Article 101 TFEU and the Chapter I prohibition by participating, between August 2004 and January 2006, in an agreement by which they coordinated their pricing in relation to their respective passenger fuel surcharges for long-haul flights through the exchange of pricing and other commercially sensitive information. In April 2012, £58.5m fine was imposed on British Airways, while the other party to the infringement (Virgin Atlantic Airways) received immunity. Although this amount does not seem low, at least at first sight, the calculation of the penalty was made under the former Penalties Guidance of 2004, under which the starting point could not exceed 10% of each undertaking's relevant turnover. It can therefore be

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4192 Penalties Guidance 2012, point 2.21.
4193 Ibid, point 2.22.
4194 Ibid, point 2.21.
4195 Ibid, point 2.24. See also Article 38(9) of the Competition Act 1998.
4196 See e.g. CMA decision in Commercial Refrigeration (CE/9856/14), paras 7.49-7.50; CMA decision in Bathroom Fitting (Case CE/9857/14), paras 7.50-7.51; CMA decision in Property sales (CE/9827/13), paras 6.59-6.61; CMA decision in CESP (Case CE/9784-13), paras 5.60-5.62.
4197 In the context of an early resolution agreement the OFT and BA had however agreed that a fine of £121.5 million was to be imposed (see OFT, Press Release 113/07 of 1 August 2007, “British Airways to pay record £121.5 million penalty in price fixing investigation”, available at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2007/113-07. The OFT commented in its press release that the reduction in BA’s fine reflected the recent case law of the CAT regarding the calculation of penalties and the fact that the overall value to the OFT’s investigation of BA’s cooperation was greater than had originally been anticipated. See OFT, Press Release 33/12 of 19 April 2012, “British Airways to pay £58.5 million penalty in OFT fuel surcharge decision”, available at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2012/33-12.
4198 Penalty Guidance 2004, point 2.8.
assumed that if the sanction would be calculated under the current methodology, a far higher fine may have been imposed.4199

Another remarkable fine was imposed in January 2011, in the Royal Bank of Scotland decision. In this case, a £28.6m fine was imposed on Royal Bank of Scotland, with the other party to the infringement (Barclays) receiving immunity. The OFT found that these parties had unlawfully exchanged confidential, commercially sensitive pricing information.4200

The cartel in the Construction Sector in England is one of the most (in)famous competition cases in the UK. In September 2009, the OFT imposed fines totaling £129.2 million on 103 construction firms. The highest individual penalty was imposed on Kier and amounted to £17.9 million.4201 The OFT found that these undertakings had engaged in illegal anti-competitive bid-rigging activities in 199 tenders from 2000 to 2006, generally in the form of ‘cover pricing’. The OFT explained that ‘[c]over pricing is where one or more bidders in a tender process obtains an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which gives a misleading impression to clients as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender’.4202 The OFT also stressed that in 11 tendering rounds, the lowest bidder faced no real competition because the rest of the bids were cover bids. This led to an even greater risk that the client may have unknowingly paid a higher price. Furthermore, the OFT found that in some cases successful bidders had paid an agreed sum of money to the unsuccessful bidder (known as a ‘compensation payment’). These payments of between £2,500 and £60,000 were facilitated by the raising of false invoices. According to the OFT’s estimation, the infringements affected building projects across England worth in excess of £200 million, including schools, universities and hospitals.4203 This decision was appealed by 25 undertakings.4204 On appeal, The CAT significantly reduced the fines of the companies. For instance, the fine of Kier was lowered from £17.9 million pounds to £1.7 million. In essence, the CAT found that the OFT had used incorrect turnover figures to calculate the fines4205 and, most importantly, the CAT underlined that the fines were calculated with the view of ensuring deterrence, which in fact had led to penalties that were excessive and disproportionate.4206 These CAT judgements led the OFT to modify its Penalty Guidance in 2012, by introducing the step concerning the proportionality assessment.

The only horizontal cartel that has been fined in accordance with the most recent 2012 Penalty Guidance concerns the CESP case. The decision imposes a fine of £500,000 on CESP Limited, a membership organisation of private consultant ophthalmologists. CESP admitted its responsibility for creating anticompetitive pricing agreements across their extensive network of surgeons and medical partnerships. The £500,000 fine was to be reduced though to include (i) a discount of 10%

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4199 Decision of the OFT No. CA98/01/2012 of 19 April 2012 (Case CE/7691-06), Airline passenger fuel surcharges for long-haul flights. Infringement of Chapter I of the CA98 and Article 101 of the TFEU by British Airways Limited and Virgin Atlantic Airways Limited, available at https://assets.publishing.service.gov.uk/media/555de2a240f0b666a200001c/fuel-surcharges.pdf
4200 Decision of the OFT No. CA98/01/2011 of 20 January 2011, Infringement of Chapter I of the CA98 and Article 101 of the TFEU by Royal Bank of Scotland Group plc and Barclays Bank plc., available at https://assets.publishing.service.gov.uk/media/555de2a0e5274a74ca000023/CE8950_08_dec.pdf
4201 See for a Table listing all the parties and the fines imposed https://assets.publishing.service.gov.uk/media/555de4c6e5274a74ca000015/puterfies2.pdf
4202 This decision was appealed
4204 This statement was published in the (now) CMA website https://www.gov.uk/cma-cases/construction-industry-in-england-bid-rigging
4206 This statement was published in the (now) CMA website https://www.gov.uk/cma-cases/construction-industry-in-england-bid-rigging
for CESP Limited for the adoption of a compliance programme and (ii) a settlement discount of 15%. After these adjustments, the final penalty amounted to £382,500.  

Another more modest fine was imposed in the Home Medicine cartel case. In March 2014, the (former) OFT issued a decision finding that Hamsard, (together with its subsidiaries Quantum and Total Medication Management Services), and Celesio AG (together with its subsidiary Lloyds Pharmacy Ltd), had infringed competition law by entering into a market sharing agreement in relation to the supply of prescription medicines to care homes in England. Under this market sharing agreement, the undertakings agreed that one party (Tomms) would not supply prescription medicines to existing Lloyds’ care home customers for six months (namely, between May 2011 and November 2011). In return, for at least some of the time, Lloyds also agreed not to supply prescription medicines to existing Tomms’ care home customers. A fine of £370,226 was therefore imposed on Hamsard and its subsidiaries. Lloyds, on the other hand, was the first company to bring the matter to the OFT’s attention and received immunity under the leniency policy.

Other significant fines have been imposed in vertical price fixing cases, including inter alia Dairy products (£49.51) and Tobacco (£225 million).

### 2.2.5. Assessment: (how) can the CMA’s Fining Guidance improve the Commission’s policy?

The CMA’s antitrust fining policy shows significant convergence with the Commission’s cartel fining system. Important similarities can be identified with respect to (the interpretation of) the maximum fine of 10% of the global undertaking’s turnover, the (interpretation) of the concepts of negligence and intent as conditions to establish infringements, the notion of undertaking and even the (newly stressed) emphasis on deterrence. Likewise, the CMA calculation method of fines for undertakings is essentially in line with the Commission 2006 Fining Guidelines. Indeed, the similarities between the key calculation steps followed by the CMA and those followed by the Commission are undeniable.

First of all, just like the Commission, the CMA also uses a percentage of up to 30% of the relevant turnover to calculate the basic amount of a fine. To calculate the undertaking’s turnover the CMA follows rules that are similar to those employed by the Commission. The same can be stated as regards the CMA’s approach to establish the specific percentage level. While the CMA’s Penalty Guidance refers to a whole range of factors, such parameters are in essence intended to reflect the harm and gains of the infringement, which guides the Commission as well. Finally, the most exemplary aspect of the high level of convergence between the CMA’s and the Commission’s fining methods, is the fact that even in practice, the CMA seems to set the proportion of sales (or starting amount) at comparable levels.

As regards the duration of the infringement, the CMA also multiplies the starting amount by the number of years of the infringement, while partial years are rounded up to the nearest quarter.

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4207 CMA decision in CESP (Case CE/9784-13).
4209 In fact, the (former) OFT stressed that it finds it important to avoid significant inconsistency with the approach to setting penalties adopted by the Commission and other European competition authorities. In the words of the OFT, “[a]voiding such divergence and inconsistency, where possible, will in the OFT’s view help to ensure the effective enforcement of Articles 101 and 102 across the Member States of the European Union”. OFT, “OFT’s guidance as to the appropriate amount of a penalty - A consultation on OFT guidance (OFT 423con)”, October 2011, para 5.6.
4210 See supra Chapter 10, section 5.4.
Although this approach is not exactly the same as the one followed by the Commission in practice – the Commission applies a proportional increase of the multiplier on a monthly and pro rata basis – both set of rules roughly have a comparable impact. With regard to the (not so relevant) divergences, namely the CMA rule of rounding up, the Commission’s method seems to be more accurate to reflect the exact duration of the infringement.

It is remarkable that, despite the high level of convergence between the CMA’s and the Commissions’ systems as regards the calculation of fines, the CMA methodology provides no entry fee. Arguably, the diminished deterrence resulting from the absence of an entry fee could be partially compensated with the “rounded up” duration multipliers employed by the CMA for periods shorter than a year. However, it should be recalled that the entry fee is always applied (by the Commission) in cartel cases due to the lower detection rates. Therefore, this calculation step appears particularly appropriate for secret collusive agreements. In contrast, the CMA rules on duration are applied to all infringements without considering the higher or lower detection probabilities.

Some of the most important divergence aspects concern the (now) CMA’s aggravating and mitigating factors. In the context of aggravating circumstances, the CMA frequently takes into account that director and/or senior executives are involved in the infringement. In practice, this factor leads to an increase of 5% to 10%. Now, the question is whether this divergence can potentially be used as a means to improve the Commission’s fining policy. Or, in other words: should fines for undertakings be higher when senior staff is involved in the infringement?

In order to answer this question, one must first examine which type of individuals take the initiative to form the cartel and, subsequently, organise and control the (complex) functioning of the agreement. It appears rather obvious that low range employees have simply no authority to conclusively negotiate prices or sale conditions. It follows that cartels can only be concluded by individuals who have a significant level of responsibility within the undertaking in the sense that they must (at least) be authorised to negotiate prices or to conclude or negotiate contracts. This statement is also corroborated by empirical evidence about the detected and sanctioned cartel infringements, which has demonstrated that most infringements involve senior management.4211

From a general perspective, the application of aggravating circumstances is justified when a certain type of behaviour increases the gravity of the conduct.4212 Given that the involvement of senior staff

4211 See M. BERZINS AND F. SOFO, “The inability of compliance strategies to prevent collusive conduct”, 2008 (8-5) Corporate Governance, 669-680, at 675 (according to these authors senior management were involved in 80 % of 69 publicly available cases from Australia, Canada, Denmark, the European Commission, Ireland, Japan, Korea, The Netherlands, New Zealand, the UK and the USA between 2000 and 2006); A. STEPHAN, “Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels”, University of East Anglia CCP Working paper 09-09 (July 2009) at 8-10, available at http://ssrn.com/abstract=1432340 (this commentator focuses on the positions held by individuals involved in 40 international cartels, identified in decisions of the European Commission or press releases of the US Department of Justice between 1998 and 2008); J. C. GALLO, K. DAU-SCHMIDT, J. L. CRAYCRAFT AND C. J. PARKER, “Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study”, 2000 (17) Review of Industrial Organization, 75-133, at 104-107 (they find that nearly 70% of all individual criminal defendants in cases brought by the US DOJ between 1955 and 1997 were corporate officers); J. M. CONNOR, Global Price Fixing: Our Customers are the Enemy, Vienna, Kluwer 2001, 598 p., at 11-12.

4212 See e.g. See e.g. Judgment of the General Court of 16 June 2011, Joined cases T-204/08 and T-212/08, Team Relocations NV (T-204/08) and Amertranseuro International Holdings Ltd, Trans Euro Ltd and Team Relocations Ltd (T-212/08) v Commission [2011] II-3569, paras 84-87.
or directors in cartels appears to be the general rule, it is questionable that this aspect should be taken into account as an aggravating factor. Even if it is true that higher fines may produce enhanced deterrence, it simply does not seem adequate or fully justified to impose higher fines on undertakings in case of managerial involvement.

With regard to the application of mitigating factors, the CMA considers two aspects that are not taken into account by the Commission under its 2006 Fining Guidelines. Those are (i) the fact that an undertaking acted under pressure and (ii) the adoption of compliance programs.

The argument regarding pressure from other undertakings to join the cartel is a recurrent argument invoked by cartel participants. It is indeed common to claim that other competitors threatened them with fierce competition if they refused to take part in an illegal agreement. However, such argument does not justify the participation in the infringement, which makes the granting of a reduction in this type of cases fully inappropriate from an effective enforcement perspective. Small competitors that are more susceptible to suffer pressure from bigger market rivals always have the possibility to report the infringement to the authorities. In addition, it should not be forgotten that companies acting under pressure also contribute to, and are even essential, for the successful working of a cartel. Likewise, if the cartel generates profits, these will also be shared with the companies that acted under pressure. Granting this type of reduction may thus undermine the effectiveness of fining policies.

The analysis of the (new) CMA decisions has shown that the introduction of compliance programmes quite often leads to the application of reductions on the basis of mitigating circumstances. In practice, such reductions have been applied (i) when the compliance programme had been adopted before the competition law violation took place and also (ii) when the compliance programme was introduced after the infringement.

In the first scenario, granting reductions seems clearly unjustified. In particular, the fact that an infringement was committed even if a compliance programme was in place, demonstrates the ineffectiveness of the compliance programme. Therefore, rewarding undertakings that have compliance programmes in place but (chose to) disregard them, has a wholly negative effect on deterrence. Even if the discounts applying on the basis of this factor are not too high (i.e. from 5% to 10%) relatively speaking, considering this mitigating factor in the calculation of the fine is simply unjustified.

The second scenario is, arguably, more controversial. In particular, one may wonder how the introduction of a compliance programme after an infringement has been established can effectively guarantee future compliance. If this is the case, granting reasonable reductions for those who will never again engage in competition law infringements may indeed be justified. In fact, if compliance programmes could secure future compliance, the (current) high level of recidivism should be significantly lower or even not exist. However, it is simply not possible to identify a number of features that make compliance programmes fully effective at a reasonable cost.4213

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4213 W. Wils, “Antitrust Compliance” 19-20 of the online version of this article. This author adds that ‘[e]ven if it were possible, at least to some extent, to identify characteristics of compliance programmes that ensure real compliance, competition authorities would be particularly badly placed to develop such insight. Indeed, competition authorities never see the full picture: they never see the cases where compliance programmes have successfully prevented infringements, only the cases where this has not happened. They can thus not compare between the two situations so as to learn better
well illustrated by the CMA approach. According to the Penalty Guidance 2012, the following requirements must be satisfied in order to obtain a reduction on the account of this mitigating factor: (i) appropriate compliance activities must be introduced and/or reviewed and adapted in the light of the events that led to the investigation in question (ii) appropriate competition law risk identification, risk assessment, risk mitigation and risk review must take place, and (iii) commitment to and accountability for the resulting compliance programme must be shown at the board level (or by other senior management).

These conditions have been widely formulated in order to allow undertakings to adopt competition law programmes “appropriate” for their needs. On the other hand, such broadly formulated requirements can certainly be misused by undertakings if they simply want to obtain a fine reduction without caring about real compliance. Moreover, the third condition regarding the need to show commitment to compliance at the board level is rather incoherent. This argument runs as follows. As commented above, in order to form and subsequently operate a cartel, it is necessary to have access to undertaking’s pricing policy and to be in a position to negotiate prices. This means that low range employees are practically never materially responsible for cartels. In turn, managers and senior officers are often involved in or at least well aware of the existence of collusive practices. The fact that (high level) board members of an undertaking have to show commitment to compliance activities when they have previously been (more or less directly) involved in the agreement is quite contradictory. This being said, there is no doubt that senior managers and executives will be more than willing to make such commitment if this would be required to secure a reduction in fines. Taking these considerations into account, it can be concluded that granting reductions in fines to undertakings that have committed competition law violations amounts to softening not only their responsibility for the violation but, most importantly, the deterrent effect of the punishment.

The last divergent aspect of the CMA Guidance with respect to the Commission’s fining method concerns the need for fines to be (deterrent and) proportional. The CMA’s focus on proportionality seems to reflect a general concern of reviewing courts that fines are too high (or excessive, as explained in the Guidance) or not morally acceptable. At European level, this concern is addressed in Regulation 1/2003, which provides that fines imposed by the Commission cannot exceed 10% of the total (consolidated) turnover of the undertaking in question during the preceding business year.

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4215 The issue regarding the need to ensure that fines are deterrent while making sure that such penalties remain proportionate has indeed been a recurrent discussion in the context of (European) competition. See e.g. A. WINKLER AND F. C. LAPERVOTE, “Selected issues raised by recent cartel fines decisions”, 2013 Competition Policy International, 1-10; N. CALVINO, “Public enforcement” 317-336 and K. LENAERTS, “Due process” 175-183.
4217 See further supra Chapter 10, section 2.6.
imposed on undertakings by the CMA for (European) competition law violations also need to respect the same 10% turnover limit as the Commission. These considerations not only lead to the (rather obvious) conclusion that the divergent approach adopted by the CMA in this context cannot serve as a source of inspiration for the Commission to guarantee proportionality of fines without having to use a ceiling for fines. Furthermore, the fact that the CMA combines the proportionality test with the standard 10% ceiling for fines suggests that, in the UK, the level of fines for undertakings is commonly set at a non-deterrent level.

2.3. Belgium

2.3.1. Key fining parameters

In contrast to Article 23 of Regulation 1/2003, the new CEL does not specify any criteria (such as the duration and the gravity of the violation) that should be taken into account in the calculation of fines for competition law infringement. Article IV.70 Section 1 CEL only provides that fines imposed on undertakings and associations of undertakings may not exceed 10% of their turnover realised on the national market during the previous financial year. Nevertheless, as further examined below duration and gravity are the crucial criteria for the BMA to calculate fines for competition law infringements.

2.3.2. The BCA’s Fining Guidelines

According to Article IV.25 the board of the Competition College is competent among other things to ‘adopt guidelines regarding competition law enforcement’. The BCA has made use of this competence multiple times. The currently applicable version of the BCA’s Fining Guidelines was adopted by the Management Committee of the BCA on 26 August 2014 and entered into force on 1 November 2014. The 2014 Fining Guidelines constitute the perfect example of (almost) full convergence as regards the method of calculation of fines for (European) competition law infringements. In fact, (and maybe contrary to expectation) the BCA Fining Guidelines 2014 do not provide a detailed and elaborated step by step methodology. Instead, as a general starting point, the new Fining Guidelines simply state that the BCA will, in principle, follow the Commission’s 2006 Guidelines on the method of setting fines. Given this full alignment, there is no need to (re)state or repeat word by word, the principles stipulated in the Commission’s 2006 methodology.

4218 See further infra.
4219 Guidelines on the method of setting fines for companies and company associations referred to in article IV.70, § 1, first paragraph of the Belgian Code of Economic Law (Wetboek van economisch recht, WER) for violations of articles IV.1, § 1 and/or IV.2 WER, or of the articles 101 and/or 102 of the Treaty on the Functioning of the European Union, hereafter: the “(BCA) Fining Guidelines 2014”. (Richtsnoeren betreffende de berekening van geldboeten voor ondernemingen en ondernemingsverenigingen bedoeld in artikel IV.70, § 1, eerste lid WER bij overtredingen van de artikelen IV.1, § 1 en/of IV.2 WER, of van de artikelen 101 en/of 102 VWEU) B.S. 10 September 2014. The 2014 Guidelines replaced the calculation method dating of 19 December 2011 (Richtsnoeren van de Raad voor de Mededinging van 19 december 2011 betreffende de berekening van geldboeten, BS 18 januari. 2012, 3217) which in turn replaced the original version which dated from 2004 (B.S. 30 April 2004, 36261).
4220 BCA Fining Guidelines 2014, point 2.
2.3.3. Main implications of the new Fining Guidelines

The adoption of the 2014 Fining Guidelines, implementing the Commission’s approach, has two main implications with respect to the previous 2012 fining method of the (now) BMA. First, the approach of the Fining Guidelines of 2012 towards the duration factor was quite different from that of the Commission’s 2006 Guidelines. Whereas under the currently applicable Commission’s Guidelines, the amount reached on the basis of the gravity factor is multiplied by the number of years of the infringement (and a proportional multiplier per month), under the former Belgian Guidelines a percentage between 10% and 30% was applied to the gravity factor, which was consequently multiplied by the number of years of infringement. Since the duration multiplier now fully applies in Belgium, infringements are fined far more heavily than in the past on the basis of their duration.

The 2014 Fining Guidelines have been recently applied for the first time in Croisières sur la Meuse. This case suggests that the BCA not only follows the literal wording of the Commission’s Guidelines. The level of convergence is such that the BMA follows the Commission’s Guidelines as interpreted in practice. This is particularly clear in the context of the duration rule. Under the Commission’s 2006 fining method, the duration of an infringement is taken into account by multiplying the starting amount by the number of years of the infringement. Periods shorter than six months are, according to the Commission’s Guidelines, counted as half a year. However, in practice, the Commission decided to adjust this rule due to proportionality reasons and only apply a duration multiplier that takes into account the precise number of months (without rounding up to half a year). This practice is also followed by the BMA. This is illustrated, for instance, in the Croisières sur la Meuse case. In this case, the amount of the fine was multiplied by 8 for the P Group for 8 years of duration while the fine for Group M was multiplied by 7.42 (7yrs and 5/12) for 7 years and 5 months of duration.

The decision in Industriële Batterijen illustrates the great impact of the modification of the duration rule. The price fixing cartel in the sector of industrial batteries lasted between 5 and 10 years. In order to consider the duration of the infringement, a percentage of 15% was applied for each full year of the infringement and a percentage of 15/4% for periods of three months.

A second modification introduced in Belgium on the basis of its new Guidelines concerns the application of the Commission’s 2006 “entry fee” for hard core cartels. Such entry fee is thus now also available and applicable for competition law infringements fined by the BMA under the 2014 Finning Guidelines. This additional amount, which was not provided under the former 2012 Belgian Guidelines, not only reflects a strong(er) determination of the BMA to sanction cartels, but also to follow a more economic approach towards the punishment of such infringements, in line with the Commission’s resolution.

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4221 (Former) Fining Guidelines 2012, point 31.
4222 Cf. supra Chapter 10, section 5.3.1.5.
The practice of the Commission as regards the entry fee is also followed by the BCA, which (just like the Commission) sets the entry fee at the same level as the “percentage of turnover”. In *Croisières sur la Meuse* both amounts were indeed set at 15% of the turnover.4225

2.3.4. Adjustments of the Commission’s methodology

This being said, the new BCA Fining Guidelines adjust and complement a number of aspects of the Commission’s 2006 policy, in order to make this calculation method more suitable for Belgium.

2.3.4.1. The relevant turnover

The most relevant departure from the Commission’s methodology regards the relevant undertaking’s turnover.

The new Guidelines maintain the undertaking’s turnover as the essential parameter to determine the basic amount or starting point to set the fine. Yet, under this methodology, the turnover taken into account for calculating the fine is the turnover which directly or indirectly relates to the infringement and which is realised *in Belgium* by the undertakings concerned.4226 This approach indeed differs from the Commission’s policy which refers to ‘the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA’.4227 Likewise, other NCAs such as the CMA may consider the turnover generated in another Member State when the relevant geographic market is wider than the UK.4228

Besides the adjustment of the relevant turnover, the BMA’s decision in *Croisières sur la Meuse* shows that it also follows the Commission’s fining practice with regard to the step of “the percentage of turnover”. In this case, the criterion regarding the nature of the infringement also played an important role. In the BMA’s view the infringement aimed at sharing the market for the services of regular cruises on the Haute Meuse and the navigable part of the river Lesse between 1983 and 2014. The BMA stressed that ‘[a]ccording to the guidelines of the European Commission on the calculation of fines, this practice should be considered as one of the most serious infringements of competition law’. However, it decided to set the turnover percentage at the level of “only” 15% because the geographic territory affected by the agreement was limited and the undertakings involved were small enterprises.4229

In *Industriële Batterijen*,4230 six undertaking participated in a price-fixing cartel by applying an agreed surcharge to the prices of power batteries in Belgium from 2004 till 2014. This conduct was qualified as a very serious infringement by nature implying that the percentage was to be set

4225 BMA, Decision n° ABC-2016-I/O-15-AUD of 27 May 2016, Case CONC-I/O-14/0028 - Croisières sur la Meuse et la partie navigable de la Lesse, para 92.
4226 BCA Fining Guidelines 2014, point 5.
4227 Commission, Fining Guidelines 2006, point 13. See for more details supra Chapter 10, section 5.3.1.2.
4228 In this situation, the CMA must have the express consent of the relevant Member State or NCA. Penalty Guidance 2012, para 2.10.
4230 The *Industriële Batterijen* cartel was fined on the basis of the former Fining Guidelines. However, the rule to establish the basic amount contained in the 2012 method was quite similar to the current method. More precisely, the 2012 Guidelines established that the basic amount of the fine consisted (for very serious infringements) in a percentage of the turnover of the goods relating to the infringement in the range of 15%-30% (Fining Guidelines 2011 (Boeterichtsnoeren 2011, point 27.). The 2012 rule for to calculate the basic amount in Belgium was fully in line with the Commission’s approach in practice (see further supra Chapter 10, section 5.3.1. The current fining methodology in Belgium is actually milder than the former approach, given the adjustment of the relevant turnover.
between 15% and 30%. The College – based only on the very serious nature of the infringement – ruled that it was appropriate to apply a percentage of 17%. In Cimenteries, the (former) Council decided to apply the highest percentage of 30%. In order to establish the level of percentage the Council mainly took into account the gravity of the infringement. Most importantly, it stressed that the parties colluded with the aim of delaying the adoption of a licence and of standards, making possible to further use Ground Granulated Blast Furnace Slag (GGBFS) as a component of ready-mix concrete. Or in other words, the participants had the intention to delay the market entry of a competing product. This percentage would ensure in the Council’s view that the fines had the necessary deterrent effect.

Furthermore, the Guidelines provide specific rules for the situation where a firm generates no turnover in Belgium. In particular, when the infringement consists of a market sharing arrangement under which one or more parties agreed not to sell their products in Belgium, the BMA will consider as the starting amount the turnover related to the infringement generated in other geographical markets. For other types of infringement, the relevant turnover is the average turnover generated in Belgium by all other infringing companies. These rules are designed to avoid the undesirable situation where a competition law infringement has a negative impact in Belgium but the undertakings involved in the illegal activity cannot be fined because no turnover was produced in Belgium. Although this rule seems to differ from the Commission’s approach, it should be kept in mind that the Commission has a considerable margin of discretion to determine the value of sales of an undertaking in a way that it properly reflects the weight of each undertaking in the infringement.

2.3.4.2. The aggravating factor of recidivism

The second BMA’s adjustment to the Commission’s Guidelines concerns the aggravating factor of recidivism. More precisely, in this jurisdiction the concept of repeated infringement is narrower than the one (theoretically) applied by the Commission. While the Commission considers its previous decisions as well as those of NCA’s in order to establish recidivism, under the Belgian Guidelines

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4231 Referring to Fining Guidelines 2011, point 27.
4232 BMA, Decision n° BMA-2016-I/O-04-AUD, Case MEDE-I/O-14/0003 – Prijsafspraken in de sector van de industriële batterijen, paras 106-107.
4233 This case was also fined under the 2012 Fining Guidelines. It should be noted that although the highest percentage within the range was chosen in this case, the decision suggests that the calculation of the turnover from the sale of goods or services relating to the infringement was milder. Conseil de la Concurrence, Decision n° 2013-I/O-34 of 30 August 2013 Case CONC-I/O-05/0075 : Cimenteries CBR S.A., Holcim (Belgique) S.A., Compagnie des ciments belges S.A., FEBELCEM A.S.B.L. et CRIC, paras 291-307, available at http://www.bma-abc.be/sites/default/files/content/download/files/2013IO34_Pub.pdf
4236 See e.g. Commission Fining Guidelines 2006, point 18 (‘Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements. In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine’).
4237 See as regards the application of these factors supra Chapter 10, section 5.3.1.7(a)(i).
only the infringements established by the Commission or a NCA of a neighbouring state of Belgium (including the UK) are taken into account.\textsuperscript{4238}

Since no mitigating or aggravating factors were applied in \textit{Croisières sur la Meuse}, unfortunately, no practical illustration of this adjustment and the corresponding percentage of increase can be given.\textsuperscript{4239}

After all aggravating and mitigating factors are applied, the resulting fine may never exceed the statutory maximum of 10\% of the undertaking’s turnover realised on the national market (\textit{i.e.} the turnover in Belgium and from Belgian exports) during the previous financial year. Given that this fine cap is only a percentage of the national turnover whereas the Commission looks at the 10\% of the undertaking’s worldwide turnover in the preceding business year, the fine ceiling in Belgium will be in practice far lower.

In Belgium, the application of the turnover cap is not unusual. In fact, this cap was applied in \textit{Croisières sur la Meuse}\textsuperscript{4240} and \textit{Industriële Batterijen}.

\textbf{2.3.4.3. Final adjustments}

Once the fine is calculated, reductions or immunity may be granted under the BCA (own) Leniency Notice (\textit{Clementiemededeling})\textsuperscript{4242} or the (Belgian) settlement procedure.\textsuperscript{4243}

After the application of the leniency system (and before the application of the settlement reductions) the decisions imposing fines suggest that the BCA may also take into account one factor that is not explicitly included in the Commission Guidelines or in its own adjusted methodology. The BCA may consider in particular the need to ensure that the amount of the fine reflects both proportionality and deterrence.

This consideration was indeed relevant for the BCA in \textit{Croisières sur la Meuse}. According to this decision, the Prosecutor believed that the amount of the fine imposed on the SA Dinant Evasion, SPRL Dinant Cruises, SPRL Dinant Boat Company was not proportionate, because they were SMEs, and not part of a large group.\textsuperscript{4244} Therefore, an additional reduction was applied.\textsuperscript{4245}

Reductions for proportionality reasons were also granted in \textit{Industriële Batterijen}. The main argument to grant these reductions was that Battery Supplies, Emrol and Celectric were small and

\begin{footnotesize}\begin{itemize}
\item \textsuperscript{4238} BCA Fining Guidelines 2014, point 11. In addition, the Fining Guidelines 2014 also clarify that the factor of repeated infringement does not apply to an undertaking (in the sense of an economic unit) when the acquisition of the entity that committed the earlier infringement takes place after the infringement. BCA Fining Guidelines 2014, point 12.
\item \textsuperscript{4239} BMA, Decision n° ABC-2016-I/O-15-AUD of 27 May 2016, Case CONC-I/O-14/0028 - Croisières sur la Meuse et la partie navigable de la Lesse, paras 94-95.
\item \textsuperscript{4240} BMA, Decision n° ABC-2016-I/O-15-AUD of 27 May 2016, Case CONC-I/O-14/0028 - Croisières sur la Meuse et la partie navigable de la Lesse, paras 97-98.
\item \textsuperscript{4241} BMA, Decision n° BMA-2016-I/O-04-AUD, Case MEDE-I/O-14/0003 – Prijsafspraken in de sector van de industriele batterijen, paras 119-120.
\item \textsuperscript{4242} BCA Fining Guidelines 2014, point 8.
\item \textsuperscript{4243} Article IV.54 of the CEL.
\item \textsuperscript{4244} This observation was made referring to Case AT.39965 — Mushrooms [2014] OJ C 453/21.
\item \textsuperscript{4245} BMA, Decision n° ABC-2016-I/O-15-AUD of 27 May 2016, Case CONC-I/O-14/0028 - Croisières sur la Meuse et la partie navigable de la Lesse, paras 106-108. This may also be the reason why the BCA considered that no deterrence multiplier was required in this case (para 93).
\end{itemize}\end{footnotesize}
independent market players who, unlike the other undertakings concerned, did not belong to a large international group. The concrete reductions were not specified.\footnote{BMA, Decision n° BMA-2016-IO-04-AUD. Case MEDE-I/O-14/0003 – Prijsafspraken in de sector van de industriële batterijen, paras 134–136; referring to Case AT.39965 — Mushrooms) [2014] OJ C 453/21.}

The BCA’s decisions suggest that proportionality considerations may lead to a reduction in cases where the fine has been imposed on a small company with limited financial capacity. Although this element is not explicitly formulated in the Commission’s 2006 Guidelines, a comparable approach is followed by the Commission for mono-product undertakings.\footnote{See supra Chapter 10, 5.3.1.9.}

2.3.5. A brief discussion of the BCA’s fining practice

At the time of writing of this work, only one cartel case – namely Croisières sur la Meuse – has been fined in accordance with the 2014 Fining Guidelines.

As commented above, in May 2016, the Investigation & Prosecution Service of the Belgian Competition Authority sanctioned two undertakings\footnote{The companies concerned are Compagnie des Bateaux de Dinant, Dinant Croisières, Dinant Evasion (these three companies belong to the same undertaking), Les Bateaux Mouches Belgique and Les Sarcelles (both companies belong to the same undertaking). The undertaking controlling Les Bateaux Mouche Belgique and Les Sarcelles benefit of a full immunity in this case.} that participated in a market sharing for regular cruise services on the Upper Meuse and the navigable part of the Lesse. The fines imposed amounted to €64,100. The two undertakings successively concluded two agreements aimed at sharing the market for the services of regular cruises on the Haute Meuse and the navigable part of the river Lesse between 1983 and 2014. This market sharing was achieved by pooling and sharing of means of production and revenues as well as by taking joint strategic decisions including price-fixing or assigning exclusive use of some river sections.

Although this case might suggest that cartel sanctioning activity in Belgium is rather modest, other cases commented below illustrate that Belgium is a good example of a Member State in which more vigorous competition enforcement is emerging. While it is true that until now the BCA has not been involved in many significant cartel matters, it is clearly strengthening its enforcement efforts against cartels.\footnote{See also P. WYTNICK, “Boetes en andere sancties (in perspectief)” in W. DEVROE, K. GEENS AND P. WYTNICK (eds.) Mijlpalen uit het Belgisch mededingingsrecht geannoteerd. Liber amicorum Jules Stuyck, Mechelen, Kluwer 2013, 624 p., at 421.}

Record fines in the history of competition law enforcement in Belgium were imposed in June 2015 in the supermarkets cartel. The decision demonstrates the increasing stricter fining trend in Belgium. In this case 18 supermarkets and suppliers of personal care, hygiene and cleaning products were involved in coordinated retail price increases between 2002 and 2007. The total fine amounted to €174 million. The highest fine amounting to €36,373,000 was imposed on Carrefour. Colruyt and Procter & Gamble were also fined for nearly €30,000,000.\footnote{See for a Table containing all the individual fines para 126 http://www.bma-abc.be/sites/default/files/content/download/files/2015IO19-AUD.pdf} \footnote{This cartel was sanctioned in conformity with the 2004 Fining Guidelines.}

In addition, the (fomer) Competition Council adopted a number of decisions in cartel cases, during the last months of its existence in 2013.

On 28 February 2013, the Competition Council imposed fines on five flour mills (Werhahn, Meneba, Ceres, Dossche and Brabomills) which produced the majority of flour in the Belgian
market. From 2000 until 2006, these undertakings had participated in a cartel involving the exchange of commercially sensitive information and the coordination of price increases with the objective of stabilizing their position on the market. This case had also been investigated by the Dutch Competition Authority and had led to the imposition of fines in December 2010 for most of the mills involved in the Belgian case. The specific circumstances of the case (length of the procedure, financial difficulties for some firms, lethargic economic context in the industry), and the fines already imposed by the Dutch Competition Authority, led the Council to reduce the penalties to between €70,000.00 and €100,000.00.\textsuperscript{4252} However, one of the undertakings lodged an appeal before the Brussels Court of Appeal which annulled its fine. Notably, the Court held that it could not be excluded that the Competition Council had violated the ne bis in idem principle, as it failed to calculate the fine by reference to the affected turnover realised in Belgium.\textsuperscript{4253}

In August 2013, the Council established that three major Belgian cement producers, a sector association and a research centre (involved in determining and applying authorizations and standards for the use of cement and concrete) had infringed (European) competition law. As a result, the Council imposed an important fine which amounted to €14,700,000. The parties colluded, between May 2000 and October 2003, with the aim of delaying the adoption of a licence and of standards making it possible to further use Ground Granulated Blast Furnace Slag (GGBFS) as a component of ready-mix concrete. The Council decided that the Belgian producers of cement and their trade association aimed to protect their commercial interests by delaying the use of GGBFS as an alternative for cement and, by doing so, to secure the sale of cement as a component of ready-mix concrete. The research centre for the Cement industry was helpful to them to that effect.

2.3.6. Assessment: (how) can the BCA’s method of calculation improve the Commission’s fining policy?

The experience of the BCA shows that the process of convergence between the Commission’s enforcement system and Member States, may lead to nearly identical domestic fining powers for NCAs. This finding not only corroborates the emergence of closely aligned fining regimes for the enforcement of Article 101 (and 102 TFEU), but most importantly reinforces the role of the Commission as the (European) competition policy leader. Whether part of a deliberative coordination process or the consequence of unilateral alignment actions, there is a clear tendency to consider and follow the Commission’s fining powers as a model of inspiration for Member States.

The almost full convergence between the BCA’s and the Commission’s Fining Guidelines renders the question ‘(how) can the BCA’s method of calculation improve the Commission’s fining policy’ which underlies this assessment somewhat redundant. As examined above, the BCA’s approach mainly consists in stating that it will follow the Commission’s fining method. Only two small alterations are made. First, under the BCA’s Guidance the ‘turnover taken relating to the infringement’ which is taken into account as starting amount of the fine, refers to the turnover is realised Belgium by the undertakings concerned.\textsuperscript{4255} This adjustment is meant to limit the BCA’s fining competence to those cases where the Belgian market has been (appreciably) affected. Given

\textsuperscript{4252} Conseil de la Concurrence, Decision n° 2013-I/O-34 of 30 August 2013 Case CONC-I/O-05/0075 : Cimenteries CBR S.A., Holcim (Belgique) S.A., Compagnie des ciments belges S.A., FEBELCEM A.S.B.L. et CRIC. The 2012 Fining Guidelines were not applied in this case because the hearing in this case took place before their publication (see para 212 of this decision).


\textsuperscript{4254} Conseil de la Concurrence, Decision n° 2013-I/O-34 of 30 August 2013 Case CONC-I/O-05/0075 : Cimenteries CBR S.A., Holcim (Belgique) S.A., Compagnie des ciments belges S.A., FEBELCEM A.S.B.L. et CRIC.

\textsuperscript{4255} BCA Fining Guidelines 2014, point 5.
that the turnover relating to the infringement is considered as a proxy ‘to reflect the economic importance of the infringement’,\textsuperscript{4256} it is understandable that this adjustment is made. Still, this (absolute) limitation may hinder the effectiveness of the BMA’s fining policy, especially if one case is allocated (only) to the BMA,\textsuperscript{4257} but the agreement also produced negative effects in other Member State(s).\textsuperscript{4258}

In the same line of reasoning, the (BCA’s) rules applicable to situations where undertakings generate no turnover in Belgium are also meant to avoid that an infringement that produces a negative (appreciable) anti-competitive effect in Belgium may be unpunished.

The second adjustment concerns the question whose infringements should be taken into account in order to establish the existence of recidivism and impose an increase in fines on this basis. According to the BCA’s approach, only infringements committed in a neighbour Member State are considered in the context of recidivism. This approach is certainly more restrictive than the one established in the Commission’s 2006 Guidelines, under which all infringements of Article 101 TFEU are taken into account to find recidivism, regardless of the CA that established the cartel. The analysis of the Commission’s decisions has, conversely, shown that the Commission only considers its own decisions to establish recidivism and neglects infringements established by NCA’s. This leads us to the question whether the Commission’s Fining Guidelines should be adjusted to reflect its practice with respect to recidivism. The answer to this question is no. The BCA’s approach to recidivism appears to be based on the reasoning that only infringements affecting trade among Member States (\textit{i.e.} those which are normally punished by the Commission) or infringements which have a negative effect on a neighbour Member State, may (directly or indirectly) affect Belgium.\textsuperscript{4259} While it is accepted that considering \textit{all} infringements of 101 TFEU may be not always viable at the national level, the Commission must at least have the competence to consider all the violations of Article 101 TFEU in the context of recidivism, regardless of which authority established the infringement in question.

Finally, special attention should be given to the issue regarding the maximum fine. As pointed out above, in Belgium, the 10\% turnover ceiling only refers to the national turnover, as opposed to the global turnover of the undertakings, which is the threshold used by the Commission. This more restrictive interpretation of the 10\% cap, just like the Bundeskartellamt’s interpretation of the same rule, not only may lead to systematically under deterrent fines. In addition, and more importantly, this divergent rule has the potential to result in differing outcomes in the level of fines imposed for the same type of infringements of EU law. This practice clearly undermines the level-playing field uniform competition rules are intended to create.

\textsuperscript{4256} European Commission’s 2006 Fining Guidelines, point 6.
\textsuperscript{4257} The process of allocation of cases within the ECN has been described in Chapter 5, section 3.2.1.1.
\textsuperscript{4258} In this situation, previous consultation with other NCAs is desirable and necessary to avoid double jeopardy issues. Cf. supra, section 2.2 of this Chapter.
\textsuperscript{4259} It should be noted that the CMA follows a similar approach, under which only infringements that had an effect in the UK are considered. See further supra, section 2.2 of this Chapter.
CHAPTER 12. Other sanctions: complementing the Commission’s enforcement system

In contrast to the Commission, which can only impose fines on undertakings that commit cartel infringements, Regulation 1/2005 does not contain any limitations with regard to the sanctioning powers of Member States. The fact that Member States may accommodate different types of sanctions for cartel within the enforcements system creates a great potential to find in national systems a source of inspiration to improve the Commission’s fining regime by complementing it with other types of sanctions. This analysis is especially important taking into account the fact that fines for undertakings are not fully appropriate to produce optimal deterrence (Chapter 10).

This Chapter will focus on the second question underlying this comparative analysis, namely, whether the enforcement system of the selected Member States contains sanctioning tools with the potential to complement the Commission’s fining policy thereby enhancing the overall deterrent working of the Commission’s anti-cartel regime. As the applicability of other types of penalties such as individual sanctions may also require leniency systems for individuals, this topic will be also be subject to discussion. This analysis will be conducted from both a theoretical and practical point of view for each selected jurisdiction.

1. Germany

In accordance with Sections 81(1) and 81(4) GWB, the German authorities can impose fines for intentional or negligent infringements of Article 101 (and Article 102) TFEU and of the administrative offence of Section 1 GWB. Such fines can be imposed on both natural and legal persons.

While fines for undertakings may not exceed 10% of the undertaking’s total (worldwide) turnover in the business year preceding the fining decision, as is analysed in more detail below, an individual acting intentionally may be fined up to € 1 million. This maximum amount may be exceeded when the competition authorities aim at disgorging the economic benefit which derived from the infringement.

Finally, the criminal offense established for bid rigging cases in Section 298 of the Criminal Code may lead to a prison sentence of up to 5 years or a fine.

1.1. Administrative fines for individuals

Germany is one of the few jurisdictions in which individuals are primarily liable for infringements of competition law. Natural persons are considered responsible for the actions of the undertakings involved in the competition law infringement and consequently may be fined in accordance with Section 81(1) and (4) GWB in conjunction with Section 9 or 14 OWiG.

4260 Section 81(4)(2) GWB. See further supra Chapter 11, section 2.1.
4261 Section 81(5) GWB (in connection with Section 17(4) OWiG).
Natural persons may be fined as (co)perpetrator of the administrative offence or in their capacity of owner of the undertaking. Notably, Section 14(1) OWiG provides that if several persons participate in a regulatory offence, each of them shall be regarded as having committed a regulatory offence.

The liability of such individuals and their sanctioning is based on the “special personal characteristics” or “personal attributes, relationships or circumstances” of such individuals. Sections 9(1) and 9(2) OWiG clarify that such “personal characteristics” refer to the relationship between undertakings and individuals. Individuals may be sanctioned (given their “personal characteristics”) when someone acts as (i) an entity authorised to represent a legal person or as a member of such an entity, (ii) as a partner authorised to represent a commercial partnership, or (iii) as a statutory representative of another. Likewise, when the owner of a business (or someone authorised to do so) commissions another person to manage a business, or to perform on his own responsibility duties, the commissioned person may also be punished.4262

In addition, the owners or representatives of the entity can also be held liable and sanctioned if they intentionally or negligently failed to adopt adequate supervisory measures meant to prevent a breach of duty committed by an employee.4263

Fines for individuals who have participated in a cartel infringement must be established within the relevant statutory framework, which sets the floor and the cap for fines imposed for a specific offence. Section 17(1) OWiG provides that an amount of €5 constitutes the minimum level. This minimum fine should be seen as symbolic given its limited practical significance. The upper limit is established in Section 81(4)(1) GWB. According to this provision, infringements committed by natural persons may be punished with a fine of up to €1 million. This amount constitutes the statutory limit for the most severe offences, such as cartel agreements. In case of negligence, the limit is set at €500,000.4264

In accordance with Section 81(4) GWB, in fixing the amount of the fine, both the gravity and the duration of the infringement must be taken into account. The calculation of fines also needs to respect the parameters set out in Section 17(3) OWiG. This provision stipulates that ‘[t]he significance of the regulatory offence and the charge faced by the perpetrator shall form the basis for the assessment of the regulatory fine’. The perpetrator’s financial circumstances shall also be taken into consideration. However, the role of these circumstances will be more limited in cases involving minor regulatory offences. In the specific case of cartels, the factor concerning economic capacity – and in particular the solvency of an undertaking – normally plays an important role given the serious nature of such infringements.4265 The economic capacity of a given person is assessed by reference to ‘the current income, the capital, assets and the liabilities, as well as mere expectations, the income of the spouse and the profitability of companies, in which the offender holds a stake’.4266

4262 According to Section 9(3) OWiG, individual liability will also be established when the legal act which was intended to form the basis of the power of representation or the agency is void.
4263 See Section 81(1) and (4) GWB, in conjunction with 130 OWiG. It has been argued that this possibility is rather exceptional. M. J. FRESE, Sanctions 202 of the original version of this dissertation.
4264 Section 81(4)(1) GWB in conjunction with Section 17(2) OWiG.
Furthermore, the constitutional principle of adequate sanctions requires that the maximum limits set by the statutory framework is not (closely) reached if the offence does not constitute a very serious offence or if mitigating aspects apply in favor of the offender.\textsuperscript{4267} Accordingly, in case of secondary participation in the infringement, the maximum limit of fines is generally reduced by 25\% per cent.\textsuperscript{4268}

In practice, the factors influencing the specific amount of the fine can be classified in three groups, namely (i) offence-related criteria, (ii) offender-related (or guilt-related) criteria and (iii) factors relating to economic capacity.\textsuperscript{4269}

The application and influence of these factors in setting fines on individuals is well reflected in the \textit{Silostellgebühren} case, which concerned an information exchange case.

In determining the amount of the fine for the person concerned in \textit{Silostellgebühren}, the OLG payed special attention to guilt related criteria. First, it explained that the anticompetitive conduct did not belong to the most serious type of infringements. The OLG explained that the concerted practice concerned the exchange of commercially sensitive information including future prices. The practice also affected large parts of the federal territory. Nevertheless, the OLG found that the information exchange agreement “only” created a climate of mutual certainty, which facilitated the enforcement of a price fixing cartel. Moreover, the OLG underlined that there were no monitoring mechanisms designed to ensure “cartel discipline”. Also, the damage caused by the agreement was assessed, which appeared to be relatively low, and the net income of the person concerned was examined.

Taking into account these considerations, the OLG concluded that a fine of €21,000 was appropriate in light of the offense, guilt and economic capacity criteria. This fine was, however, further reduced by 30\% to take into account the long duration of the proceedings. As a result, the final fine amounted to €14,700.\textsuperscript{4270}

1.2. Interaction between administrative fines for individuals and leniency

As discussed above, the \textit{Bundeskartellamt} can fine undertakings as well as individuals who have represented or supervised a company.

Natural persons who have been involved in a competition law infringement may obtain immunity for fines or reductions if they cooperate in the \textit{Bundeskartellamt’s} investigation and satisfy a number of conditions.\textsuperscript{4271}

\textsuperscript{4268} C. VOLLMER in G. HIRSCH, F. MONTAG AND F.J. SÄCKER (eds.) \textit{Münchener Kommentar, Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht) Band 2, GWB}, (2008), section 81, para 86.
\textsuperscript{4269} Any guilt-related criteria which are particularly condemnable will have the effect of increasing a fine, cf. Higher Regional Court of Berlin Decision of April 18, 1984 (Kart 27/84-Altölpreise) WuW./E OLG 3387, 3394, or the committing of repeated offences over considerable time periods, cf. FCO Decision of October 27, 1972 (B1-300/71) WuW./E BKartA 1417, at 1426. The action or attempt to preserve jobs was considered to be a mitigating fact with the effect of decreasing the fine, cf. Higher Regional Court of Düsseldorf Decision of March 3, 1981 (Kart 4/80-Heizöl-Spediteure) WuW./E OLG 2488, 2494; the independent cessation of the infringement, cf. FCO Decision of December 17, 2003 (B9-903-Fotourbeitstasche) WuW./E DE-V 911 at 917 and the co-operation during the investigations, cf. Higher Regional Court of Düsseldorf Decision of January 8, 2004 (VI Kart 48-50/01 OWi), unreported, and Higher Regional Court of Berlin Decision of February 17, 1970 (Kart 22/69) WuW./E OLG 1100, 1102.
\textsuperscript{4270} OLG Düsseldorf, 29 October 2012, V-1 Kart 1–6/12 (OWi) paras 140–96, NRWEntscheidungen — Silostellgebühren.
\textsuperscript{4271} Given that the \textit{Bundeskartellamt’s} and the \textit{Landeskartellbehörden’s} competences are mutually exclusive, in Germany there is no single valid leniency policy. Some \textit{Landeskartellbehörden} follow and apply the \textit{Bundeskartellamt’s}
The Bundeskartellamt operates a leniency policy (Bonusregelung), which is equally applicable to undertakings and natural persons. A leniency application made by a person authorised to represent an undertaking covers all the natural persons participating in the cartel as current or former employees of the undertaking, unless otherwise indicated in the application.

In addition, leniency applications can also be made directly by individuals, independently of their employers. However, a separate leniency application made by an individual in his own name and/or without authorisation to represent a company will not cover the company. Arguably, this can enhance the detection potential of the Bonusregelung because immunity is only granted to the first applicant, regardless of the fact whether the applicant is a natural person or a legal person. In this situation, the company can (in the best case scenario) be the second qualifying applicant and obtain (only) a reduction instead of immunity.

The requirements to qualify for immunity or a reduction in fines as an individual are the same as those applicable to undertakings.

In line with the Commission and the ECN Model Leniency Programme, only first applicants can qualify for immunity. Immunity is granted if the information submitted by the applicant allows the Bundeskartellamt to obtain a search warrant to initiate investigations or alternatively, beyond this phase, to prove the infringement. Immunity can only be obtained if the applicant (i) cooperates fully and on a continuous basis and (ii) was not the only ringleader of the cartel and (iii) did not coerce others to participate in the collusive arrangement. The ringleader exclusion is policy (this is for instance the case of the authority of Nordrhein-Westfalen, see http://www.mweimh.nrw.de/wirtschaft/strukturoerforderung/foerderung_von_regionen/pdf_container/Bonusregelung_NRW.pdf). Other Landeskartellbehörden, in contrast, have their own leniency regime (see e.g. the leniency policy of the authority in Bayern available at https://www.bayerische-landeskartellbehördede/fileadmin/user_upload/landeskartellbehoerde/Dokumente/Veroeffentlichungen/Bonusregelung_2006.pdf). There are also some Landeskartellbehörden that have not published an official leniency system. All the (available) leniency programmes of the Landeskartellbehörden are closely aligned to that of the Bundeskartellamt. In this regard M. FRESE correctly observes that the existences of multiple leniency programmes in Germany ‘seems to go against the idea of the ECN Model Leniency Programme’. M. J. FRESE, Sanctions 209 of the original version of this dissertation.


Bundeskartellamt Leniency Programme 2006, para 1.

See further infra.


In the context of a corporate leniency application it is important to keep in mind that if the applicant is granted immunity from a fine, the Bundeskartellamt will generally renounce to apply disgorgement measures according to Section 34 Act against Restraints of Competition (see supra). If a fine is reduced the Bundeskartellamt shall as a rule only skim off a proportion of the economic benefit or order partial forfeiture which correspond to the proportion by which the fine is reduced (Bundeskartellamt Leniency Programme 2006, para 23). Although it has been argued that this intention is not an absolute guarantee (R. RAUM in E. LANGEN Section 81, para 182), it is unlikely that the Bundeskartellamt choses to simply disregard its own Guidelines.
particularly noteworthy, as a similar exclusion is not included in the Commission’s or in the ECN Model Leniency Programme. While this exclusion is understandable given the responsibility of cartel ringleaders in the forming and subsequent functioning of the agreement, one may wonder whether this rule is actually applied in practice. In fact, the Commission’s 1996 leniency programme contained a similar rule but, due to the impossibility to identify only one ringleader, it removed this rule in the revised versions of its leniency system.  

The Bundeskartellamt leniency policy clarifies the specific obligations comprised in the requirement to provide full and continuous cooperation during the entire duration of the proceedings. In particular, the applicant must (i) end his involvement in the cartel immediately at the request of the Bundeskartellamt, (ii) hand over to the Bundeskartellamt all the information and evidence available to him after his application for leniency has been filed, including in particular all information that is of significance for calculating the fine, (iii) keep his cooperation confidential until the Bundeskartellamt relieves him of this obligation (normally after the search has been concluded), (iv) name all the employees involved in the cartel agreement (including former employees) and (v) ensure that all employees, from whom information and evidence can be requested, cooperate fully and on a continuous basis during the proceedings. The obligations included in the cooperation requirement are as such aligned with both the Commission’s and the ECN Model Leniency Programme.

Cartel participants who do not meet the conditions for immunity can obtain a reduction in fines of up to 50%. To be eligible for a reduction, the applicant must (i) provide the Bundeskartellamt with information and evidence which significantly contribute to prove the infringement and (ii) cooperate fully and on a continuous basis. The amount of the reduction will be based on the value of the contributions and the order of the applications.

While the Commission’s system of reductions is more nuanced as it specifies the ranges of discounts and defines the concept of “added value”, the essence of both systems is similar. The more general formula of the Bundeskartellamt seems to grant it more discretion than the Commission has in the context of granting discounts.

It is also noteworthy that the Bundeskartellamt’s leniency regime does not contain a partial immunity provision, in contrast to the Commission’s system. It has however been reported that in practice the Bundeskartellamt grants partial immunity.

The application process for individuals is also the same as for undertakings. The Bundeskartellamt 2006 leniency programme similarly contains a marker system for leniency applicants that still need

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4281 See supra Chapter 8, section 4.1.2.2(e).
4282 Bundeskartellamt Leniency Programme 2006, paras 6-10.
4284 Bundeskartellamt Leniency Programme 2006, para 3.
4285 Ibid, para 26.
to gather all incriminating evidence. The fact that the Bundeskartellamt Leniency Programme does not specify whether the marker is available only for immunity applicants, suggests that this system can be used by both immunity and reduction applicants. This approach differs from the more appropriate view of the Commission that the absence of a marker for reduction applicants encourages the ‘leniency race’ once the infringement has been discovered.

The timing of the placement of the marker is decisive for the status of the application and the marker must contain basic information on the cartel, such as the type and duration of the infringement, the product and geographic markets affected, the identity of those involved, and whether other Competition Authorities are (going to be) contacted in the context of a leniency application. After having placed the marker, the applicant has a time limit of up to eight weeks to submit a complete leniency application.

If these conditions are satisfied, the Bundeskartellamt does not have any other type of discretion and will simply grant a marker. This aspect again differs from the Commission’s discretionary market system. As discussed in Chapter 8, the fact that the Commission retains considerable discretion as regards the market system may have the adverse effect of discouraging early applications.

In addition, under the German leniency system summary applications are also accepted in cases in which a full leniency application has been submitted to the Commission.

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4288 Marker and leniency applications in English are accepted, provided that the parties submit a German convenience translation shortly afterwards. Such applications can also be made orally. Bundeskartellamt Leniency Programme 2006, paras 11 and 15. Regarding potential disclosure risks in the context of civil damages follow-on litigation it is important to recall that according to the EU Damages Directive of 26 November 2014, statements submitted to the Bundeskartellamt in the course of leniency procedures are be excluded from the general right to access the files.

4289 See for a more detailed assessment of this aspect supra Chapter 8, section 4.3.2.4. Compare ECN Model Leniency Programme, paras 16-18.

4290 Bundeskartellamt Leniency Programme 2006, para 11.

4291 Ibid, para 12. The FCO will confirm immediately that a marker has been placed and that the application has been received. Once the application has been filed and the requirements for immunity are satisfied, the FCO will assure the applicant in writing that he will be granted conditional immunity.

4292 The Bundeskartellamt promptly (usually within three to seven days) confirms in writing that a marker has been placed or that the application has been received, stating the date and the time of the receipt. In case of an application for full immunity, where the Bundeskartellamt does not provide sufficient evidence to obtain a search warrant, the Bundeskartellamt will confirm that the applicant will be granted immunity from the fine provided the other conditions for immunity are and continue to be met. In all other cases, the Bundeskartellamt will inform the applicant of his or her provisional position in the ranking order and that the application is, in principle, eligible for immunity or a reduction, especially if he or she fulfils all duties to cooperate. Only when the Bundeskartellamt has reviewed the evidence gathered during the investigation will it make a final decision on immunity or reduction. When making this decision, the Bundeskartellamt will take into account whether the undertaking has continuously complied with its other duties as leniency applicant, especially regarding confidentiality and cooperation. U. SCHNELLE AND V. SOYEZ, “Germany: Cartels”, 2016 The European Antitrust Review, available online at http://globalcompetitionreview.com/reviews/72/sections/249/chapters/2921/germany-cartels/

4293 Germany also noted in their submission to OECD (2012) that a marker system “offers the advantage that the immunity applicant is “hooked” by the Bundeskartellamt at a very early stage and that the Bundeskartellamt – now being in the driver’s seat- has an increased opportunity to steer the investigations in order to avoid destruction of evidence and leaks”. OECD, “Use Of Markers” 18.

4294 In order to grant the market, the Commission requires the applicant to have legitimate reasons. See further supra Chapter 8, section 4.3.2.4.

1.3. (Administrative) fines for individuals in practice

Unfortunately, the Bundeskartellamt does not publish its full decisions imposing fines in cartel cases, nor does it publish statistical information on the number of cartel cases involving fines. Still, the Bundeskartellamt’s activity reports as well as its press releases do provide some relevant insights on its fining decisions regarding both natural persons and undertakings.

In Germany, the power to fine individuals is regularly used by the Bundeskartellamt in cartel cases.\(^{4296}\)

This frequent use of fines for individuals is well reflected in the activity reports of the Bundeskartellamt. In particular, the Bundeskartellamt noted that it imposed fines totalling approx. €208 million in eleven cartel cases in 2015. The fines were imposed on 45 companies and 24 individuals. These proceedings concerned various sectors, such as e.g. automotive part manufacturers, mattress manufacturers, providers of container transport services and manufacturers of prefabricated garages.\(^{4297}\)

In 2014, the Bundeskartellamt imposed fines amounting to around €1,117 billion on 83 companies and 81 individuals in nine antitrust cases. This total amount of fines was by far the highest in the Bundeskartellamt’s history, and the activity report clarified that ‘[t]his extraordinarily high amount [was] attributable to the conclusion of three extensive proceedings (sugar, beer, sausage)’.\(^{4298}\)

One year earlier, the Bundeskartellamt had “only” imposed fines amounting to around €240 million on 54 companies and 52 individuals in 11 antitrust cases. The fines concerned the rail cartel case, companies in the milling industry and manufacturers of confectionery products, household porcelain and drugstore products.\(^{4299}\)

As regards individual cartel cases, the Bundeskartellamt even revealed quite recently, in March 2016, that it had imposed fines totaling around €21.3 million on nine wholesalers and one individual involved in anti-competitive agreements in the Bundeskartellamt sanitary, heating and air conditioning sector.\(^{4300}\)


\(^{4297}\) See Bundeskartellamt, Jahresbericht 2015, at 36 et seq.

\(^{4298}\) See Bundeskartellamt, Jahresbericht 2014, at 36 et seq.

\(^{4299}\) See Bundeskartellamt, Jahresbericht 2013, at 36 et seq.

\(^{4300}\) Bundeskartellamt, Press Release of 22.03.2016, “Bundeskartellamt imposes fines in cartel in sanitary sector”. The decision of this case has not been published.
In early 2014, the Bundeskartellamt concluded cartel proceedings against three major German sugar manufacturers Pfeifer & Langen, Südzucker and Nordzucker, leading to fines totalling €280 million, which were imposed on not only the companies but also on seven of their representatives.4301

In the first months of 2014, the Bundeskartellamt also imposed fines for around €338 million on eleven breweries, a trade association and 14 individuals for concluding illegal price-fixing agreements.4302 The Bundeskartellamt further clarified that the fines imposed on the 14 individuals amounted to a total of approx. €3.6 million.4303 This amounts to fines of €257,000 per individual on average.

In July 2014, the Bundeskartellamt imposed fines of €338.5 million on 21 sausage manufacturers as well as 33 company representatives for concluding illegal price-fixing agreements. This cartel had been in operation since the early 1980s.4304

In the summer of 2014, the Bundeskartellamt concluded proceedings against manufacturers of concrete paving stones. It imposed fines amounting to around €6.2 million on 14 companies and 17 individuals for concluding price-fixing agreements for the market region North Rhine-Westphalia and the bordering districts.4305

The same year, the Bundeskartellamt also imposed fines for around 17 million euros on four wallpaper manufacturers, their representatives and their trade association for coordinating price increases. The Bundeskartellamt stressed that the representatives of the four wallpaper manufacturers had agreed to introduce a price increase of around five to six percent for wallpaper in Germany with effect from 1 March 2006. The association’s managing director at the time helped to implement the price agreement, by forwarding information about the forthcoming announcement of the price increase to all association members.4306

In October 2013, the Bundeskartellamt concluded cartel proceedings against manufacturers of household porcelain and imposed fines totalling €900,000.00 on two companies (Porzellanfabrik Christian Seltmann GmbH and KAHLA/Thüringen Porzellan GmbH), the ceramic industry association (Verband der Keramischen Industrie) and two individuals who were involved.4307

Other earlier cases in which individuals were fined date from 2007 and 2008. Following a search in November 2007, fines amounting to €62 million were imposed at the end of January 2008 on three manufacturers of decoration paper and five individuals. The companies and persons were

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4302 See Bundeskartellamt, Jahresbericht 2014, at 36.
4303 See Bundeskartellamt, summary decision of 2 April 2014, Manufacture and sale of beer (ref B10-105/11).
4305 See Bundeskartellamt, Press Release of 15.07.2014, “Bundeskartellamt imposes further fines on manufacturers of concrete paving stones on account of price-fixing agreements”; see also Bundeskartellamt, Jahresbericht 2014, at 38.
4307 See Bundeskartellamt, Press Release of 17.10.2013, “Bundeskartellamt concludes cartel proceedings against manufacturers of household porcelain".
found to have been involved in price and capacity shutdown agreements during at least the period between 2005 and 2007.\footnote{See Bundeskartellamt, Press Release of 05.02.2008, “Bundeskartellamt imposes fines against manufacturers of décor paper”.
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In July 2008, fines amounting to 10 million euros were imposed by the Bundeskartellamt on nine manufacturers of high-quality perfume and cosmetic products and 13 individuals. These individuals and companies had exchanged a whole range of intercompany data such as price increases, turnover statistics, etc.\footnote{Bundeskartellamt, Tätigkeitsberichte 2007/2008, at 22.}

As regards the total number and amount of fines, the Bundeskartellamt revealed in a case before the German Constitutional Court that in the period between 1993 and 2010, 510 individuals (and 563 legal persons) had been fined for (European) competition law violations. Based on these numbers, one individual would be fined per undertaking on average\footnote{BVerfG, 19 December 2012, 1 BvL 18/11, WuW/E DE-R 3766, paras 52-60, available at http://www.bverfg.de/entscheidungen/ls20121219_1bv1001811
}, and the average fine per individual would amount to €56,000.\footnote{Ibid, para 60.}

It should, however, be noted that this average amount of fines does not only concern horizontal cartel cases but all antitrust infringements. In addition, the average amount of fines of €56,000 does not take into account the fact that the maximum level of fines was doubled from €500,000 to €1 million in 2005. It is therefore submitted that, although fines are significantly below the statutory maximum of €1,000,000, in cartel cases they tend to range from €200,000 to €250,000.\footnote{F. WAGNER-VON PAPP, “Compliance and Individual Sanctions for Competition Law Infringements” in P. JOHANNES (ed.) Competition Law Compliance Programs - An Interdisciplinary Approach, Springer (Forthcoming), at 18 of the online version of this contribution, available at SSRN: http://ssrn.com/abstract=2771289 (hereafter: ‘F. WAGNER-VON PAPP, “Compliance”’)
}

This view is supported by a number of recent cases. For example, in the Breweries case, the Bundeskartellamt clarified in the summary decision that the fines imposed on the 14 individuals personally involved amounted to a total of approx. 3.6 million euros.\footnote{See Bundeskartellamt, summary decision of 2 April 2014, Manufacture and sale of beer (ref B10-105/11).
} This would equal to a fine of 257,000 euros per individual on average. Likewise, in the Paper Wholesale\footnote{BGH, 19 June 2007, KRB 12/07, WuW/E DE-R 2225 – Papiergroßhandel, para 1.
} and Cement\footnote{BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861 – Grauzement. In this case, the individual fine was reduced by 5% on appeal because of the long duration of the appeal procedure.
} cases,\footnote{See also commenting on this point I. LIANOS et al. “An Optimal” 162 F. WAGNER-VON PAPP, “Criminal Antitrust” 18 of the online version of this paper.
} fines for individuals of 250,000 euros resp. 200,000 euros were imposed.\footnote{See also stressing this point F. WAGNER-VON PAPP, “Criminal Antitrust” 18 of the online version of this paper.
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That being said, it is important to keep in mind that – as discussed above – multiple factors are taken into account for the calculation of the fine, including the economic situation of the person who is fined. Given the specificities of such individual assessment, most individual fines in cartel cases will be substantially lower or higher than the average above.\footnote{BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861 – Grauzement.
} For example, in the Cement case, the lowest of the fines for nine individual appellants was only €6,000.\footnote{BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861 – Grauzement.
} In another cartel case, the
OLG (Higher Regional Court Düsseldorf) imposed a fine of €40,000 approximately for one of the individuals. In *Silostellgebühren*, individual fines were even lower.

Last but not least, the Bundeskartellamt’s practice also confirms that, in line with Section 9 OWiG, only owners of the undertaking or their representative, such as managers and directors, are punished in practice. Low range employees are thus not prosecuted.

For instance, the individuals fined in the price-fixing Sausage cartel in 2014 were 33 company representatives.

In the Drugstore Products case, the Bundeskartellamt declared that it had imposed fines totalling 37.000.000 euros on seven brand manufacturers of drugstore products and their sales managers for coordinating price increases.

Heavy fines amounting to €208.000.000 were also imposed on seven companies and their directors in 2008 in the Liquefied Petroleum Gas cartel.

1.4. Bid rigging as criminal offenses

In addition to imposing administrative fines on undertakings and individuals, bid rigging also constitutes a criminal antitrust offense in Germany and can be prosecuted both under a special provision against bid rigging, namely Section 298 Criminal Code (*Strafgesetzbuch*, StGB) or the general fraud provision of Section 263. It is important to keep in mind that these criminal provisions only apply to the individual(s) responsible for having rigged the bid, while undertakings can only be prosecuted and punished through administrative fine proceedings.

Bid rigging can be punished as criminal fraud under Section 263 StGB when it can be established that the rigged price was higher than the hypothetical competitive price. In essence, Section 263 StGB provides that when someone, with the intent of obtaining an unlawful material benefit,
damages the property of another by pretending that false facts exist or by distorting or suppressing true facts, the person in question shall be liable to imprisonment not exceeding five years or a fine.

Despite the broad wording of this provision, the courts have (only) applied it to bid rigging and not to other types of cartels. While in general the sanction may not exceed five years imprisonment or a fine, in especially serious cases the penalty can range from six months to ten years of imprisonment.

In 1997, the legislator inserted the bid-rigging offence of Section 298 into the StGB. This Section is especially dedicated to agreements restricting competition in the context of public bids. According to Section 298(1), those who – called upon a tender in relation to goods or commercial services – make an offer based on an unlawful agreement, shall be liable to imprisonment not exceeding five years or a fine. Section 298(2) StGB extends the offense to less regulated forms of bidding processes, where multiple bidders participate in the competition.

The main difference between Section 298 StGB and the fraud provision of Section 263 StGB is that the former provision does not require proof of ‘economic loss’ on the part of the victim in order to establish liability. However, it must be emphasised that liability for bid rigging under Section 298 StGB does not replace or exclude liability under Section 263 StGB. When the conditions to be held liable are met under both Sections, and especially when the perpetrator of a bid rigging charge acts on a commercial basis, the aggravating form of fraud may be applicable, meaning that one can be convicted to imprisonment for a term up to 10 years. This may be the case when, inter alia, the infraction causes great economic loss.

The calculation of criminal fines does significantly differ from the Bundeskartellamt’s approach in fine proceedings against natural persons. In criminal proceedings, the amount of the fine is determined in accordance with Section 40 StGB. This provision sets out a system of daily rates (from five up to 360 days). The daily rate must be set between a minimum of €1 to a maximum

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4328 F. WAGNER-VON PAPP, “Criminal Antitrust” 5-6 of the online version of this article; see also in this context T. LAMPERT AND S. GÖTTING, “Startschuss für eine Kriminalisierung des Kartellrechts?”, 2002 WuW, 1069-1070.
4329 Section 263(3) StGB. This provision also lists some examples of specially serious cases including the following situations: (i) when someone acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud, (ii) when someone causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss, and (iii) when someone places another person in financial hardship, (iv) abuses his powers or his position as a public official.
4330 Private tenders are generally prosecuted under the general fraud provision set out in Section 263 StGB. See BGH, 11 July 2001, BGHSt 47 (83), WUW/E Verg 486 (Ger.); BGH, Jan. 8, 1992, BGHSt 38 (186), WUW/E BGH 2849 (Ger.).
4331 Because private entities are generally not bound by the strict rules on tenders, they only enjoy the protection of section 298 of the German Criminal Code if they adhere to these rules on a voluntary basis. See BGH, Dec. 19, 2002, NSZ (548-549), 2003 (Ger.).
4332 Section 298(2) StGB specifies that the private award of a contract after previous participation in a competition shall be equivalent to an invitation to tender within the meaning of subsection 1. Section 298(3) StGB exempts the offender from liability if he voluntarily and earnestly makes efforts to prevent the acceptance of the offer or the provision of the service and the bid is not accepted or performed.
4333 Courts have assumed this to be the case for losses amounting to EUR 50,000 and above. See BGH, Oct. 7, 2003, BGHSt 48 (360), NJW 169-171, 2004 (Ger.). See also C. STADLER, “Handbook on Multijurisdictional” 32.
4334 See also underlining this aspect C. STADLER, “Handbook on Multijurisdictional” 32; M. J. FRESE, Sanctions 203 of the original version of this dissertation.
4335 Section 40(1) StGB.
of €30,000 per day. In determining the precise rate, a court must take into consideration the personal and financial circumstances of the perpetrator and specially his average net income. 4336

It is true that, in theory, criminal fines for bid rigging can be set at a significantly higher level than administrative fines for cartel cases. Whereas the limit for administrative fines is ‘only’ €1,000,000 4337 the application of the maximum daily rate for corporate fines (€30,000 x 360) totals €10,800,000. Nevertheless, in practice, criminal fines seem to be set at comparatively moderate levels. 4338 In fact, it has even been submitted that the amount of the administrative fine imposed on individuals for their involvement in competition law offenses is commonly higher than the criminal fines they incur for bid rigging cases. 4339 For instance, in the District Heating Pipes cartel, the Regional Court in Munich imposed a criminal fine of €100,000 on the main defendant in addition to a 2 year and 10 months prison sentence. 4340

One important – and more problematic – consequence of the criminalisation of bid rigging concerns the interaction with leniency programmes. A leniency application made by an individual or an undertaking to the Bundeskartellamt has no effect on a potential criminal prosecution of that individual. When the activity in question does indeed constitute a criminal offence, in particular under Sections 298 StGB or 263 StGB, the Bundeskartellamt must refer proceedings against a natural person to the public prosecutor under Section 41 OWiG. 4341

1.5. Interaction between criminal sanctions and leniency

The Bundeskartellamt leniency programme clearly stipulates that the notice has no effect on the criminal enforcement of competition law. 4342 This means in particular that the Bundeskartellamt must refer proceedings against a natural person to the public prosecutor under Section 41 OWiG, if and when the activity concerned constitutes a criminal offence (in particular within the meaning of Section 298 StGB, on fraud relating to bids). 4343 In fact, the rationale underlying the introduction of a leniency programme is at odds with the principle of mandatory prosecution governing criminal proceedings. 4344

Although a leniency application does not shield an individual from prosecution, in practice, it may be possible to reach a deal with a public prosecutor and a judge under Section 257c StPO. 4345 When

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4336 Section 40(2) StGB.
4337 See supra.
4338 See also M. J. FRESE, Sanctions 203-204 of the original version of this dissertation. This author shares this view and confirms that ‘the difference between the fine actually imposed by the criminal court and the fine actually imposed by the competition authority may well be more equivalent than the statutory maximum amounts suggest (and could even be in favour of the latter)’.
4339 See F. WAGNER-VON PAPP et al “Individual Sanctions” 18. These authors, however, submit that this ‘may be due to the under-inclusivity of the official statistics’. Criminal competition law enforcement in Germany is discussed in more details below.
4341 See also C. STADLER, “Handbook on Multijurisdictional” 32-33.
4343 Ibid, para 24.
4345 STPO, Apr. 7, 1987, BGBl. I at 1074, as amended, Section 257c.
relying on this type of “plea bargaining”, a judge may suggest an arrangement regarding the continuation of proceedings including the legal consequences, but not the conviction itself.\textsuperscript{4346} The determination of the exact verdict, however, remains the sole competency of the judges. An agreement only becomes valid when the court determines the content of the agreement and both the prosecution and defense consent.\textsuperscript{4347} In general, such an arrangement will include a guilty plea of the accused, who nonetheless retains his right of appeal.\textsuperscript{4348}

1.6. Criminal enforcement in practice

In 2012, the Bundeskartellamt underlined its plans to prosecute bid rigging cases more actively. Especially during the last years, both the Bundeskartellamt and public prosecutors have shown their increased efforts to exchange experiences and cooperate more closely.\textsuperscript{4349} This enhanced cooperation is reflected in the increasing number of shared cartel cases including Steam boilers,\textsuperscript{4350} Fire Engines,\textsuperscript{4351} Fire-fighting Vehicles,\textsuperscript{4352} Power Transformers\textsuperscript{4353} and Rail-Tracks.\textsuperscript{4354}

Despite this enhanced commitment towards bid rigging prosecution, K. OST, the director of General Policy at the Bundeskartellamt, submitted that ‘[t]he practical impact of [the criminal bid rigging provisions] is rather negligible’.\textsuperscript{4355} To support this statement, he added that at ‘a recent meeting of public prosecutors from all over Germany with a specific competency for prosecuting bid-rigging, not one could remember any conviction including the imposition of a custodial sanction. Most proceedings against bid rigging are stayed, sometimes settled if the perpetrator agrees to pay a fine’.\textsuperscript{4356}

However, this might be an underestimation of the (certainly not so infrequent) application of Section 298 StGB and/or Section 263 StGB. Official statistics show that, on average, approximately 20 persons are sentenced per year on the basis of the special bid rigging provision. Most commonly, the sanctions imposed consist(ed) of criminal fines and/or suspended prison sentences, although there is also some anecdotal evidence of prison sentences that are not suspended.\textsuperscript{4357}

\textsuperscript{4346} C. STADLER, “Handbook on Multijurisdictional” 32-33.
\textsuperscript{4347} Section 257c(3) StPO.
\textsuperscript{4350} Bundeskartellamt, Case Summary of 17 January 2011, Decision of 6 August 2010 (Ref: B11 - 26/05), (“Fines Proceeding against Manufacturers of Utility Steam Generators Sector: Manufacture of steam boilers”).
\textsuperscript{4351} Bundeskartellamt, Case Summary of 29 July 2011, Decision of 27 July 2011 (Ref: B12 - 12/10), (“Cartel proceedings against manufacturers of fire engines with turntable ladders”).
\textsuperscript{4352} Bundeskartellamt, Case Summary of 18 February 2011, Decision of 10 February 2011 (Ref: B12 - 11/09), (“Cartel proceedings against manufacturers of fire-fighting vehicles”).
\textsuperscript{4353} Bundeskartellamt, Case Summary of 20 September 2012, Decision of 19 September 2012 (Ref: B10-101/11), (“Fines imposed on manufacturers of power transformers”).
\textsuperscript{4354} Case Summary of 14 December 2012, Decision of July 2012 (Ref: B12 - 11/11), (“First fines imposed in rail case”).
\textsuperscript{4355} K. OST, “From Regulation 1” 134.
\textsuperscript{4356} Ibid.
\textsuperscript{4357} See also F. WAGNER-VON PAPP et al “Individual Sanctions” 17-18; F. WAGNER-VON PAPP, “Criminal Antitrust” 8-9 of the online version of this paper; I. LIANOS et. al. “An Optimal” 150.
The official data provided by the Federal Statistics Office (for the years between 2008 and 2013) confirms this view. F. WAGNER-VON PAPP and D. ZIMMER have analysed the official statistics on Section 298 StGB and report that ‘in 2009, 19 convictions were reported (three of which were suspended prison sentences, one for six months, one for more than 9 but no more than 12 months, and one for more than one year but no more than two years); in 2010, 17 convictions were reported (one of which was a suspended prison sentence of more than one but no more than two years); in 2011, 20 convictions were reported (seven of which were suspended prison sentences, four of which were for sentences of more than one but no more than two years); and in 2012, 22 convictions were reported (all fines). In addition, in 2013, […] 35 convictions were reported, of which five defendants were sentenced to suspended prison sentences’. 4358 4359

These statistics illustrate that bid rigging cases are being prosecuted in an active manner. Nevertheless, they also confirm that the most frequently imposed sanctions consisted of criminal fines and/or suspended prison sentences. This raises the question whether prison sentences that are not suspended, are actually imposed in this type of cases.

According to F. WAGNER-VON PAPP, there are some traces of prison sentences that have been carried out. This author mentions (only) one (exceptional) case in which the Regional Court in Munich imposed an unusual severe sentence of two years and 10 months of (unsuspended) imprisonment.4360 This decision is closely connected to the Commission’s proceedings in the Preinsulated Pipe Cartel (1999).4361 In this case, the Commission established that a number of Danish and German undertakings colluded during 1990 and 1996. The Commission imposed fines amounting to approximately €92 million, and its decision was appealed. ‘[…] Starting from the year 2000, while the appeal before the Court of First Instance was still pending, one of the German participants of the Pre-Insulated Pipes Cartel re-initiated contacts with its competitors, exchanged information about current and future bids, agreed to the submission of cover bids, and submitted rigged bids on several occasions between 2001 and 2004. All this was done with the stated objective of raising prices between 5 and 15 per cent. The driving force in the renewed cartelisation efforts was the main defendant, who in the European case had narrowly escaped becoming himself an addressee of an infringement decision. In sentencing the main defendant, the Regional Court in Munich considered as aggravating factors that he was the de facto head of the undertaking and that the infringements had taken place at a time when the appeal of the very same undertaking to the European courts in the Pre-insulated Pipes Cartel case was still pending. The Court also considered the loss inflicted, estimated to be €165,000 (using a 5 per cent overcharge assumption), as ‘substantial’ and an aggravating factor. On the other hand, the defendant’s attempts to compensate victims were treated as a mitigating factor. The Court considered that a final prison sentence of 34 months, i.e. two years and ten months, and an additional fine of €100,000, was adequate and sufficient punishment for the main defendant. Pursuant to section 56(2) of the Criminal Code, a prison sentence exceeding two years cannot be suspended. Accordingly, the ‘King of the Pipes’ was sentenced to serve his term in prison. Two of his co-defendants were sentenced to suspended prison terms of two years each, and the third co-defendant to a suspended prison term of one year’.4362


4359 F. WAGNER-VON PAPP also examines the official statistics for bid rigging before 2008 and finds that during the period from 1998 to 2008, there were 264 prosecutions, 184 convictions, and 26 suspended prison sentences. F. WAGNER-VON PAPP, “Criminal Antitrust” 8-9 of the online version of this paper.


4362 F. WAGNER-VON PAPP, “Criminal Antitrust” 9-10 of the online version of this paper, F. WAGNER-VON PAPP also comments that in 2005 other individual was imprisoned (BGH, 22 June 2004, 4 StR 428/03, 49 BGHSt 201). However, in my point of view, the importance of this case should be put into perspective because it mainly dealt with corruption
2. The United Kingdom

Infringements of UK or EU competition law may lead to both civil and criminal sanctions.

As analysed above, the CMA may impose financial penalties of up to 10% of a company’s worldwide turnover on undertakings that have intentionally or negligently infringed the Chapter I prohibition and/or Article 101 TFEU.4363

Violations of the criminal cartel offense committed by individuals after 20 June 2003 can be penalised with an unlimited criminal fine and/or jail time of up to five years - in addition to possible administrative fines.

Moreover, directors of companies that breach European or UK competition law, or a director who has been held liable for the criminal cartel offence, may be subject to a disqualification order up to 15 years.

The analysis below will scrutinize sanctioning mechanisms other than fines for undertakings.

2.1. The original Cartel Offence

The UK is a notable European jurisdiction in the context of cartel criminalisation. The Enterprise Act, containing the original criminal cartel offence, came into force in the UK on 20 June 2003. The cartel offense was created with the main objective of creating a real deterrent for cartel behaviour.

Section 188 of the original Enterprise Act4364 set out the offence, while Section 190 prescribed the penalties. The offence as originally drafted reads as follows:

(1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B),
(2) The arrangements must be ones which, if operating as the parties to the agreement intend, would-
(a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,
(b) limit or prevent supply by A in the United Kingdom of a product or service,
(c) limit or prevent production by A in the United Kingdom of a product,
(d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,
(e) divide between A and B customers for the supply in the United Kingdom or a product or service, or

offences and only some aspects related bid rigging. The same can be stated about a more recent case in which the German Federal Court of Justice dismissed an appeal of two defendants who had been convicted of bid rigging (concurrently with corruption charges) and sentenced to one and a half years and two years and four months, respectively. (BGH, 29 April 2015, 1 StR 235/14, BeckRS 2015, 12466). Even if F. WAGNER-VON PAPP argues that it is difficult to know whether these cases are the only ones in which defendants “served time” or whether they are the tip of the iceberg, it seems unlikely that individuals frequently serve prison sentences in Germany for (exclusive or non-exclusive) bid-rigging, and that no cases are known or reported.

4363 Section 36 of the Competition Act 1998. See further supra Chapter 11, section 2.2.3.5.
4364 As is further discussed below, the Enterprises Act was reformed in 2013. Hereafter: “Enterprise Act 2002”.

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(f) be bid-rigging arrangements.

(3) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would—
(a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) a product or service,
(b) limit or prevent supply by B in the United Kingdom of a product.

(4) In subsection (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 189).

(5) “Bid-rigging arrangements” are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom—
(a) A but not B may make a bid, or
(b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.

(6) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.

(7) “Undertaking” has the same meaning as in Part 1 of the 1998 Act.’

Section 189 Cartel offence: supplementary

(1) For section 188(2)(a), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by B in the United Kingdom.

(2) For section 188(2)(b), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain—
(a) at which the product or service would at the same time be supplied by B in the United Kingdom, or
(b) at which supply by B in the United Kingdom of the product or service would be limited or prevented by the arrangements.

(3) For section 188(2)(c), the appropriate circumstances are that A’s production of the product would be at a level in the production chain—
(a) at which the product would at the same time be produced by B in the United Kingdom, or
(b) at which production by B in the United Kingdom of the product would be limited or prevented by the arrangements.

(4) For section 188(2)(d), the appropriate circumstances are that A’s supply of the product or service would be at the same level in the supply chain as B’s.

(5) For section 188(3)(a), the appropriate circumstances are that B’s supply of the product or service would be at a level in the supply chain at which the product or service would be at the same time be supplied by A in the United Kingdom.

(6) For section 188(3)(b), the appropriate circumstances are that B’s supply of the product or service would be at a level in the supply chain—
(a) at which the product or service would at the same time be supplied by A in the United Kingdom, or
(b) at which supply by A in the United Kingdom of the product or service would be limited or prevented by the arrangements.

(7) For section 188(3)(c), the appropriate circumstances are that B’s production of the product would be at a level in the production chain—
(a) at which the product would at the same time be produced by A in the United Kingdom, or
(b) at which production by A in the United Kingdom of the product would be limited or prevented by the arrangements.’

In essence, the complex language of Section 188(1) of the Enterprise Act 2002 provided that an individual would be guilty of an offence if he/she dishonestly agreed with one or more other persons to make or implement, or to cause to be made or implemented ‘a cartel arrangement between at least two horizontal competitors. Basically, the arrangements involve: fixing the prices of a product or service supplied to a third party; limiting or preventing the supply of a product/service or the
production of a product; the dividing of markets or customers; or bid-rigging. As the essence of this provision indicates, the offence was designed to only capture horizontal hard core cartel agreements.

The chief rationale for the creation of the UK cartel offence was the need to promote deterrence of cartel activity. In effect, in 2001, the Government concluded that:

‘[h]ard-core cartels are highly damaging to consumers and to the economy in general. The Government believes that the current level of fines against those who engage in cartels does not provide an adequate deterrent. There is a strong case for introducing criminal sanctions against individuals who engage in hard-core cartels: The new criminal offence would need to catch price-fixing, market-sharing and bid-rigging cartels. It should target individuals who set up and maintain cartels, and also senior executives or directors who either condone or encourage the arrangement. There would be real advantages for the main prosecuting authority to be the OFT. The Government intends that the OFT should be able to bring a criminal case against an individual whenever a cartel is implemented or intended to be implemented in the UK; this would include cases where the case against the firm is pursued by the European Commission’.

To signal the seriousness of the offence, Section 190(1)(a) of the Enterprise Act 2002 set out harsh penalties. According to Section 190(1), a person found guilty of this offence is liable, on summary conviction, to a maximum term of six months imprisonment and/or a fine and, on conviction on indictment, to a maximum term of five years imprisonment and/or a fine.

One of the most remarkable differences between the cartel offence and the prohibition included in Article 101 TFEU concerns the excessive focus on form and detail. The same degree of precision cannot be found in the relevant TFEU Articles or in the UK Competition Act.

Furthermore, and even more remarkably, the offence does not refer to the Article 101 TFEU or the Chapter I prohibition. The lack of references to (national) competition law was a conscious choice contradictorily designed to maintain consistency with European law. It has indeed been argued that, by introducing the dishonesty element in the offense, compatibility with Article 101(3) TFEU and/or Section 9 of the Competition Act 1998 could be ensured, without having to include in the definition of the offense any complex efficiency considerations relating to the application of those provisions. In other words, the definitional structure of the offense was meant to guarantee that this provision would not apply to legally acceptable cartel behavior, which fell under the scope of

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4365 Enterprise Act 2002, Section 188(2). See also summarising the content of the original offense e.g. P. M. Whelan, “Section 47” 5 of the online version of this publication; E. M. Michels, “The Real Shortcoming of the UK Cartel Offence: A Lack of Public and Political Support”, 2014 Global Antitrust Review, 53-79, at 66-67 (hereafter: ‘E. M. Michels, “The Real Shortcoming”’).
4366 Hughes LJ noted in RB v IB [2009] EWCA Crim 2575 at 22 that ‘there is no doubt whatever that [the Cartel Offence] was created because it was thought to provide a stronger deterrent to [anticompetitive practices] to threaten executives with imprisonment than was achieved by threatening undertakings with civil financial penalties, heavy as the latter may often be’. See also e.g. A. MacCulloch, “Honesty, Morality and the Cartel Offence”, 2007 (28-6) ECLR, 355-363, at 355; P. M. Whelan, “Section 47” 5 of the online version of this publication (hereafter: ‘A. MacCulloch, “Honesty, Morality”’).
4369 P. M. Whelan, “Section 47” 5 of the online version of this publication.
101(3) TFEU or the national equivalent. Although, as analysed in Chapter 4, this situation is extremely rare, it cannot be absolutely excluded.4370

The design of the offence reflects the concerns of its drafters that a direct reference to Article 101(3) TFEU and/or to the individual exemptions contained in Section 4 of the Competition Act 1998 would induce defendants to raise economic efficiency arguments and thereby greatly complicate trials.4371 Such complication would be unnecessary, particularly taking into account that the conditions for the application of Article 101(3) and Section 4 of the Competition Act 1998 are highly unlikely to be met by undertakings involved in hardcore cartels.4372 Following this line of reasoning, the UK criminal cartel offence was created entirely separate from the administrative one. Given that the Cartel Offence is a stand-alone offence, there is no need to proof of a violation of Article 101(1) TFEU.4373

The fact that the UK cartel offence is not considered "national competition law" has been confirmed by UK Court of Appeal in IB v R Court of Appeal.4374 In this case, the Court found that the test for what constitutes national competition law is whether the national law in question had the objective of applying Articles 101 or 102 TFEU (i.e. deciding substantively whether those provisions had been infringed), rather than whether it pursued the overall objective of preventing anti-competitive practices. The Court concluded that the question of the validity of agreements does not arise within the context of the offence, since the UK criminal cartel offence is aimed at the conduct of individuals. Accordingly, the Court of Appeal found that the UK can bring criminal proceedings in respect of individuals involved in cartels which are subject to parallel proceedings at the EU level for infringement of EU competition law.

To reinforce the standalone nature of the offence, it was made applicable only to individuals – not to undertakings – and special emphasis was put on the dishonesty requirement.4375

4370 It is indeed true that a very specific type of price fixing conduct, may fall under 101(3) TFEU. For examples of this type of activity, see e.g. Commission Decision of 15 September 1999 (Case No IV/36.748 - REIMS II) [1999] OJ L 275/17; Commission Decision of 24 July 2002 (Case COMP/29.373, Visa International – Multilateral Interchange Fee) [2002] OJ L 318/17.

4371 At the time of drafting the offence, the process of modernisation of European competition law had already started. It appears that the process of reform created uncertainty as regards the relationship between national and EU competition law. Given the doubts as to whether, and if so, how the cartel offense would fit in the modernised European enforcement structure, the offense was distanced from the whole (European) competition law system. See M. FURSE AND S. NASH, “Partners in Crime” 144; E. M. MICHELS, “The Real Shortcoming” 66. However, it should be noted that the modernisation process started as soon as 1999 with the publication of the White paper on Modernisation. In September 2000, the Commission presented its proposal for a new Regulation replacing Regulation 17. After more than two years of intensive work in the Council, this proposal led to the adoption of the new Regulation 1/2003 on 16 December 2002. The Regulation was published in the Official Journal of the European Union in January 2003. Taking into account that all Member states had been actively involved in the reforms, the uncertainty in the UK about the possibility to criminalise the enforcement Article 101 and 102 TFEU and their equivalents in national law can certainly be questioned. Most probably, the UK government simply intended to create a standalone offence, even if such offence could properly fit within the modernised enforcement system.


4374 IB v R Court of Appeal - Criminal Division [2009] EWCA Crim 2575.

4375 A. JONES AND R. WILLIAMS, “The UK Response” 21 the online version of this paper.
The Enterprise Act 2002 did not clarify the meaning of the dishonesty element. It was generally accepted that the Ghosh\textsuperscript{4376} notion of dishonesty under common law was applicable in this context.\textsuperscript{4377} The Ghosh test requires the assessment of an objective and a subjective element. First, it must be considered whether the defendant was acting dishonestly according to the standard of ‘a reasonable and honest person’. Second, it must be assessed whether the defendant realized that his act would be regarded as such.\textsuperscript{4378}

While it is argued that the ‘dishonesty’ element can be considered an intrinsic flaw of the cartel offence, there are a number of reasons for its explicit incorporation.

First, this element would underline the moral wrongfulness and the serious nature of the offence.\textsuperscript{4379} In the words of B. Fisse ‘[d]ishonesty goes to the heart of serious cartel conduct, where customers are deceived when purchasing goods and services unaware that the price and supply of those goods and services were determined by collusion, rather than competition’.\textsuperscript{4380} In addition, the criminalization of only dishonest cartel activity sends out the strong message that some types of cartel activity are in fact dishonest and therefore ‘wrong’ from a moral perspective.\textsuperscript{4381} Communicating such message may help to create and/or to reinforce a moral norm concerning cartel activity.\textsuperscript{4382}

Second, the criminalisation of (only) dishonest cartels would make it more likely that courts would impose actual custodial sentences.\textsuperscript{4383} In other words, courts would be more prone to send individuals to prison who had acted dishonestly.

Third, as briefly mentioned before, the concept of dishonesty would reduce the risk that the offence would be categorised as ‘national competition law’ for the purpose of Regulation 1/2003.\textsuperscript{4384} This would, in turn, ‘reduce the likelihood that conviction would depend on judgments taken on detailed

\textsuperscript{4377} The dishonesty requirement derives from more conventional fraud offences, including theft and commercial fraud cases. M. J. Freese, Sanctions 231 of the original version of this dissertation; E. Morgan, “Criminal Cartel Sanctions” 75. This last commentator points out that the Ghosh test ‘was contentious in these contexts well before the introduction of the Enterprise Act’. There is indeed some literature which is critical of the test. See e.g. D. W. Elliot, “Dishonesty in theft: a dispensable concept?” 1982 Criminal Law Review, 395–410; A. Steel, “The appropriate test for dishonesty”, 2000 Criminal Law Journal, 24, pp. 46–59 (‘D. W. Elliot, “Dishonesty in theft”).
\textsuperscript{4379} OFT 365, “Proposed criminalisation of cartels in the UK”, A report prepared for the OFT by A. Hammond and R. Penrose, November 2001, para 2.5. See also E. M. Michels, “The Real Shortcoming” 68.
\textsuperscript{4381} P. M. Whelan, “Section 47” 7 of the online version of this publication; B. Fisse, “The proposed Australian” 6.
\textsuperscript{4382} P. M. Whelan, “Section 47” 7 of the online version of this publication; see also P. Whelan, “Improving Cartel Enforcement in the UK: The Case in Favour of BIS’s “Option 4””, 2012 (8-3) European Competition Journal, 589-601 (hereafter: ‘P. Whelan, “Improving Cartel Enforcement”’).
\textsuperscript{4383} OFT 365, “Proposed criminalisation of cartels in the UK”, A report prepared for the OFT by A. Hammond and R. Penrose, November 2001, para 1.10. In this context, Harding and Joshua argued that ‘it may be that the drafters had an uneasy awareness that their definition of the actus reus was so confusing and elusive that ‘dishonesty’ might give the jury something meaty they could get to grips with’. C. Harding and J. Joshua, “Breaking up the Hard Core: the Prospects for the Proposed Cartel Offence”, 2002 Criminal Law Review, 933-944, at 939 (hereafter: ‘C. Harding and J. Joshua, “Breaking up”’). See also P. M. Whelan, “Section 47” 7 of the online version of this publication.
\textsuperscript{4384} A. Jones and R. Williams, “The UK Response” 9 of the online version of this paper.
economic evidence.\textsuperscript{4385} \textsuperscript{4386} It has been argued that there was a concern that juries would not be able to fully understand such economic evidence.\textsuperscript{4387} This comment, however, disregards the fact that national judges are required to apply competition law in the context of private enforcement. Given that the enforcement of Article 101(3) TFEU had been taken place since the entry into force of Regulation 1/2003, it can be assumed that such concerns would only have a limited impact in practical cases.

Finally, and somehow paradoxically, the element of dishonesty was meant to ensure the compatibility of the criminal offence with the (administrative) competition law system.\textsuperscript{4388} In this sense, the original cartel offence appears to be based on the premise that the term ‘dishonest’ would always mean ‘unlawful’ under Article 101 TFEU or the Competition Act.\textsuperscript{4389}

Even though it was recognised that the inclusion of the dishonesty requirement was an imperfect means to achieve the objectives discussed above, this element still appeared to be the best option available.\textsuperscript{4390}

In contrast to this optimistic view, some argued strongly (and almost predicted) that the definitional element of ‘dishonesty’ as included in the cartel offence would be more than problematic.\textsuperscript{4391} One of the most debated issues was the moral aspect of cartel behaviour. The introduction of the dishonesty element was supposed to stress the serious nature as well as the moral wrongfulness of the offence. However, such conviction cannot be created without a bottom-up public sense of ‘moral outrage’\textsuperscript{4392} and attitudes being sufficiently hardened from the outset.\textsuperscript{4393}

\begin{itemize}
\item \textsuperscript{4385} Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills, para 6.9.
\item \textsuperscript{4386} In the view of P. M. WHelan ‘a central feature of an effective criminal cartel law is the absence of a requirement to analyse and to prove any economic effects in a market to find an infringement’. He puts forward three reasons for this. First, the difficulties in defining a market in practice. Second, undertaking complex economic analyses is not a classic institutional competence of criminal courts. Third, determine if a criminal cartel offence has been committed on the basis of economic effects would create a slight and inappropriate - distinction between criminal conduct and non-criminal conduct. P. M. WHelan, “Section 47” 12-13, of the online version of this publication.
\item \textsuperscript{4387} P. M. WHelan, “Section 47” 7-8 of the online version of this publication.
\item \textsuperscript{4388} A. Jones and R. Williams, “The UK Response” 8-9 of the online version of this paper.
\item \textsuperscript{4389} It has been argued that the Ghosh test could carve out from the UK Cartel Offence cartel activity that would benefit from an exception under UK or EU law. P. M. WHelan, “Section 47” 8 of the online version of this publication; M. Furse, The Criminal Law 112.
\item \textsuperscript{4392} This expression has been borrowed from A. Jones and R. Williams, “The UK Response” 10 of the online version of this paper.
\item \textsuperscript{4393} In the words of P. Whelan ‘the use of the definitional construct of ‘dishonesty’ engenders a problem of the ‘chicken and egg’ variety: one wishes to have criminal prosecutions to harden attitudes to cartel activity; but by arguing that cartel activity is dishonest (according to the standards of honest people), one in effect presupposes the existence of such
An additional and in my view more problematic issue concerns the relationship of the dishonest cartel offense with European and/or national competition law. The cartel offense was created in a completely separate manner from the (EU) competition law system and thus from the prohibitions in Article 101 TFEU and in Chapter I of the Competition Act 1998.

Section 188 of the Enterprise Act 2002 does not refer or mirror the content of Article 101 TFEU or Chapter I of the Competition Act 1998. Although it is true that the cartel offence was originally designed to only apply to horizontal naked cartels, which as a rule are prohibited under competition law, this purpose was to be achieved indirectly through the dishonesty element. There is no need to say that the inclusion of this element to attain such objective is rather questionable. Since Section 188 of the Enterprise Act 2002 does not provide any rules regarding the exemption of agreements that appear to be pro-competitive (comparable to those contained in Article 101(3) TFEU) the risk of criminalizing behavior that is economically efficient and thus acceptable under the existing (EU) competition regime is certainly present. Those admittedly exceptional cases in which price-fixing, market sharing, output limitation and or bid rigging are not prohibited under (European) competition law, may this still be banned under the cartel offence if the conduct at hand is considered dishonest. Moreover, the desire of the UK authorities to avoid any reference to competition law not only creates unfair situations for individuals. The design of a standalone offence is as such contrary to the principle of supremacy and to the framework set out by Regulation 1/2003 which requires the application Article 101 TFEU when the effect on trade condition is satisfied.

Furthermore, it is also difficult to see how the dishonesty element can preclude the use of economic evidence. Arguably, it may even induce defendants to claim that an agreement that, overall, has a positive effect on economic efficiency cannot be seen as dishonest. In other words, by presenting economic evidence and putting forward complex economic arguments about the applicability of Article 101(3) TFEU (or the national equivalent), it may be easier to show that a certain behavior cannot be dishonest and is thus not criminalized.

4394 A. JONES AND R. WILLIAMS, “The UK Response” 23-24 of the online version of this paper; E. M. MICHELKS, “The Real Shortcoming” 70; this author qualifies the dishonesty element as a “filter”.

4395 Such inappropriateness in inter alia linked to nature of the Ghosh test, which focuses on the defendant’s state of mind. See B. FISSE, “The Cartel Offence” 239-240. Such focus is indeed quite different than that of competition law which deals with the effect of market behaviour on the competitive process.

4396 P. M. WHELAN, “Section 47” 9-10 of the online version of this publication.

4397 A. HAMMOND AND R. PENROSE observed that the element of dishonesty’ would ‘go a long way to preclude a defence argument that the activity being prosecuted […] might have economic benefits’. OFT 365, “Proposed criminalisation of cartels in the UK”, A report prepared for the OFT by A. HAMMOND AND R. PENROSE, November 2001, para 2.5. See also P. M. WHELAN, “Section 47” 12 of the online version of this publication. This author even points out that the use of economic evidence and arguments is necessary for the defendant. In the light of this he concludes that ‘the employment of the definitional element of ‘dishonesty’ merely provides another way for economic evidence to be used to carve ‘acceptable’ cartel activity out of the criminal cartel offence’. See also E. M. MICHELKS, “The Real Shortcoming” 70. This last commentator comments in this regard that ‘under the second subjective leg of the Ghosh test, a defendant may try to raise a defence that at the time of committing the offence he believed he was acting honestly according to the standards of ordinary honest people. He may thus try to raise a ‘Robin-Hood defence’, by arguing for instance that in a time of economic downturn he participated in a cartel to avoid layoffs. As the judge is barred from directing the jury on what dishonesty means, the jury may be persuaded to find that the second condition was not met’. See also A. MACCULLOCH, “Honesty, Morality” 358; J. JOSHUA, “D.O.A: Can the UK Cartel Offence” 151.
2.2. The reformed Cartel Offence

Given the frequent obstacles encountered by the former OFT in prosecuting individuals under the cartel offence, the Government decided to remove ‘dishonesty’ as an element of the cartel offence. In the document on the consultation for reform, the Government acknowledged that the ‘dishonesty’ element in the offence seem[ed] to make the offence harder to prosecute. It also put(s) the UK at odds with developing international best practice on how to define a hard core cartel offence’. Accordingly, the Government decided to replace this element with a number of statutory exclusions and defences intended to identify the core elements of the offence while avoiding the difficulties caused by the need to prove ‘dishonesty’. In essence, the new exclusions and defences would narrow the offence by defining it ‘so that it does not include cartel arrangements that the parties have agreed to publish in a suitable format before they are implemented, so that customers and others are aware of them’.

The revised criminal cartel offence, which does not require dishonesty to be proven, was implemented by the Enterprise and Regulatory Reform Act 2013, and entered into force on 1 April 2014.

The statutory exclusions of the reformed cartel offence set out the circumstances under which the offense will not be committed. As a result, parties to cartel arrangements that would otherwise fall within the scope of the offence may bring the arrangements outside the scope of the offence by ensuring that their conduct satisfies the requirements of the three following exclusions:

- The notification exclusion provides that an individual will not commit an offence if, under the terms of the arrangement, customers are given relevant information about the arrangement before they enter into agreements for the supply of the product or service affected.

- Under the bid-rigging notification exclusion an individual will not commit an offence if, in the case of bid-rigging arrangements, the person requesting bids is given relevant information about the arrangements at or before the time of a bid.

- The publication exclusion provides that an individual will not commit an offence if the relevant information about the arrangement is published before the arrangement is

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4399 See further infra Chapter 12, 2.5.
4400 Department for Business, Innovation and Skills, Competition for Growth: Consultation on Options for Reform (2011), at 32.
4401 Department for Business, Innovation and Skills, Growth Competition and the Competition Regime: Government Response to Consultation, March 2012, at 66. The publication of the Government Response to Consultation was swiftly followed by legislative action (see generally http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html). The Enterprise and Regulatory Reform Bill, which contained inter alia the Cartel Offence proposal for reform, had its first reading in the House of Commons on 23 May 2012. This Bill eventually received Royal Assent on 25 April 2013 and became the Enterprise and Regulatory Reform Act 2013 (hereafter: ‘ERRA 2013’).
4402 ERRA 2013 s.47, adding section 188A to the Enterprise Act 2002. See also CMA, “Cartel offence prosecution guidance” (CMA9), paras 4.11–4.17.
4403 Enterprise Act 2002 as amended by the ERRA 2013, Section 188A(1)(a).
4404 Ibid, Section 188A(1)(b).
implemented, by advertising such information once in either the London Gazette, the Edinburgh Gazette, or the Belfast Gazette.\textsuperscript{4405}

“Relevant information” for the purpose of the three exclusions means: (i) the names of the companies to which the arrangements relate, (ii) a description of the nature of the arrangements sufficient to show for what reason they (might) fall within the scope of the offence, (iii) the products or services to which they relate, and (iv) any other information as may be specified in an order made by the Secretary of State.\textsuperscript{4406}

In addition to these exclusions, an individual will not commit a cartel offence if the agreement is made in order to comply with legislation in force in the UK or elsewhere in the European Union, or is imposed directly by the TFEU or the European Economic Area Agreement.\textsuperscript{4407}

There are also three new statutory defences to the cartel offence.\textsuperscript{4408}

- An individual may show that at the time of the making of the agreement, he or she did not intend to conceal the nature of the arrangement from customers at all times before they entered into agreements for the supply to them of the product or service.\textsuperscript{4409}

- An individual may demonstrate that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA.\textsuperscript{4410}

- A individual is entitled ‘to show that, before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation’.\textsuperscript{4411} The term “professional legal advisers” under the third defence covers both external and in-house legal advisers qualified in the UK and could also apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification. The defence applies whenever the individual took reasonable steps to seek legal advice about the arrangements in question.\textsuperscript{4412}

\textbf{2.3. Assessment of the reformed Cartel Offence: (exclusions and defences)}

From a general perspective, the defences and exclusions contained in the new revised cartel offence are, to some extent, related to the secrecy of the arrangements in question.

Given that, arguably, the new regime is designed to ‘carve out’ agreements that had been notified or published and/or have not been concealed or hidden from legal advisors, it has been argued that the

\begin{footnotesize}
\begin{enumerate}
\item Ibid, Section 188A(1)(c).
\item Ibid, Section 188A(2). See also CMA, “Cartel offence prosecution guidance” (CMA9), para. 4.12
\item Enterprise Act 2002 as amended by the ERRA 2013, Section 188A(3).
\item ERRA 2013 s.47, adding a s.188B to the Enterprise Act 2002. See also CMA, “Cartel offence prosecution guidance” (CMA9), paras 4.18–4.24.
\item Enterprise Act 2002 as amended by the ERRA 2013, Section 188A(1).
\item Enterprise Act 2002 as amended by the ERRA 2013, Section 188B(2).
\item Ibid, Section 188B(3).
\item CMA, “Cartel offence prosecution guidance” (CMA9), para. 4.24.
\end{enumerate}
\end{footnotesize}
covert or secretive character of the agreements prohibited by the offence can be equated with the concept of ‘deception’.\textsuperscript{4413} Such correlation between secrecy and deception would only stress the morality attached to the cartel offence.\textsuperscript{4414}

It is, however, more than evident that even if the legislator meant to connect the revised offence with deception, such a link is quite blurred or indirect. Just like the original version of the offence, the very essence of this norm targets price fixing and other classic cartel behaviour. At best, the element of “deception” is implied in the failure to disclose.\textsuperscript{4415}

Furthermore, even if the cartel offence was to be considered as “deception” it is important to stress that under UK common law, deception does not constitute a criminal offence by definition. Section 1 of the Fraud Act creates a general offence of fraud, which can be committed by false representation.\textsuperscript{4416} However, this offence also requires that the misrepresentation has been committed dishonestly and with intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss.\textsuperscript{4417}

The major handicap concerning the reformed offence, once again, is its relationship with European and national competition law and more precisely, the need to define exclusions and defences so as to avoid that the offence is applied to pro-competitive conduct (which is not prohibited under competition law).

As was analysed in Chapter 2, the deterrence objective of competition law is specifically appropriate in cartel cases because there is little risk of targeting false positives. If a sanctioning mechanism consisting of fines for undertakings does not achieve the desired level of deterrence, there is indeed a strong argument to look at other types of sanctions that may include criminal penalties. Still, the most important justification to adopt criminal sanctions remains unchanged: harsh penalties for cartel cases are specially appropriate due to the naked nature of such agreements and thus inexistent risk of targeting false positives. The concept of “naked” agreement is as such intrinsic to the


\textsuperscript{4414} P. M. WHELAN, “Section 47” 23-24 of the online version of this publication.

\textsuperscript{4415} A. JONES AND R. WILLIAMS, “The UK Response” 19 the online version of this paper. This point of view is also supported by the judgement in Norris v Government of the United States of America [2008] UKHL 16, in which the House of Lords (now Supreme Court) confirmed that price fixing did not amount to a ‘conspiracy to defraud’ at common law unless some aggravating factor was present such as fraud, misrepresentation, violence or intimidation.

\textsuperscript{4416} The Fraud Act 2006, available at http://www.cps.gov.uk/legal/d_to_g/fraud_act/#a07

\textsuperscript{4417} See Section 2 of the Fraud Act 2006. In addition, the element of dishonesty contained in the Fraud Act 2006 has also been a problematic feature of the UK criminal law for undermines the criminal law’s moral signalling role. See A. ASHWORTH, Principles of Criminal Law, Oxford, OUP 2006, 544 p., at 405; D. ORMEROD, “The Fraud Act 2006: Criminalizing Lying”, 2007 Criminal Law Review, 193-210, at 201; A. JONES AND R. WILLIAMS, “The UK Response” 19-20 the online version of this paper.
definition of a hard core cartel.\(^\text{4418}\) Cartels, by definition – or by their very nature – do not produce any type of economic efficiency or benefit for consumers.\(^\text{4419}\)

If a cartel offence is to be adopted, it is crucial to catch the very essence of cartels. While it cannot be denied that cartels most commonly involve an element of secrecy and, more indirectly, deception, such secrecy is only a consequence of their blatantly illegal nature.\(^\text{4420}\) As stated by M. MONTI cartels are ‘cancers on the open market economy’, they go against the most fundamental principles of the free market economy,\(^\text{4421}\) and are so intrinsically detrimental to the competitive process precisely because they never produce any countervailing benefits. In turn, the absence of pro-competitive effects inevitably leads to the conclusion that hard core cartels will never be considered lawful under (European) competition law.\(^\text{4422}\)

The very essence of cartels is well reflected by the OECD 1998 Recommendation Concerning Effective Action against Hard Core Cartels, which defined a hardcore cartel as ‘an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce’. The OECD recommendation added that these categories of arrangements do ‘not include agreements, concerted practices or arrangements that i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or iii) are authorised in accordance with those laws’.\(^\text{4423}\)

\(^{4418}\) See further Chapter 4 and more generally Chapter 2. See also in this context A. JONES AND R. WILLIAMS, “The UK Response” 20-21 the online version of this paper. As these authors correctly underline The strongest argument for criminalising cartels, but not other conduct targeted by the antitrust laws, seems to rest on the fact that, not only do cartels restrict competition between competitors and cause significant harm, but that they are ‘naked’. See also A. KOLEV, “The Abolishment of the ‘Dishonesty’ Requirement in the Cartel Offence and the Future of Anti-Cartel Enforcement in the United Kingdom”, (April 1, 2013), at 14, available at http://ssrn.com/abstract=2318991 (hereafter: ‘A. KOLEV, “The Abolishment”’).

\(^{4419}\) See also in this context A. KOLEV, “The Abolishment” 14. This author argues that ‘the UK courts demand clarity in order to enforce the criminal cartel offence, and are tangled in the application of the ‘dishonesty’ element by considerations that are irrelevant to the harm of cartels on the economy. […] the intrinsic criminality of hard-core cartels is better demonstrated by economic rationale, which also justifies the notion that hard-core cartels must be per se illegal. This concept conveys deterrence more effectively to the public, companies and individuals alike, and allows for swifter serving of justice’.

\(^{4420}\) As examined in Chapter 4 (section 3), during the first enforcement decades the Commission’s approach towards cartels was far milder than now. This was for instance illustrated by the fact that the so-called crisis cartels were (exceptionally) accepted. Once this approach was abandoned and the Commissions started to prosecute cartels more actively and to impose stricter fines, undertakings started to develop more sophisticated concealment measures to hide their illegal behaviour and avoid fines. It was precisely the development of concealment instruments that lead to the necessary adoption of the Commission’s leniency programme.

\(^{4421}\) The detrimental effects of cartels on the economic were examined in detail in Chapter 2, section 2.

\(^{4422}\) Indeed, cartel behaviour has been described as ‘a practice without defenders in the economic profession’ (I. STELZER, quoted by J. R. KINGHORN AND R. NIELSEN, “A Practice without Defenders: The Price Effects of Cartelization” in P. Z. GROSSMAN (ed), How Cartels Endure and How They Fail—Studies of Industrial Collusion, Cheltenham, Edward Elgar, 2004). See also in this regard, A. JONES AND R. WILLIAMS, “The UK Response” 20-21 the online version of this paper. See also more generally S. BISHOP AND M. WALKER, The Economics of EC Competition Law, London, Sweet & Maxwell 2010, 832 p.

These crucial aspects are (once again) not specified in the UK offence. On the contrary, the cartel offence is deliberately designed so as not to engage competition law. The division between the cartel offence and competition law is, nonetheless, fully artificial and constitutes most likely the greatest handicap of the project of cartel criminalization in the UK.

Finally, even if the separation between the cartel offence and competition law was accepted, one may wonder whether (a lack of) secrecy is an appropriate means to carve out pro-competitive conduct and thus to identify and define the very essence of cartels.

In this regard it has been argued that the exclusions and defences will operate as a far more effective filter to distinguish hard-core cartel agreements from benign or pro-competitive arrangements than the previous element of dishonesty. This view is based on the reasoning that hard core cartel participants are unlikely to expose their secret agreements through publication or notification, as this would quickly lead to the intervention of competition authorities.

There is no doubt that secrecy is a common feature of cartel agreements. This aspect has in effect also been stressed on a regular basis by the Commission and the European Courts. Still, the efforts to conceal cartels and thus secrecy should not be seen as a definitional element but as a consequence of their naked and illegal nature, which in turn leads to the imposition of significant sanctions. This does not mean on the other hand that the element of secrecy has no influence on the design of competition law. In fact, the secrecy of cartels is translated in a low detection probability. In order to attain deterrence this lower probability of deterrence is also considered in the calculation of fines for undertakings that are – as analysed in Chapter 10 – significantly stricter in cartel cases.

Following this line of reasoning, it can certainly be concluded that openly communicated cartels may only require or even deserve a milder sanction than secret cartels to attain the deterrence goal. Given that the probability of detection is higher in such cases, the amount of the fine could be lowered according to economic insights on optimal deterrence. Nevertheless, it is difficult to see

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4424 See also noting this surprising absence e.g. V. BROPHY, M. EVANS, F. LIBERATORE AND M. LAVEDAN, “The UK’s New Civil and Criminal Antitrust Enforcement Regime”, 2014 (3) GCLR, 159-167, at 164.

4425 The UK Government indeed considers that the secrecy element (instead of the former dishonesty element) distinguishes the cartel offence from competition law. See Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills, para 7.30. In the (at least peculiar) view of the UK Government ‘as amended, the criminal cartel offence would remain significantly distinct and so would not be more likely to be classed as ‘national competition law’ for the purposes of Regulation 1/2003/EC. This means that criminal cases could still be pursued if there were parallel civil proceedings at EU level’.

4426 See sharing this view e.g. M. J. FRESE, Sanctions 231-232 of the original version of this dissertation.

4427 See agreeing on this point A. JONES AND R. WILLIAMS, “The UK Response” 20-21 the online version of this paper. These authors argue that ‘[i]t would seem essential, however, that these [efficiency] aspects of cartel conduct should be clear, if a case for criminalisation is to be built and if an anti-cartel culture is to ‘evolve’ to the point that it is natural to view cartel activity as a serious crime’.

4428 See e.g. E. M. MICHELS, “The Real Shortcoming” 72.

4429 See further commenting on this element supra Chapter 2 and Chapter 8, section 1.


4431 Furthermore, as pointed out above the secrecy of cartels is also the main justification for the development of leniency programmes. See further supra Chapter 8, section 1.

4432 The relationship between the probability of detection and the level of the fine has been examined in Chapter 10, section 1.
how such secrecy can have an impact on the fact that cartels are naked agreements by nature or on their lack of pro-competitive effects. In fact, these features constitute the very foundation of the cartel prohibition.\footnote{See supra Chapter 4. Making again a link between the cartel offence and a moral norm such as deception, it has been observed that ‘[i]f there is an admission of the existence of a cartel prior to a sale (either through public publication (of which customers could be deemed to have constructive notice) or direct communication with potential customers), then, there is no violation of the moral norm against deception’. P. M. WHELAN, “Section 47” 5 of the online version of this publication. This opinion is, however, questionable given the very indirect link between the cartel offence and deception. If the legislator indeed meant to criminalize cartels because of their deceptive nature, this is clearly not reflected in the content of the offence. Indeed, cartels which are not secret have more probabilities to be scrutinised by competition authorities. In this regard it has been commented that ‘then one can take comfort in the fact that ‘carve outs’ help to undermine their potency’. See e.g. P. M. WHELAN, “Section 47” 26 of the online version of this publication. In this regard, it has even been argued that the two defences relating to the lack of intention to conceal the nature of the cartel arrangements from (i) customers or (ii) from the CMA have ‘been drafted more to define situations in which it should not be available, i.e. secret cartels, than to provide a generally useful defence for legitimate commercial arrangements’. See B. MCGRATH AND J. LOVE, “A Further Twist in the “Dishonesty” Tale: UK Government Proposes New Defences to the Criminal Cartel Offence”, Lexology, 30 October 2012, at 3, also available at http://www.martindale.com/antitrust-trade-regulation-law/article_Edwards-Wildman-Palmer-LLP_1616878.htm. On the other hand, it is true that in the event that parties do not communicate their agreement (to their legal advice) there is some potential for overcriminalisation. See point out this aspect A. JONES AND R. WILLIAMS, “The UK Response” 24 the online version of this paper. These commentators point out that ‘the legislation has again approached the efficiencies problem ‘indirectly’, and in an extremely formalistic manner. […] In fact, under their point of view ‘the language utilised in the new legislation, which is not familiar to competition lawyers, is […] causing considerable turbulence in the business community and fear that the criminal offence applies too broadly, encompassing a number of benign ventures between competitors’. Those who equate the cartel offence with deception, however, argue that ‘the notification and publication ‘carve outs’, can be rationalised as an attempt to link (criminalised) cartel activity to deception: an absence of an intention to conceal can be interpreted as an absence of an intention to mislead’. P. M. WHELAN, “Section 47” 30-31 of the online version of this publication. Even the literature supporting the UK approach towards the exclusions and defences has noted that one of the defences is clearly poorly designed. See e.g. P. M. WHELAN, “Section 47” 30 of the online version of this publication. See also stressing this aspect E. M. MICHELIS, “The Real Shortcoming” 72. This interpretation is corroborated by the Explanatory Notes and the CMA’s Prosecution Guidance in which the CMA takes the view that this must ‘genuinely be an attempt to seek legal advice about the arrangement’ but says nothing about the need to follow such advice, CMA, “Cartel offence prosecution guidance” (CMA9), para 4.24; Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, para 361. See also S. BRANCH, “Competition, the Revised Cartel Offence and the CMA – A New Landscape”, Business Crime – 2014 Conference, London, 23 September 2014.}

While it may be argued that the risk of over-criminalisation can be minimised if parties choose to disclose their agreement,\footnote{It takes the view that there must ‘genuinely be an attempt to seek legal advice about the arrangement’ but says nothing about the need to follow such advice, CMA, “Cartel offence prosecution guidance” (CMA9), para 4.24; Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, para 361. See also S. BRANCH, “Competition, the Revised Cartel Offence and the CMA – A New Landscape”, Business Crime – 2014 Conference, London, 23 September 2014.} it is at least questionable to state that openly concluded cartels deserve (only) an administrative sanction whereas secret cartels must be considered a criminal offence.\footnote{This interpretation is corroborated by the Explanatory Notes and the CMA’s Prosecution Guidance in which the CMA takes the view that this must ‘genuinely be an attempt to seek legal advice about the arrangement’ but says nothing about the need to follow such advice, CMA, “Cartel offence prosecution guidance” (CMA9), para 4.24; Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, para 361. See also S. BRANCH, “Competition, the Revised Cartel Offence and the CMA – A New Landscape”, Business Crime – 2014 Conference, London, 23 September 2014.} Without entering into too much detail about the content of the exclusions and the defences, it should be especially clear that one of the defences carries a great potential to undermine the whole system. The ‘legal advise defence’ may excuse an individual who can show that he took \textit{reasonable steps} to obtain legal advice, which can be coming from an external advisor or the in-house legal team.\footnote{See supra Chapter 4. Making again a link between the cartel offence and a moral norm such as deception, it has been observed that ‘[i]f there is an admission of the existence of a cartel prior to a sale (either through public publication (of which customers could be deemed to have constructive notice) or direct communication with potential customers), then, there is no violation of the moral norm against deception’. P. M. WHELAN, “Section 47” 5 of the online version of this publication. This opinion is, however, questionable given the very indirect link between the cartel offence and deception. If the legislator indeed meant to criminalize cartels because of their deceptive nature, this is clearly not reflected in the content of the offence. Indeed, cartels which are not secret have more probabilities to be scrutinised by competition authorities. In this regard it has been commented that ‘then one can take comfort in the fact that ‘carve outs’ help to undermine their potency’. See e.g. P. M. WHELAN, “Section 47” 26 of the online version of this publication. In this regard, it has even been argued that the two defences relating to the lack of intention to conceal the nature of the cartel arrangements from (i) customers or (ii) from the CMA have ‘been drafted more to define situations in which it should not be available, i.e. secret cartels, than to provide a generally useful defence for legitimate commercial arrangements’. See B. MCGRATH AND J. LOVE, “A Further Twist in the “Dishonesty” Tale: UK Government Proposes New Defences to the Criminal Cartel Offence”, Lexology, 30 October 2012, at 3, also available at http://www.martindale.com/antitrust-trade-regulation-law/article_Edwards-Wildman-Palmer-LLP_1616878.htm. On the other hand, it is true that in the event that parties do not communicate their agreement (to their legal advice) there is some potential for overcriminalisation. See point out this aspect A. JONES AND R. WILLIAMS, “The UK Response” 24 the online version of this paper. These commentators point out that ‘the legislation has again approached the efficiencies problem ‘indirectly’, and in an extremely formalistic manner. […] In fact, under their point of view ‘the language utilised in the new legislation, which is not familiar to competition lawyers, is […] causing considerable turbulence in the business community and fear that the criminal offence applies too broadly, encompassing a number of benign ventures between competitors’. Those who equate the cartel offence with deception, however, argue that ‘the notification and publication ‘carve outs’, can be rationalised as an attempt to link (criminalised) cartel activity to deception: an absence of an intention to conceal can be interpreted as an absence of an intention to mislead’. P. M. WHELAN, “Section 47” 30-31 of the online version of this publication. Even the literature supporting the UK approach towards the exclusions and defences has noted that one of the defences is clearly poorly designed. See e.g. P. M. WHELAN, “Section 47” 30 of the online version of this publication. See also stressing this aspect E. M. MICHELIS, “The Real Shortcoming” 72. This interpretation is corroborated by the Explanatory Notes and the CMA’s Prosecution Guidance in which the CMA takes the view that this must ‘genuinely be an attempt to seek legal advice about the arrangement’ but says nothing about the need to follow such advice, CMA, “Cartel offence prosecution guidance” (CMA9), para 4.24; Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, para 361. See also S. BRANCH, “Competition, the Revised Cartel Offence and the CMA – A New Landscape”, Business Crime – 2014 Conference, London, 23 September 2014.}

It is obvious that that this defence is extremely simple to meet in practice:

- There is no need to actually obtain legal advice. The mere fact that \textit{reasonable steps} to do so have been taken, suffices.\footnote{It takes the view that there must ‘genuinely be an attempt to seek legal advice about the arrangement’ but says nothing about the need to follow such advice, CMA, “Cartel offence prosecution guidance” (CMA9), para 4.24; Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, para 361. See also S. BRANCH, “Competition, the Revised Cartel Offence and the CMA – A New Landscape”, Business Crime – 2014 Conference, London, 23 September 2014.} The reading of this provision implies, in other words, that the defence can be applied in the event that an individual submits evidence showing, for instance, that he or she e-mailed a law firm concerning an agreement.
- Moreover, in the event that legal advice is provided, there is no obligation to actually follow this advice, even if the legal advisor clearly explains the prohibited nature of the conduct and the consequences thereof.\footnote{This interpretation is corroborated by the Explanatory Notes and the CMA’s Prosecution Guidance in which the CMA takes the view that this must ‘genuinely be an attempt to seek legal advice about the arrangement’ but says nothing about the need to follow such advice, CMA, “Cartel offence prosecution guidance” (CMA9), para 4.24; Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, para 361. See also S. BRANCH, “Competition, the Revised Cartel Offence and the CMA – A New Landscape”, Business Crime – 2014 Conference, London, 23 September 2014.}
Finally, since most (relatively) large companies dispose of a legal team, one may wonder whether this condition is not fulfilled by definition for such companies.

Taken as a whole, ‘this defence allows cartelists to escape criminal conviction merely by informing their lawyers of their intended cartel plans in order to get their advice regarding their legality’. This approach is, once again in stark contrast with the interpretation and application of European competition law under which ‘legal advice provided to an undertaking cannot form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU nor will it give rise to the imposition of a fine’, even where the advice is erroneous and relied upon in good faith by the undertaking. If the UK cartel offence was (as argued by some) intended to catch secret deceptive behaviour, the legal advice defence has the intrinsic potential to undermine such goal and, thereby, the potential deterrent effect pursued by the introduction of the offence.

2.4. Interaction between criminal sanctions and leniency

The CMA operates a corporate leniency policy as well as a “no-action” policy for individuals. Under Section 190(4) of the Enterprise Act 2013, the CMA may grant immunity from individual...
criminal sanctions in the form of “no-action letters”. These letters are written notices stating that no proceedings for a specific cartel offense will be brought except in specified circumstances (e.g., failure to cooperate at a later stage of the investigation).

A no-action letter will prevent an individual from being prosecuted for the cartel offence in England, Wales and Northern Ireland. Immunity from prosecution can, however, not be automatically given for Scotland. Instead, a consolation effort between the CMA and the COPFS must take place with regard to leniency applicants. If the CMA advises to grant criminal immunity for the leniency applicant, the Lord Advocate will take such cooperation into account. The lack of certainty with regard to criminal immunity in Scotland can be seen as one of the major shortcomings of this policy. Even if the COPFS will normally follow the CMA’s advice, the possibility that immunity is not granted may dissuade individuals and undertakings involved in cartels from coming forward and cooperating in the investigation. This may in turn not only undermine the effective working of the cartel offence but also the functioning of the administrative enforcement system.

2.4.1. General conditions to obtain no-action letters

An individual may be able to obtain a no-action letter from the CMA in two different situations. First, when the business that employs the individual has been granted immunity from financial penalties or a lenient treatment, for an infringement of the Competition Act and/or Article 101 TFEU. Second, when the individual directly approaches the CMA to obtain a no-action letter.

Regardless of the context in which immunity is granted, it is important to keep in mind that the CMA’s leniency policy is not only applicable to horizontal conduct. In fact, the CMA’s Guidance clarifies that the term “cartel activities” cover hard-core cartel conduct such as horizontal price fixing and market-sharing as well as vertical price-fixing. The applicability of the leniency system to vertical agreements, even if they consist of price fixing, is certainly more difficult to justify than for horizontal cartel cases. In addition, this wider scope of application may lead to inconsistencies and uncertainty for undertaking (and individuals) involved in cartels covering different Member States including the UK. Furthermore, this wider scope of application is also at odds with the cartel offence itself, which is meant to cover only horizontal agreements. Whether vertical price-fixing should be covered by the leniency system is, therefore, (at least) questionable.

In order to benefit from immunity from prosecution, the individual in question must (continuously) meet the conditions set out in the no-action letter until the end of the proceedings. More precisely, the individual must (i) admit his participation in the cartel offence, provide the CMA with all the information, documents and evidence available to them regarding the cartel activity, (ii) cooperate with the CMA throughout the investigation and until the conclusion of any criminal proceedings, (iii) provide the CMA with any additional information, documents and evidence on request, (iv) not obstruct the investigation, (v) not attempt to dissuade others from providing information or cooperating with the CMA. This includes taking all reasonable steps to prevent anyone who has provided information to the CMA from exercising influence on any person who has or may have provided information to any relevant authority.

CMA has (re)adopted the guidance published by its predecessor. Under the leniency policy, companies can report “cartel activities” that infringe the Chapter I prohibition under the Competition Act, and/or Article 101 TFEU to the CMA.

See further elaborating on these reasons supra Chapter 8, section 4.1.2.1.

Cf. supra.
(iii) cease involvement in the cartel activity from the point when it is disclosed to the CMA, (iv) not have coerced another business to take part in the cartel.4453

It is noteworthy that these conditions are also generally applicable to undertakings aiming to obtain (corporate) immunity. Looking at the level of alignment between these cooperation obligations and the requirements set out in the Commission’s leniency programme, it can be affirmed that both systems are greatly aligned. The only exception regards the first condition under which companies and/or individuals are required to admit their liability for the cartel infringement, while the Commission only requires a description of the undertaking’s role in the cartel.4454

A no-action letter may be revoked if: (i) the recipient of a letter ceases to satisfy in whole or in part any of the relevant conditions, or if (ii) the recipient of a letter has knowingly or recklessly provided information that is false or material that is particularly misleading. If a no-action letter is revoked, immunity immediately ceases to exist as if it had never been granted. In this scenario, the CMA may rely on any information given by the applicant in a prosecution for the cartel offence.4455 These provisions are meant to ensure that individual applicants are prepared to provide full and sincere cooperation. If an individual applies for criminal leniency with the intention of misleading the CMA, he or she will have a lot to lose as the CMA can use the submitted information to secure the criminal case. On the other hand, if the CMA applies the cooperation condition too strictly, the fact that the evidence submitted can be used may deter indecisive individuals from coming forward. In this regard, it is interesting to recall that the Commission does not have a revocation right for undertakings that apply for leniency. However, under the Commission’s leniency system, applicants are only granted provisional immunity if all the relevant conditions are satisfied. If one or more conditions are no longer met during the proceedings, the Commission may decide not to grant final immunity.4456 In this situation the Commission will inform the applicant who may decide to withdraw the evidence it has submitted. Although the Commission is not prevented from conducting an inspection, the fact that the information submitted cannot be used to prove an infringement protects leniency applicants from situations in which the cooperation obligations are not satisfied against their will.

2.4.2. Individual criminal immunity in the context of a corporate leniency application (for administrative fines)

As discussed above, an individual may be able to obtain criminal immunity through a no-action letter from the CMA when the business employing him has been granted some type of leniency treatment for an infringement of the Chapter I prohibition of the Competition Act and/or Article 101(1) TFEU. In other words, criminal immunity is available for current and former employees and directors that cooperate in the context of a corporate immunity application.

The question whether or not an individual will be granted criminal immunity depends on the type of corporate leniency that was obtained by the undertaking. The CMA grants four forms of leniency:

4453 Ibid, para 2.7.
4454 See generally supra Chapter 8.
4455 OFT, “Applications for leniency” (OFT1495), paras 10.10-10.13. If the OFT is minded to revoke a no-action letter the recipient of the letter will be notified in writing and given a reasonable opportunity to make representations.
4456 See further supra Chapter 8, section 4.2.2.6.
(i) type A immunity (automatic), (ii) type B immunity (discretionary), (iii) type B leniency (discretionary), and type C leniency (discretionary).

Type A immunity consists of total immunity from administrative fines. This type of immunity is given to an undertaking if it is the first applicant (undertaking or individual) to submit evidence to the CMA of the cartel activity, before the CMA has commenced an investigation (either civil or criminal), provided that: (i) the CMA does not already have sufficient information to establish the existence of the cartel, (ii) the information and evidence provided by the undertaking, as a minimum, give the CMA a sufficient basis for taking forward a credible investigation, and (iii) the undertaking fulfils its cooperation obligations.

If an undertaking satisfies these conditions, it is granted type A immunity. In this situation, all its current and former employees and directors who cooperate with the CMA are guaranteed blanket criminal immunity.

Under type B immunity, the CMA also grants total immunity from administrative fines. This type of immunity may be given to an undertaking if it is the first to provide the CMA with evidence of a cartel after it has commenced an investigation (either civil or criminal) but before it has issued a statement of objections. In addition, this type of immunity is only granted if the undertaking in question (i) provides information, documents and evidence that add significant value to the CMA’s investigation (that is, they must constitute or contain information that genuinely advances the investigation), (ii) fulfils its cooperation obligations and (iii) if type A immunity has not been granted to another undertaking or individual. This last condition implies that, in practice, applications for type B immunity are most likely to be triggered by ex officio inspections.

This form of immunity is, however, discretionary. The decision to grant immunity depends on a balancing exercise, in which the CMA assesses ‘the benefits of gaining additional evidence by reason of the grant of immunity against the disadvantage of making an immunity grant after an investigation has already commenced, resources have been spent and after the OFT may already

4457 When the first applicant (Type A or B) is an individual, that individual’s employer undertaking will be eligible to apply for Type B provided it remains the first undertaking to apply. OFT, “Applications for leniency” (OFT1495), para 2.12.

4458 OFT, “Applications for leniency” (OFT1495), para 2.13. The Guidance clarifies in this context that a ‘pre-existing investigation will exist from the point where the OFT considers it has reasonable grounds to suspect cartel activity, such that it may conduct an investigation under one or both of section 192 of the EA02 and section 25 of the CA98, and has taken active steps in relation to that investigation. Active steps may be overt or covert and may or may not involve the use of statutory information gathering powers. Examples would include (but are not limited to) voluntary interviews of witnesses, inspections of premises (under Section 28 of the CA98 or Section 194 of the EA02) or preparing applications for warrants’.

4459 Ibid, para 2.11.

4460 Ibid, paras 2.9–2.14. As discussed above the undertaking must fulfill the same obligations as individuals, namely they must (i) accept that it participated in cartel activity, (ii) provide the CMA with all the information, documents and evidence available to it regarding the cartel activity, (iii) maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action (including criminal proceedings and defending civil or criminal appeals) by the CMA arising as a result of the investigation, (iv) refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA) and (iv) not have taken steps to coerce another undertaking to take part in the cartel activity.

4461 Ibid, para 2.10.

4462 These obligations are the same as for Type A immunity.

4463 OFT, “Applications for leniency” (OFT1495), para 2.22.

4464 Ibid, para 2.16.
have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.\textsuperscript{4465} This assessment will generally depend on the stage at which the undertaking comes forward, the information, documents and other evidence already in the CMA’s possession and the probative value of the information, documents and other evidence provided by the undertaking. The CMA will also take into account the overall level of cooperation that was provided.\textsuperscript{4466}

If the CMA decides to grant an undertaking type B immunity, all its current and former employees and directors who cooperate with the CMA are guaranteed \textit{blanket} criminal immunity for cartel activity.\textsuperscript{4467}

Type B \textit{and} type C \textit{leniency} consist of a sliding scale of leniency reductions in administrative fines.

Type B \textit{leniency} applicants may qualify for a reduction of up to 100% in administrative fines. This type of leniency is available in the same circumstances as type B \textit{immunity}. As indicated by the reduction range, type B leniency applicants may indeed opt to obtain full corporate immunity (i.e. a 100% reduction in administrative fines), when the CMA is reluctant to grant blanket immunity to all of an undertaking’s current and former employees and directors who cooperate with the CMA. Such corporate immunity may thus be given to an undertaking when the granting of blanket immunity for the individuals involved is not in the public interest. This is more likely to happen when there is an ongoing criminal investigation rather than a civil one.\textsuperscript{4468}

Regardless of the level of fine discount granted to the undertaking under type B leniency, \textit{blanket} criminal immunity for all the undertaking's current and former employees and directors who cooperate with the CMA is never applicable in type B \textit{leniency} cases. Instead, the CMA will consider, on an individual basis, whether one or more current or former employees or directors of an undertaking qualifying for type B leniency should be granted individual criminal immunity.\textsuperscript{4469}

Under type C \textit{leniency}, a reduction of up to 50% in administrative fines can be granted to undertakings. This reduction is available if an undertaking is not the first (undertaking) to come forward to the CMA or if it otherwise did not qualify for type B \textit{immunity}/\textit{leniency}.\textsuperscript{4470} To qualify for type C \textit{leniency}, an undertaking must provide the information, documents and evidence that add significant value to the CMA’s investigation (that is, they must genuinely advance the investigation). In addition, the undertaking must also fulfil its general cooperation obligations, except for the coercer test.\textsuperscript{4471}

Like type B \textit{leniency}, the granting of type C \textit{leniency} is also discretionary.\textsuperscript{4472} As is the case for type B \textit{leniency}/\textit{immunity}, the CMA uses its discretion to grant leniency in instances where this is in the public interest. In this assessment, the overall added value of the information, documents and

\textsuperscript{4465} \textit{Ibid}, para 2.18.
\textsuperscript{4466} \textit{Ibid}, para 2.20.
\textsuperscript{4467} \textit{Ibid}, paras 2.38 - 2.40.
\textsuperscript{4468} \textit{Ibid}, para 2.21.
\textsuperscript{4469} M. J. FRESE, \textit{Sanctions} 233 of the original version of this dissertation.
\textsuperscript{4470} OFT, “Applications for leniency” (OFT1495), paras 2.23-2.24. Undertakings which were considered as coercers can only qualify for type C leniency.
\textsuperscript{4471} \textit{Ibid}, para 2.26.
\textsuperscript{4472} \textit{Ibid}, para 2.24.
evidence provided by the undertaking will be the decisive factors to determine the specific fine reduction.  

Under type C leniency there is no blanket criminal immunity for all the current and former employees and directors of the undertaking who cooperate with the CMA. However, if an undertaking is given type C leniency, at least some of its current or former employees or directors may still be rewarded with individual criminal immunity. The question whether the CMA will grant individual criminal immunity in type C leniency cases is assessed on an individual basis and will depend on whether granting immunity would be in the public interest.

The (now) CMA recognises that ‘[i]n circumstances where [it] has sufficient information to establish the existence of the reported cartel activity in relation to an applicant, such that it could prove the involvement of that applicant in cartel activity, [it] is highly unlikely to exercise its discretion to grant leniency’. Still, the CMA may grant criminal immunity if it considers that ‘the public interest is best served by using information and cooperation from the applicant to prove the participation by others in the cartel’.  

2.4.3. Individual immunity application (outside the context of a corporate leniency application)

When no corporate immunity or leniency application has been made, individuals may also apply for criminal immunity.

When an individual applies for immunity before any other individual or undertaking and there is no pre-existing criminal or civil investigation, criminal immunity will be guaranteed. It is, however, important to take into account that if an individual applies for immunity on his or her own account, he or she alone will be guaranteed immunity from criminal prosecution, but his/her employer undertaking and colleagues may (only) be eligible for discretionary type B immunity protection. Other undertakings lose, however, the possibility to qualify for type A or type B immunity. This system is meant to stimulate undertakings in making prompt immunity applications, rather than to await the opening of any investigations and then apply for leniency.

4473 Ibid, para 2.27.
4474 Ibid, “Applications for leniency” (OFT1495), para 2.29.
4475 Ibid, para 2.30.
4476 Ibid, para 2.31.
4477 Ibid.
4478 The CMA explains that, if possible, it will give applicants an indication of whether Type C leniency reductions and/or individual immunity are available at the time of the application. However, it also recognises that – depending on the stage at which the application is made and the extent of information already in the CMA’s possession – the CMA may only be able to assess whether the applicant could potentially add significant value to the investigation once it has fully assessed both the information already gathered from other sources and that put forward by the applicant. As a result, the CMA not be able to confirm whether or not leniency is available until a late stage. Ibid, para 2.32.
4479 Ibid, para 2.33-2.37.
4480 Ibid, para 2.9-2.12.
4481 Ibid, para 2.12.
4482 As commented above, this implies that immunity covering both the undertaking and all of its co-operating current and former employees and directors will become discretionary and not guaranteed.
4483 According to the (now) CMA Guidance, ‘[t]he ability of an individual to apply for individual immunity independently of an undertaking, and before the undertaking has itself applied for immunity, is one of the key reasons why undertakings who discover potential wrongdoing should promptly make a Type A immunity application and not
When there is already a pre-existing investigation, but the individual self-reports the cartel to the CMA before any other individual or undertaking, the individual may still be granted individual immunity provided he/she adds significant value to the OFT’s investigation. However, it is important to stress that the CMA always retains discretion in such cases and will conduct a ‘public interest assessment, weighing up the benefits of gaining additional evidence by reason of a grant of immunity against the disbenefit of making an immunity grant after an investigation has already commenced, resources have been expended and after the OFT may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession’.

As this discussion shows, the interplay between corporate leniency and criminal sanctions for individuals is a very complex subject. On the one hand, the risk of being punished with criminal penalties in relation to cartel conduct may constitute an important motivation for both individuals and undertakings to approach the CMA and cooperate in the investigation. On the other hand, it is important to preserve such incentives by ensuring that the competence to impose criminal sanctions on individuals does not undermine the detection potential of leniency programmes. It is generally recognised that individuals as well as undertakings may simply be unwilling to voluntarily provide information about cartels if they fear the possibility of criminal prosecution of individuals. In this regard, there seems to be a general consensus among competition authorities that coordination and compatibility of leniency schemes and criminal sanctions is particularly important.

In order to protect the employees of undertakings that cooperate under the corporate leniency programme, the CMA fully guarantees (blanket) criminal immunity for all cooperating current and former employees and directors in the cases where an undertaking applying for leniency informs the CMA of cartel activity that is not already the subject of an investigation (Type A immunity). In the CMA’s view, this is one of the key features of the UK leniency regime that maximises its effectiveness. It can in effect be argued that the combination of criminal penalties with the certainty that immunity from fines and criminal prosecution is available for the undertakings and all its employees constitutes the greatest motivation to come forward.

postpone it in the hope of being able to make a successful Type B immunity application once an investigation has started’. Ibid, para 2.37.

4484 Ibid, paras 2.15-2.17 and 2.36.

4485 Ibid, para 2.36.

4486 This aspect has been recognised by the competition authority see ibid, para 1.4.

4487 See e.g. OECD, Cartel Sanctions Against Individuals 8. According to this policy document ‘[i]ndividuals who have information about cartels may have little incentive to reveal evidence about cartels if there is no risk of sanctions against them. Threatening credible sanctions against individuals creates incentives for an individual to disclose cartels that are separate from the incentives of a corporation. They can thus create a greater likelihood that someone will defect from a cartel arrangement and offer information and co-operation. As a result, a leniency programs should become more effective’.

4488 OECD, Cartel Sanctions Against Individuals 9.


4490 CMA, “Response to the European Commission’s public consultation on “Empowering the national competition authorities to be more effective enforcers”, para 47.

However, the interaction between leniency and criminal penalties becomes more complicated beyond the type A *immunity* scenario, *i.e.* after the CMA has opened an investigation. In particular, although the CMA also offers (corporate and, derivative blanket) immunity after an investigation has commenced, the granting of type B *immunity* is subject to considerable discretion. In contrast to the Commission leniency system which guarantees immunity from fines if an undertaking can prove the existence of an infringement and cooperates with the Commission investigation, the CMA (only) offers discretionary immunity based on the added value of the cooperation afforded by the undertaking. Only if such discretionary immunity is granted, all (former and current) individual employees will also be granted (blanket) criminal immunity.

If the uncertainty about obtaining type B immunity is perceived as considerable, it is not unthinkable that directors and/or members of the board – who are, in principle, ultimately to decide whether to proceed with a leniency application – may be less inclined to contact the CMA and apply for corporate leniency. This situation may not only create tension between the different individuals employed by a firm when they have divergent interests in the context of a potential (criminal or corporate) investigation. Most importantly, the lack of certainty in the context of criminal and administrative immunity after the initiation of an investigation has the potential to jeopardize the whole working of the CMA’s leniency programme.

Furthermore, as discussed above, the criminal cartel offence was created completely separate from the administrative (European) competition law system. Even if this division is certainly artificial from a substantive point of view, the fact that criminal immunity is given to individuals when their employer obtains corporate immunity raises more doubts as regards the validity and credibility of the cartel offence system.

Such doubts become even more visible in the context of the interplay between the cartel offence and the Commission’s leniency system. While the CMA grants immunity to the employees of an undertaking that has obtained type A or B *immunity* under its own leniency programme, the CMA does not guarantee criminal immunity to the employees of companies on the back of immunity granted under the Commission’s Leniency Notice.

In fact, the CMA considers that if this were the case, the deterrent effect of the enforcement regime and the basis for the leniency system could be undermined. In the CMA’s view, this risk is

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4492 In effect, it has been argued that ‘[w]hen such immunity from criminal prosecution is either not guaranteed or simply unavailable, the risk of prosecution may lead individuals to seek to minimize their role or to conceal it in the hope of avoiding prosecution, or to blame the conduct on others within the organization. That can hamper both a firm’s own internal investigation (which will assist it in deciding what action to take, including whether to seek leniency) and the (administrative and criminal) investigation(s) conducted by the CMA itself’. *Ibid* para 1.51.

4493 See also e.g. R. KELLAWAY et al, *UK Competition Law* para 1.53. See also accepting the concerns deriving from the non-availability of leniency OFT, “Applications for leniency” (OFT1495), para 8.3. The Guidance clarifies that when there is no guarantee of ‘blanket’ criminal immunity, the CMA ‘might still be able to reassure the undertaking’s adviser, on the basis of the provision of a hypothetical set of facts provided by him/her, that the case would not be of a type where the OFT would contemplate bringing a criminal prosecution’.


4495 See further supra Chapter 11, section 1.2.3.

4496 OFT, “Applications for leniency” (OFT1495), para 8.6.

4497 CMA, “Response to the European Commission’s public consultation on “Empowering the national competition authorities to be more effective enforcers”, para 49 available at
maximised if criminal immunity were to be automatically granted to individuals employed by a company that cooperates under the Commission’s leniency programme when there is already a pre-existing criminal investigation in the UK (which normally implies that there is already a type A immunity applicant in the UK). 4498

Although this concern is understandable, it is equally reasonable to argue that the lack of guaranteed criminal immunity in case the Commission grants corporate immunity, may inadvertently increase exposure for the undertaking's current and former employees to the risk of prosecution in the UK for the cartel offence, in those instances where the infringement had some effect on the UK. Although it is unlikely that the CMA will decide to prosecute individuals under the cartel offence in this type of cases, it cannot be excluded that the still existing risk of potential criminal prosecution may discourage undertakings to blow the whistle. 4499 Taken as a whole, the lack of coordination and compatibility between European leniency schemes and criminal sanctions, reflects the important difficulties to find a workable method to combine an administrative leniency policy with a criminal regime.

2.5. The Cartel Offence in practice

The White Paper that preceded its adoption in 2003 required the cartel offence to ‘be actively applied so that its deterrent effect is genuinely felt’. 4500 In general, the Hammond-Penrose report predicted between six to ten prosecutions a year. 4501 Although the former OFT tried to diminish these expectations by stating that there would be few prosecutions and that targets would be carefully selected, 4502 the enforcement record suggests that there is still work to be done before criminal sanctions against individuals will in fact become an active deterrent enforcement instrument. 4503


4498 OFT, “Applications for leniency” (OFT1495), para 8.6. Similarly, the CMA is concerned that granting criminal immunity in these cases may enable undertakings to ‘game the system’. This may occur, for example, if an undertaking is too late for Type A immunity in the UK and the OFT suspects that an application has subsequently been made to the Commission largely as a device for trying to procure no-action letters, the OFT might decline to offer criminal immunity (ibid). In this context the CMA has also commented that if immunity from sanctions were to be automatically granted to individuals employed by a company that is cooperating under the Commission’s leniency programme without the need for that individual to cooperate with the NCA granting immunity, this would: (i) ‘result in under-enforcement by extending automatic immunity not only to employees of the first undertaking to come forward in circumstances where there was no prior investigation, but also to the employees of all other leniency applicants’. In the CMA’s view this would therefore be contrary to the general principle that immunity should only be granted to those who cooperate with the investigation. CMA, “Response to the European Commission’s public consultation on “Empowering the national competition authorities to be more effective enforcers”, footnote 19.

4499 See acknowledging the existence of this concern OFT, “Applications for leniency” (OFT1495), para 8.1.


4503 See also E. MORGAN, “Criminal Cartel Sanctions” 81.
Although the Cartel Offence has existed since 2003:

- during the first 10 years of enforcement, only 3 individuals, in relation to one single cartel - the Marine Hoses cartel, were convicted and sentenced to prison;
- one (contested) case (relating to a fuel surcharges cartel) collapsed immediately before a trial hearing in 2010.
- several cases have been commenced but were then abandoned at a relatively early stage.

The most important cases are discussed in more detail below.

2.5.1. Marine Hoses: one successful (US) case

The first convictions on the basis of the original cartel offence were passed on 11 June 2008 in the Marine Hoses case.\(^{4504}\) Three UK individuals were sentenced to imprisonment and were also disqualified from acting as company directors. The OFT proudly stated that ‘[t]his first criminal prosecution sends a clear message to individuals and companies about the seriousness with which UK law views cartel behaviour. The OFT will continue to investigate and prosecute cartels vigorously, with the aim of ensuring strong competition within the UK economy’.\(^{4505}\)

This case concerned a global cartel for marine hoses, which had operated for years – that is, until May 2007, when the US Department of Justice (hereafter: the “DOJ”) detected the illegal agreement and subsequently arrested seven businessmen, including three British nationals, Peter Whittle, David Brammar and Bryan Allison. Peter Whittle worked as the cartel ‘coordinator’. David Brammar and Bryan Allison both worked for Dunlop Oil and Marine Ltd. Bryan Allison was the managing Director and Brammar reported directly to him.\(^{4506}\)\(^{4507}\)

In December 2007, the US DOJ announced that it had accepted plea bargains from the three British individuals, under which they agreed to plead guilty to participating in a conspiracy to rig bids, fix prices and allocate market shares in violation of the Sherman Act. As part of the plea bargain agreements, these individuals were allowed to return to the UK and face charges over there.\(^{4508}\) On arrival in the UK, the three men were arrested and charged with the criminal cartel offences under the Enterprise Act.\(^{4509}\) The charges relate to the period between 20 June 2003 (the date on which the

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\(^{4506}\) See OFT Press Release 19 December 2007, “OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel”.

\(^{4507}\) It is interesting to note that the OFT criminal investigation was conducted in parallel with the Commission’s investigation of the case under Article 101 TFEU. See OFT Press Release 19 December 2007, “OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel”.


\(^{4509}\) See OFT Press Release 19 December 2007, “OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel”. Simon Williams, OFT Director of Cartels, said that: ‘[t]hese charges follow an OFT investigation that has been closely coordinated with other overseas agencies. Although no presumption should be made as to the guilt of the businessmen arrested and charged today, this illustrates our willingness to use our criminal powers
cartel offence came into force under the Enterprise Act), and 2 May 2007 (when the men were arrested in the United States and the cartel arrangements were brought to an end). In accordance with their US plea, the defendants chose to plead guilty in the UK proceedings.  

Peter Whittle received a three-year prison sentence and was disqualified from company directorship for seven years. David Brammar was sentenced to two and a half years imprisonment and five years of director disqualification. Brian Allison was sentenced to three year imprisonment, seven years of director disqualification and £25,000 costs. The Court of Appeal however reduced the sentences to those specified in the plea agreements. In particular, Whittle was sentenced to 2.5 years imprisonment, Allison to 2 years, and Brammar to 20 months.  

Some statements of the Court of Appeal are particularly noteworthy. The Court commented with respect to the appellants that ‘each was of good character, each admitted his involvement readily….each has offered to assist the authorities further, each has pleaded guilty at the first opportunity, each has lost a livelihood and there will be significant financial consequences for him and his family (…)’. The Court also seemed to assume from this that the trial judge ‘must have taken the starting point as at or near the statutory maximum. The Court also noted that although the profits engendered by the cartel probably amounted to some £2,500,000, these ‘did not, of course go into the pockets of the applicants’. The Court then reduced the sentences imposed at trial, and indicated that, if had it been asked to do so it ‘may well have been persuaded to reduce the sentences further’.  

The fact that the Court was clearly not persuaded that the participation in the Marine Hoses cartel merited a penalty towards the upper end of the range is significantly concerning in terms of deterrence. In the case at hand, the cartel had been functioning during at least eight years. The agreement required constant supervision and maintenance to function properly and also included concealment measures to avoid detection. This demonstrates that the participants were clearly aware of the illegality of their activities and underlines the flagrant nature of the conduct. From the perspective of European competition law, the Marine Hoses cartel constituted by its very nature one of the most harmful restrictions of competition. Cooperation with the competition authorities and guilty pleas were only the consequence of the existence of undisputable evidence combined with the threat of harsh sanctions. Moreover, references to “good character” in the specific area of cartel infringements must be questioned. Given that those accused of having committed the cartel offence to investigate suspected domestic and international cartel activity.’ OFT Chairman, Philip Collins, added that: [t]hese charges are a highly significant development in both the UK’s own competition regime and in international cooperation against cartels. They demonstrate the OFT’s determination to act decisively and innovatively when investigating suspected cartel activity, and in appropriate cases, to bring charges before the UK criminal courts. Our willingness in this respect should send a clear message to business, that the OFT takes its enforcement responsibilities seriously’.


4511 Ibid, para 14.


4513 Ibid, para 11.

4514 See also in this context A. KOLEV, “The Abolishment” 10-11.

4515 Ibid, para 30.

4516 Ibid, para 31.

4517 See also M. FURSE, The Criminal Law 133.


4519 See further supra Chapter 4.
are most likely senior executives, it is normally rather usual that they will show no signs of (prior) bad character. Finally, business executives commonly get easy access to and may benefit from legal expertise. It is therefore not unusual that defendants show a general tendency to cooperate with the competition authorities.

2.5.2. British Airways: a(n) (un)famous collapse

The *British Airways* case was a high-profile attempt by the OFT to secure its first contested criminal prosecution under the Enterprise Act 2002. In this case, British Airways and Virgin Airlines had been involved in a price fixing cartel concerning the setting and maintaining of fuel surcharges on transatlantic flights and, as a result, four British Airways executives were charged by the OFT with the cartel offence. This case did not emerge from an OFT (ex-officio) investigation into the industry; instead, Virgin Airways applied for leniency in both the US and the UK. While the US authorities secured a guilty plea and a fine of $300 million, the OFT imposed administrative fines totaling £121 million.

After the commencement of the trial in the UK, thousands of decisive electronic documents (believed to be irrecoverable) that had not been disclosed to British Airways or reviewed by the OFT had been recovered. The OFT and the trial judge came to the conclusion that it would be wholly unfair to allow the case to continue. As a result, the OFT announced that it had dropped its criminal proceedings against four British Airways executives and the jury acquitted the defendants. There is no need to say that the collapse of this case has been considered one of the greatest failures of the OFT.

Although this case did not reach the trial phase, it is interesting to note that in the pre-trial proceedings, Judge Owen expressed his concerns about the (interpretation of the) dishonesty

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4520 M. FURSE, *The Criminal Law* 134; see also A. STEPHAN, “Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain”, 2007 (5-1) *Comp. Law Review*, 123-145, at 16, of the online version of this publication available at http://ssrn.com/abstract=993407 (hereafter: ‘A. STEPHAN, “Survey of Public Attitudes”’). This author even notes that individuals who have participated in cartels may even bee, seen as decent members of the community.


4522 See OFT Press release 47/10 (10 May 2010), “OFT withdraws criminal proceedings against current and former BA executives; R v George, Burn, Burnett and Crawley [2010] EWCA Crim 1148. See also analysing this case in more depth M. FURSE, *The Criminal Law* 154-160; J. JOSHUA, “D.O.A: Can the UK Cartel Offence” 140 et seq. This case has been qualified by L. DANAGHER as the ‘OFT’s most publicised prosecution to date’. L. DANAGHER, “The convergence” 306.


4524 Decision of the OFT No. CA98/01/2012 of 19 April 2012 (Case CE/7691-06), *Airline passenger fuel surcharges for long-haul flights, Infringement of Chapter I of the CA98 and Article 101 of the TFEU by British Airways Limited and Virgin Atlantic Airways Limited*.


element. In particular, he ruled that ‘an agreement to fix prices is capable of being inherently dishonest, but will not always be dishonest (…), I therefore rule that the proper construction of section 188 does not require the prosecution to prove additional dishonest conduct over and above the price fixing’.

These words imply that a cartel agreement to fix prices or share markets can per se amount to dishonest and, therefore, per se illegal. The court also stated that an ‘infringement of the law by an agreement under section 188(2) could occur without the element of ‘dishonesty’’. This comment reflects the difficulties of designing a criminal cartel offence that underlines the seriousness of the conduct without referring to the competition law regime.

2.5.3. Galvanised steel tanks: the third attempt

The galvanised steel tanks cartel was the third case brought to trial. The CMA carried out an investigation which had been initiated by the OFT into cartel conduct in respect of the supply, in the UK, of galvanised steel tanks for water storage. Three individuals, Mr Dean, Mr Stringer and Mr Snee, were charged with the criminal cartel offence under original Section 188 of the Enterprise Act 2002. The conduct in question concerned price fixing and the rigging of bids between 2004 and 2012.

Mr Dean and Mr Stringer pleaded not guilty and were acquitted following trial by jury. Dean and Stringer’s defenses were mainly based on the argument that their conduct was not dishonest. In this case, greed – as a motivator for dishonesty – became the key issue. Defense counsels argued that the defendants were not greedy because their behavior was simply meant to save their firm and the jobs of their employees. The counselor also stressed that the men on trial worked hard and lived unflashy lives, driving second hand cars and paying off mortgages. The “evil” underpinning dishonesty - greed – was, therefore, not present. The argument was raised successfully, as the jury unanimously acquitted Dean and Stringer after only two and a half hours of deliberation.

The CMA accepted that the jury was not convinced that Mr Stringer and Mr Dean acted dishonestly and that, therefore, they should have been acquitted. Ironically, these acquittals came after Mr Snee, another defendant, had already pleaded guilty to cartelizing the supply of galvanised steel.

4528 R v George, Crawley and others [2010] 1 Lloyd’s Law Rep 495.
4529 Ibid, para 27.
4530 See further infra Chapter 13, section 2.
4532 OFT Press release 04/14 of 27 January 2014, “Man faces charge in criminal cartel investigation”.
tanks in a dishonest manner.\textsuperscript{4536} Nigel Snee was sentenced to 6 months imprisonment, suspended for 12 months, and ordered to do 120 hours community service.\textsuperscript{4537}

When explaining his approach to sentencing, Judge Goymer remarked that ‘the economic damage done by cartels is such that those involved must expect prison sentences’.\textsuperscript{4538} The judge also clarified that his starting point as regards the penalty in this case was a prison sentence of 2 years. Taking into account the early guilty plea, personal mitigation factors and voluntary cooperation as a witness, he reduced the sentence by 75\% and concluded that, in the circumstances of this case, it was appropriate to suspend the resulting 6 month sentence.\textsuperscript{4539}

2.5.4. Other (discontinued) cases

Several other cases have been commenced and then abandoned at a relatively early stage. This is the case in a number of investigations, initiated in 2010 in the automotive sector,\textsuperscript{4540} the agricultural sector,\textsuperscript{4541} and commercial vehicle manufacturers.\textsuperscript{4542} In all these cases, the (now) CMA concluded that there was insufficient evidence for any individual to be charged with the cartel offence and, subsequently, closed these cases.

A potential success may nonetheless follow soon. On 7 March 2016, the CMA confirmed that, following an investigation regarding the supply of precast concrete drainage products, it commenced criminal proceedings against one individual under Section 188 of the Enterprise Act 2002.\textsuperscript{4543} At a Pre-Trial Preparatory Hearing on 21 March 2016, at Southwark Crown Court, one individual, Barry Kenneth Cooper, pleaded guilty.\textsuperscript{4544}

2.6. Disqualification orders in the UK

In addition to penalties imposed on companies, directors of companies that breach EU and/or UK competition law may be the subject of a Competition Disqualification Order for a maximum period of 15 years. This possibility was installed when Section 204 of the Enterprise Act 2002 modified the Company Directors Disqualification Act 1986 by inserting Sections 9A-9E, concerning the disqualification of directors for competition law infringements.\textsuperscript{4545}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{4536} CMA Press release of 14 September 2015, “Supply of galvanised steel tanks for water storage: criminal investigation”.
\item \textsuperscript{4537} CMA Press release of 15 September 2015, “Director sentenced to 6 months for criminal cartel”.
\item \textsuperscript{4538} This information was published in the CMA website. Unfortunately, the full case is not available. CMA Press release of 15 September 2015, “Director sentenced to 6 months for criminal cartel”.
\item \textsuperscript{4539} CMA Press release of 15 September 2015, “Director sentenced to 6 months for criminal cartel”.
\item \textsuperscript{4540} OFT, criminal cartel investigation in the automotive sector, case reference: CE/9229-09.
\item \textsuperscript{4541} OFT, criminal cartel investigation in the agricultural sector. The information of this case is available at https://www.gov.uk/cma-cases/agricultural-sector-criminal-cartel-investigation.
\item \textsuperscript{4542} OFT, criminal cartel investigation in commercial vehicle manufacturers. The information of this case is available at https://www.gov.uk/cma-cases/commercial-vehicle-manufacturers-criminal-cartel-investigation.
\item \textsuperscript{4543} CMA, criminal cartel investigation in precast concrete drainage products, case reference: CE/9705/12, case reference: CE/9229-09; CMA Press Release of 7 March 2016, “Man charged in CMA criminal cartel investigation”.
\item \textsuperscript{4544} CMA, criminal cartel investigation in precast concrete drainage products, case reference: CE/9705/12, case reference: CE/9229-09.
\item \textsuperscript{4545} For a general assessment of how disqualification of directors compare to other company law provisions concerning firm’s directors see e.g. P. HUGHES, “Directors’ Personal Liability for Cartel Activity under UK and EC Law: A Tangled Web”, 2008 (29-11) ECLR, 632-648 (hereafter: ‘P. HUGHES, “Directors’ Personal Liability”’). See also for a detailed assessment of CDOs in the context of competition law A. STEPHAN, “Disqualification Orders for Directors Involved in
\end{itemize}
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The possibility to impose Competition Disqualification Orders (hereafter: CDOs) is considered as a means to provide individuals with a further incentive to comply with (European) competition law.\textsuperscript{4546} CDOs are essentially administrative penalties\textsuperscript{4547} and can be applied in relation to (all types of) infringements of Articles 101 and 102 TFEU.\textsuperscript{4548} However, the CMA does not have the direct power to impose disqualifications on individuals. Instead, the CMA must make an application to the court, which will decide whether a CDO should be imposed.\textsuperscript{4549} In addition, a disqualification order can be imposed by a court in the context of a (criminal) cartel offence procedure under Section 188 of the Enterprise Act.\textsuperscript{4550}

As an alternative to applying for a CDO from a court, the competition authority may accept a Competition Disqualification Undertaking (CDU) from the individual concerned.\textsuperscript{4551} The effect of a disqualification undertaking is the same as that of a CDO approved by the court.\textsuperscript{4552}

The maximum period of disqualification under a CDO is 15 years.\textsuperscript{4553} During the period in which the person is subject to the CDO, he/she cannot be director of a company, act as receiver of a company’s property, be concerned or take part in the promotion, formation or management of a company, or act as an insolvency practitioner.\textsuperscript{4554} Acting contrary to a disqualification order (or to a disqualification undertaking) is considered a criminal offence, which may lead to a custodial sentence of two years and/or an unlimited fine.\textsuperscript{4555} In addition, any person involved in the management of a company in contravention of a CDO is personally liable for all of the relevant debts of the company.\textsuperscript{4556}

Section 9A of the Company Directors Disqualification Act puts forward two conditions for a CDO to be issued. First, the individual must be the director of a company that has taken part in an infringement of Article 101 (or 102) TFEU or the domestic equivalents under UK law competition law. This requirement suggests that the individual concerned needs to be director at the time the violation occurred.\textsuperscript{4557} Whether this person still works for the company involved in the infringement at the time the order is passed, is irrelevant in this regard.\textsuperscript{4558} The (now) CMA considers the term

\textsuperscript{4547} A. STEPHAN, “Disqualification Orders” 3 of the online version of this article.
\textsuperscript{4548} Company Directors Disqualification Act 1986, Section 9A(2).
\textsuperscript{4549} See \textit{ibid}, Section 9A(10).
\textsuperscript{4550} \textit{Ibid}, Section 2. The relevant court is the High Court (or the Court of Session in Scotland). A. STEPHAN, “Disqualification Orders” 3 of the online version of this article; R. WHISH AND D. BAILEY, \textit{Competition Law} (2012) 435.
\textsuperscript{4551} Company Directors Disqualification Act 1986, Section 9B. A. STEPHAN, “Disqualification Orders” 3 of the online version of this article; D. WENT, “United Kingdom” 20.
\textsuperscript{4553} Company Directors Disqualification Act, Section 9A(9).
\textsuperscript{4554} \textit{Ibid}, Section 1(1).
\textsuperscript{4555} \textit{Ibid}. On summary conviction, liability is limited to a custodial sentence of maximum six months and/or a fine.
\textsuperscript{4556} \textit{Ibid}, Section 15(1).
\textsuperscript{4557} E. O’NEILL AND E. SANDERS, \textit{UK competition}, para 10.124.
‘director’ to include a *de facto* director, while staff officers cannot be subject to CDOs.\textsuperscript{4559} Second, the court must consider that the conduct of the director makes him or her unfit to be responsible for the management of a company.\textsuperscript{4560} In assessing this question, the court must have regard to whether: (i) the director’s behaviour contributed to the infringement; (ii) the director had reasonable grounds to suspect that there might be an infringement, but took no steps to prevent it; (iii) and whether he or she did not know, yet ought to have known, that the conduct of the company constituted an infringement.\textsuperscript{4561} As such, it is irrelevant whether the person actually knew that the conduct of the undertaking constituted an infringement.\textsuperscript{4562}

In its 2010 CDOs Guidance, the CMA specifies the process it follows to decide whether to apply for a disqualification order.\textsuperscript{4563} In all relevant cases it considers: (i) whether there has been a breach of competition law, (ii) the nature of the breach and whether a financial penalty has been imposed, (iii) whether the company in question benefitted from leniency, (iv) the extent of the director’s responsibility for the breach of competition law, and (v) any aggravating and mitigating factors.\textsuperscript{4564}

A CDO application can be made following proceedings by the CMA, a sector regulator or the Commission, or following procedures before the CAT, the Court of Justice or ‘any other competent court’.\textsuperscript{4565} Most commonly, CDO applications will be made after the competition law infringement has been established (in a separate, earlier procedure) and is no longer subject to appeal.\textsuperscript{4566} However, the 2010 guidance on CDOs specifies that there may be exceptional cases in which it is appropriate to apply for a disqualification order where no prior decision or judgment has been issued in relation to the infringement.\textsuperscript{4567} In order to do so, the CMA would still need to establish that there

\textsuperscript{4559} Ibid paras 2.3 and 4.5. According to this last paragraph ‘[t]he directors or officers of a parent company may not have been formally appointed as directors of a subsidiary company pursuant to the subsidiary’s articles of association. Where this is the case, the OFT or Regulator will consider whether any of the directors or officers of the parent company are de facto or shadow directors of the subsidiary. Where such a person is a de facto or shadow director of the subsidiary, the OFT or Regulator will consider whether to apply for a CDO against that person’. See also M. J. Frese, *Sanctions* 241 of the original version of this dissertation.

\textsuperscript{4560} Company Directors Disqualification Act, Section 9A (1)-(3); OFT, Competition disqualification orders in competition cases: an OFT Guidance Document, paras 4.19-4.23. See also M. J. Frese, *Sanctions* 241 of the original version of this dissertation; A. Stephan, ‘Disqualification Orders’ 3 of the online version of this article. This last author argues that these requirement are easy to satisfy which implies, on the other hand that, ‘[o]nce a breach of competition law by the undertaking has been established, it is in principle very difficult to defend against disqualification’.

\textsuperscript{4561} Company Directors Disqualification Act, Section 9A(6).

\textsuperscript{4562} Ibid, Section 9A(7).

\textsuperscript{4563} In 2003, the (former) OFT published its first guidance paper in relation to CDOs (Competition Disqualification Orders (OFT 510, May 2003). More recently, in 2010, the OFT revised such guidance. (OFT, Competition disqualification orders in competition cases: an OFT Guidance Document).

\textsuperscript{4564} OFT, Competition disqualification orders in competition cases: an OFT Guidance Document, para 4.2.

\textsuperscript{4565} Ibid, para 4.6. In any event, in respect of infringements established in a European Commission decision or a judgment of the European Court, the relevant competition authority only intends to apply for CDOs if the infringement has an actual or potential impact in the United Kingdom (ibid, para 4.8).

\textsuperscript{4566} Ibid, paras 4.6-4.7, 4.10.

\textsuperscript{4567} The 2010 Guidance does not contain any examples of what would be an “exceptional case” but the OFT’s response document to the consultation (available here: http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_of/consultations/of1244.pdf) explains that this provision may allow the OFT to take action in circumstances where directors have sought to avoid responsibility for their actions by winding up an existing company and starting a new one. See also in this context A. Stephan, ‘Disqualification Orders’ 6-7 of the online version of this article. According to A. Stephan ‘[t]his refers to cases subject to appeals which only contest the size of the fine, and where the OFT does not reach a formal decision because the company has been liquidated or is too small to be subject to fines’.
had been an infringement of competition law in such cases. This measure is meant to encourage company directors to take additional initiatives to ensure competition law compliance and other proactive steps to avoid infringements and to conduct extensive supervisory tasks within the company. While this objective is certainly acceptable, it is doubtful whether threatening directors with CDOs in cases in which the infringement has not even been proved is the most appropriate way to enhance compliance action.

In addition, the (now) CMA has underlined in its 2010 Guidance that it will seek disqualification orders against those who were directly involved in a competition law infringement, but also against those directors who ought to have known of the infringement. This situation contrasts with its previous 2003 approach according to which the (former) OFT mainly focussed on directors who had been personally involved in cartel activity. In relation to situations where a director did not know, but ought to have known, that the company was involved in a violation of competition law, the revised Guidance explains that the CMA will consider (i) the director’s role in the company including his specific position and responsibilities, (ii) the relationship of the director’s role to those responsible for the breach, (iii) the general knowledge, skill and experience actually possessed by the director in question and that which should have been possessed by a person in his or her position; and/or (iv) the information relating to the breach which was available to the director.

The (former) OFT explained that even though it ‘[does] not expect that directors should have specific expertise in competition law, [it does] expect that all company directors should appreciate the importance of competition law compliance. Furthermore, the OFT and Regulators expect that every director of every company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law’. Arguably, CDOs can represent an important motivation for directors to promote a culture of compliance within their businesses. On the other hand, one may question whether it is appropriate to induce compliance through the threat of imposing CDOs. Although it is important to create a culture of compliance and to avoid breaches of competition law, such goals may also be pursued through alternative and more effective means.

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4568 OFT, Competition disqualification orders in competition cases: an OFT Guidance Document (2010), para 4.7. This aspect constitutes one of the main modifications with respect to the former 2003 guidance (Competition Disqualification Orders (OFT 510, May 2003). See also commenting on this aspect R. CANDLER, “United Kingdom: procedure - Office of Fair Trading - director disqualification - new guidance published”, 2010 (31-12) ECLR, 196-197, at 196 (hereafter: R. CANDLER, “United Kingdom”’); A. STEPHAN, “Disqualification Orders” 6-7 of the online version of this article.

4569 Ibid, “United Kingdom” 196.


4571 Ibid, para 4.22.

4572 Ibid, para 4.23.

4573 The Guidance emphasises that ‘[t]he OFT and Regulators will also take into account the actions taken by such a director to create a compliance culture and to avoid breaches of competition law occurring’. Ibid, para 4.23.

4574 See further infra Chapter 13, section 2.
2.7. Interaction between disqualification orders and leniency

The CMA will not apply for a disqualification order against any current director of a company that benefits from leniency. This is not only the case when an undertaking has been awarded full immunity but also when a reduction in fines has been granted. Furthermore, such leniency discounts may be granted by the CMA itself or by the Commission. In order to benefit from CDO immunity, the director in question must maintain complete and continuous cooperation with the investigation.

The (now) CMA has indeed made clear that it will consider seeking a CDO where a director fails to cooperate with the leniency process by failing to maintain continuous and complete cooperation throughout the investigation. The same approach will be adopted in cases of directors who engaged in competition law infringements but were removed or ceased to act as such.

On the other hand, it should be kept in mind that, in the context of criminal proceedings under the cartel offence, the court may always impose a disqualification order on its own motion.

2.8. Disqualification orders in practice

The CMA has gradually recognised and emphasised the potential of CDOs to increase deterrence and, in particular, to complement criminal enforcement.

For example A. NIKPAY (Senior Director, Cartels and Criminal Enforcement Group, Office of Fair Trading) commented that ‘[t]he case for director disqualification also tends to be strongest in those cases which are also susceptible to investigation for the cartel offence, in which case – on a conviction - it will be open to the criminal court to impose a director disqualification order (as, indeed, was the case in Marine hose). I therefore expect to see director disqualification, in cartel cases, coming through primarily as part of the criminal regime - though we continue actively to consider director disqualification in purely civil cases’.

On the other hand, in the context of administrative enforcement it is generally accepted that the application of director disqualification in competition law cases presents important challenges. According to A. NIKPAY, experience in administrative cases indicates that the cartel has not been operated at a sufficiently senior level. Moreover, it is difficult to prove that a director knew or ought to have known about the illegal agreement conduct.

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4577 Ibid, para 4.12.
4578 Ibid, para 4.14; OFT, “Applications for leniency” (OFT1495), footnote 10. The (former) OFT does not hold the view that this approach will undermine the incentive for a company to apply for leniency. R. CANDLER, “United Kingdom” 196.
4581 It has indeed been argued that the greater emphasis on CDOs was in fact a reaction to the problems associated with the enforcement of the criminal. See A. STEPHAN, “Disqualification Orders” 6 of the online version of this article; E. MORGAN, “Criminal Cartel Sanctions” 81.
4583 Ibid.
The lack of (successful) criminal cartel cases combined with the difficulties in the application of CDOs in administrative cases explains why neither a CDO nor a competition disqualification undertaking has been imposed to date in the context of competition law. Although in the Marine Hoses case three company directors prosecuted under the cartel offence were disqualified as directors, the disqualification orders were not CDOs but instead were made pursuant to other (more general) provisions of the Company Directors Disqualification Act.

3. Belgium

3.1. Administrative fines for individuals

The Competition College may not only impose fines on each undertaking and association of undertakings that have infringed Article IV.1 of the CEL and/or Article 101 TFEU. In addition, the 2013 Competition Act granted the Competition College the power to sanction individuals for their participation in hardcore cartels. Under this provision, natural persons are prohibited to fix prices when selling products or services, to limit the production or sale of products or services and to allocate markets.

The new competence to sanction natural persons has two (complementary) goals. The first and most obvious objective of is to enhance the deterrence of the competition sanctioning system in Belgium. Second, by threatening individuals with the application of a sanction, it is expected that they feel more pressured to report infringements to the BMA, thereby increasing the detection rate. This is made possible thanks to the possibility for natural persons to obtain immunity under the leniency programme.4584 4585

The prohibition contained in Article IV.1(4) CEL does not exactly match the content of the general prohibition contained in Article IV.1(1) CEL that is applicable to undertakings. Notably, Article IV.1(1) CEL generally prohibits all agreements between undertakings, all decisions by associations of undertakings and all concerted practices that have as objective or result the significant prevention, restriction or distortion competition in (a substantial part of) the Belgian market. This rule can thus be seen as a prohibition of collective anti-competitive behaviour or, thus, the as the equivalent of Article 101 TFEU. In contrast, Article IV.1(4) CEL only prohibits certain categories of agreements or practices that are classically banned under the Article IV.1(1) CEL prohibition, i.e. the so-called horizontal hardcore cartels.4586 The fact that Article IV.1(4) CEL only aims at prohibiting hardcore horizontal cartels follows inter alia from the wording of this provision which refers to negotiations


4584 See further infra Chapter 3, section 3.2. As it is examined in more detail below, individuals can also apply for leniency and obtain immunity from personal sanctions (Article IV.46(2) CEL).
4585 See for a similar opinion H. GILLIAMS, “Het nieuwe Belgisch” 483.
4586 For also supra Chapter 4.
“with competitors”.\textsuperscript{4587} In addition, in contrast to the general prohibition of Article IV.1(1) CEL, the list of categories of agreements or practices prohibited by Article IV.1(4) CEL is also exhaustive.\textsuperscript{4588}

Based on its specific features, it has been argued that Article IV.1(4) CEL has been designed as if it were a separate infringement with its own constitutive elements.\textsuperscript{4589} In this context, Article IV.1(4) CEL has been qualified as a ‘very problematic provision’\textsuperscript{4590} because its approach towards individuals is stricter than the one for undertakings set out in Article IV.1(1) CEL. According to this reasoning, the harsher treatment of individuals is, in particular, reflected in (i) the absence of the condition to restrict competition appreciably (which is not mentioned with respect to individuals) and in (ii) the absence of a system of legal exceptions or block exemptions for natural persons similar to the rules applicable to Article IV.1(3) CEL. If such rules were present in Article IV.1(4) CEL, it would be easier for individuals to escape this prohibition. Furthermore, it has been pointed out that the individual is considered to have committed an infringement when he or she negotiates about the conclusion of an arrangement, while undertakings in contrast are liable for an infringement only if the agreement is effectively concluded.\textsuperscript{4591}

Nevertheless – and regardless of the (in)consistency of these arguments – it is essential to keep in mind that Article IV.1(4) CEL has not introduced a “new” type of infringement or a separate offence.\textsuperscript{4592} This provision only aims at punishing individuals who have been involved in hardcore cartel infringements committed by an undertaking or association of undertakings. In this sense a violation of Article IV.1(4) CEL can be described as ancillary to an infringement of Article IV.1(1) CEL: individuals cannot be fined on the basis of Article IV.1(4) CEL absent an infringement of Article IV.1(1) CEL by undertakings.\textsuperscript{4593} This view is also supported by the fact that the liability of both undertakings and natural persons will be determined in the context of the same proceedings.\textsuperscript{4594}

Although the term “negotiate” used in Article IV.1(4) CEL may seem stricter than the requirements applicable to undertakings under Article IV.1(1) CEL, in light of the discussion above and

\textsuperscript{4587} It has however been argued that the term competitors could be subject to debate. See D. VANDERMEERSCH, “De mededingingsregels en hun handhaving: de hervorming van 2013” in A. TALLON (ed) Le nouveau code de droit économique / Het nieuwe wetboek van economisch recht, Brussel, Larciere, (2014) 224 p., at 60 (hereafter: ‘D. VANDERMEERSCH, “De mededingingsregels”). Although the interpretation of the term competitors may indeed be disputed, it is equally true that in this context such term is meant to limit the scope of application of Article IV.1(4) CEL to horizontal agreements. This interpretation is also supported by the Explanatory Memorandum, which refers to the definition of hardcore horizontal agreements set out in the Commission de minimis Guidelines (see Memorie van toelichting bij het wetsontwerp van 27 december 2012 houdende invoeging van Boek IV “Bescherming van de mededinging” en van Boek V “De mededinging en de prijsevoluties” in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek IV en aan boek V en van de rechtshandhavingsbepalingen eigen aan boek IV en aan boek V, in boeken I en XV van het Wetboek van economisch recht, Parl. St. Kamer 2012-2013, nr. 53-2591/001 en bij het wetsontwerp van 27 december 2012 houdende invoeging van de bepalingen die een aangelegenheid regels als bedoeld in artikel 77 van de Grondwet, in boek IV “Bescherming van de mededinging” en boek V “De mededinging en de prijsevoluties” van het Wetboek van economisch recht, Parl. St. Kamer 2012-2013, nr. 53-2592/001, (hereafter: ‘Explanatory Memorandum 2013’) at 6).

\textsuperscript{4588} See also stressing this aspect D. VANDERMEERSCH, “De mededingingsregels” 59.

\textsuperscript{4589} Ibid.

\textsuperscript{4590} Ibid.


\textsuperscript{4592} Cf supra Chapter 12, section 2.

\textsuperscript{4593} Explanatory Memorandum 2013, at 18; D. VANDERMEERSCH, “De mededingingsregels” 59-62.

\textsuperscript{4594} Explanatory Memorandum 2013, at 19; D. VANDERMEERSCH, “De mededingingsregels” 62. See also D. GERARD AND A. DE CRAYENCOUR, “La réforme du droit belge des pratiques restrictives de concurrence”, 2013 (2) TBM, 131-144.
considering in particular the ancillary nature of the former prohibition, this concept should be seen as the criterion used to identify the responsible persons. Arguably, in absence of this term, personal liability could be easily contested by natural persons by claiming for instance that they did not conclude an agreement but only discussed its terms or potential content.

The fact that Article IV.1(4) CEL does not constitute a stand-alone offence with its own constitutive elements ensures coherence and consistency between the application of (European) competition law to undertakings on the one hand, and to individuals, on the other hand. By adopting such approach, one can avoid that individuals are held responsible for an infringement of Article IV.1(4) CEL when the same conduct is not prohibited for undertakings under Article IV.1(1) CEL. Although it is true that price fixing, market sharing and output limitation can almost as a rule not be exempted under Article IV.1(3) CEL and/or 101(3) TFEU, the fact that such exemption cannot be fully excluded renders the interaction between rules for undertakings and rules for individuals appropriate. If the full coherence between both sorts of rules cannot be guaranteed, the very foundations of the sanctioning system of natural persons can be easily undermined.

With respect to the capacity of the natural persons who can be held liable for cartel infringements, Article IV.1(4) CEL refers to those who negotiate ‘in name and for the account of an undertaking or association of undertakings’.

The wording of this provision seems to indicate that only persons with a certain level of responsibility within the undertaking who are authorized to represent it can commit an infringement of Article IV.1(4) CEL and be subsequently penalised with a fine. This view is also confirmed by the explanatory memorandum, which specifies that the term “natural person” only refers to the management of the relevant company. In addition, the condition regarding the term “negotiate”, ensures that only persons who can represent the undertaking and who were directly involved in the cartel can be sanctioned. As pointed out above, the concept negotiate is thus meant to identify the specific persons who participated in the (discussions and negotiations of the) agreement.

The debatable interpretation of the term negotiate had led some to argue that persons who were only informed about the existence of an infringement of Article IV.1(4) CEL without having actively participated in the negotiations do not commit a violation of the CEL (themselves). The same has been stated about persons who were (only) present in but adopted a passive attitude during the cartel negotiations and meetings (which were handled by other persons) and about those persons who merely implemented the agreement.4598

4595 Cf supra Chapter 12, section 2.
4597 Explanatory Memorandum 2013, at 16. See also D. VANDERMEERSCH, “De mededingingsregels” 61. According to this author, this could imply that all persons who were directly involved in the negotiation and/or the conclusion of the arrangement may be held liable regardless of position in the firm. This view does not seem fully correct as it contradicts the Explanatory Memorandum which explains that this provision is specifically designed for the management of the undertaking. Most likely, Article IV.1(4) CEL will be applicable on the undertaking’s representatives (such as managers) who have fiscally been responsible for the cartel negotiations.
If this interpretation was to be adopted in practice, the whole essence of the individual fining system would be undermined. Managers who are present in negotiations without actively participating in the conclusion of arrangements or who simply tolerate the agreements, are implicitly taking part in the cartel negotiations because, without their consent or indirect supervision, the agreement could not be concluded. In other words, managers who are aware of the agreement and do not act against it should be considered liable. A different interpretation would result in an unjustifiable evasion of responsibility for the infringement.  

The penalty established for violations of Article IV.1(4) CEL consist of an administrative fine from €100 to €10,000. The specific amount of the fine within the range is calculated having regard to the seriousness of the offense and the involvement and other features of the case.

3.2. Interaction between administrative fines for individuals and leniency

The new BMA adopted its new Leniency Guidelines on 1 March 2016. The reformed Belgian leniency system was primarily adopted to deal with the fact that natural persons can be sanctioned for cartel infringements and, as a consequence, should also be able to submit leniency applications. The guidelines set out the procedure to make leniency applications by individuals and elaborate on the interplay between individual and corporate leniency applications.

First of all, the BMA’s Leniency Guidelines stress that individuals can only be held liable under the CEL when an undertaking or association of undertakings has been involved in a cartel infringement. Only if an individual authorised to represent an undertaking infringes Article IV.1(4) CEL and faces individual fines, he/she may be entitled to obtain a lenient treatment.

Individuals entitled to leniency may submit a leniency application in two contexts: (i) to participate in a leniency application made by an undertaking or association of undertakings for whom they act(ed), or (ii) in his/her own name and initiative, irrespective of whether the undertaking or association of undertakings have submitted a leniency application.
In the first situation, in order to be granted immunity the individual will reasonably have to provide full cooperation and continuous cooperation in the context of the corporate leniency application.\textsuperscript{4606}

In the second scenario, (i.e. when an individual choses to submit a leniency application in his/her own name) two essential conditions must be satisfied to obtain immunity. First, as pointed out above, the individual concerned must have been involved in one or more of the prohibited practices consisting of price fixing, output limitation or market sharing. Second, he or she must also contribute to prove the existence of these practices by providing information which the BMA did not have before or by acknowledging the existence of the cartel.\textsuperscript{4607} To this end, a leniency application made by an individual on his own account must specify (i) the name and address of the applicant, (ii) the parties of the alleged cartel, (iii) the affected product (s) and territory, (iv) the nature of the conduct, (v) the estimated duration of the cartel, and (vi) the role he/she played within the cartel.\textsuperscript{4608}

It is important to keep in mind that there are four important differences between the leniency regime for natural persons and the one applicable to undertakings. First, the type of lenient treatment granted to natural persons always consists of “immunity from prosecution”, instead of some sort of reduction in fines. This means that if the individual in question satisfies the relevant conditions, the fine is simply not imposed.\textsuperscript{4609} Second, individual immunity from prosecution is granted regardless of the chronological order of the (individual or corporate) leniency application, while in the case of undertakings only the first applicant can obtain immunity from fines. Third, while only one undertaking is entitled to obtain immunity, conversely, several individuals may be granted full immunity from fines.\textsuperscript{4610} Four, individual leniency applications are not taken into account to determine the ranking or order of an undertaking’s application.\textsuperscript{4611} The fact that an individual is first to submit a leniency application does therefore not prevent an undertaking from being “first (undertaking) applicant” and obtain complete immunity from fines. Nevertheless, if an individual has already provided information which the BCA did not have, it will arguably be more difficult for an undertaking to fulfil the conditions to obtain immunity.

Immunity from prosecution is granted by the Competition Board at the request of the Auditor General. Normally, the Competition Board makes an immunity statement specifying the conditions that must be satisfied to grant (final) immunity.\textsuperscript{4612} If the immunity applicant does not comply with the terms of the immunity declaration, the Auditor General can request the Competition Board to impose a penalty against the person concerned.

3.3. Administrative fines for individuals in practice

Given that the currently applicable BMA Fining Guidelines are relatively recent, they have only been applied in one case to date, namely in the Industrial batteries cartel.\textsuperscript{4613} Although no personal

\textsuperscript{4606} See Article IV.1(46)(2) CEL. See also D. VANDERMEERSCH, “De mededingingsregels” 63; H. GILLIAMS, “Het nieuwe Belgisch” 483.

\textsuperscript{4607} BMA Leniency Notice 2016, point 23. See D. VANDERMEERSCH, “De mededingingsregels” 64.

\textsuperscript{4608} Ibid, points 61-62.

\textsuperscript{4609} See also stressing this difference D. VANDERMEERSCH, “De mededingingsregels” 64.

\textsuperscript{4610} BMA Leniency Notice 2016, points 24-16. See also D. VANDERMEERSCH, “De mededingingsregels” 64.

\textsuperscript{4611} See also D. VANDERMEERSCH, “De mededingingsregels” 64.

\textsuperscript{4612} This can be inferred from Article IV.46(3) and (4) CEL.

\textsuperscript{4613} This case has been further described above (“Belgium: fining practice for undertakings”).
fines were imposed, the BMA granted immunity from prosecution to three individuals in this case. These individuals applied for immunity from prosecution during the investigation process, after Exide Technologies blew the whistle in 2013 and four other undertakings (Hoppecke, Battery Supplies and Enersys) applied for corporate leniency reductions.

It is submitted that this case does not reflect the full detection potential of the individual leniency programme. Yet, the importance of granting individual immunity, should not be underestimated. In fact, this case reflects the genuine impact of the threat of individual sanctions for natural persons. Once a cartel is detected (through a corporate leniency application or other method), the risk of individual sanctions will put those persons representing companies under significant pressure to cooperate. The same may hold true even before a cartel has been detected. Now that both undertakings and individuals are in a prisoner’s dilemma, their motivation to cooperate in the investigation of the case and in the process of collection of evidence will certainly be enhanced.

3.4. Bid rigging as criminal offenses

In Belgium, no criminal sanctions may be imposed by the BMA with regard to cartel infringements. However, bid rigging in respect of public tenders is a crime under Article 314 of the Belgian Criminal Code (Strafwetboek/Code Pénal). More precisely, this provision sanctions those who, in the context of tendering procedures, perturb others’ freedom to bid by way of violence, force, gifts, promises or any other fraudulent means. Those who contravene Article 314 may be punished with a criminal fine of €100 up to €3,000 and imprisonment of 15 days to six months.

As the wording of Article 314 reflects, the offence is broadly formulated. In fact, Article 314 of the Criminal Code is considered as one the main fraud offences regarding public contracting. While this provision is applicable to bid rigging in the sense of competition law, the scope of application of the rule is actually much wider. The main difference between Article 314 and Article IV.1(4) CEL is that Article 314 of the Penal Code does not punish the final conclusion of the contract but rather focuses on the bids that led to it.

There is, unfortunately, little information about the application of Article 314 Strafwetboek and about the penalties imposed in this type of cases. However, and most importantly, it can be assumed that individuals are imprisoned seldom on the basis of this provision. This is due to the fact that the maximum prison sentence amounts to 6 months implying that prison sentences are commonly suspended.

3.5. Interaction between criminal sanctions and leniency

In Belgium, the offence contained in Article 314 Strafwetboek is prosecuted by the general public prosecutors before the Belgian criminal courts. The Strafwetboek contains no provisions regarding the possibility to grant leniency or immunity for any type of offences, including bid rigging. Yet, in accordance with the principle of opportunity (opportuniteitsbeginsel), public prosecutors are free to

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4614 The BMA decision in this case does however not comment or mention this aspect. This information was only stated in the Press Release of this decision, available at http://www.belgiancompetition.be/sites/default/files/content/download/files/20160223_press_release_04_bca.pdf
establish their own priorities (in accordance with general policy) and to decide whether or not a
given offence must be de facto prosecuted. This implies that some sort of non-prosecution policy
could, in theory, be established with respect to Article 314. To date, this is however not the case and
individuals involved in bid rigging cannot be protected from the risk of being punished with criminal
sanctions.

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4617 See stressing the risks of criminalising competition law in the Belgian context P. WYTINCK, “Sancties, risico’s en kosten bij overtredingen van het mededingingsrecht”, in P. WYTINCK (ed.) Gericht op mededinging - Consacré à la concurrence. In honorem Bernard van de Walle de Ghelee. Antwerpen, Maklu 2011, 178 p., at 150-151. This author puts a special emphasis on the need to provide individual immunity in criminal competition law cases.
CONCLUDING CHAPTER. What is the right way forward?

1. Finding convergence in divergence

Over and above the common sanctioning base to impose fines on undertakings in all competition law systems in the EU, the analysed Member States provide for one or more types of sanctions for the individuals who infringe (European) competition law.

Precisely because there is no Commission precedent in this area, the possibility to impose penalties other than fines on undertakings at the Member States level has a great intrinsic potential to complement and improve the Commission’s sanctioning enforcement system. While, as examined above, Member States have increasingly modelled their national enforcement systems to match the Commission’s regime, they have also shown their eagerness to experiment with and accommodate other types of sanctions in order to enhance deterrence. Within this divergence with respect to the Commission’s system, the systems of the Member States that were analysed contain important similarities in terms of sanctioning preferences other than fines for undertakings. Such similarities reflect, at least to a certain extent, the current sanctioning tendencies at the Member State level.

The sanctions identified at the selected Member State level take multiple forms and include: (i) custodial sanctions imposed in a classical criminal-style procedure involving a prosecutor and court; (ii) (administrative) fines on individuals and (iii) director disqualification orders. The analysis below explores to which extent each type of sanction is available and imposed in each one of the selected Member State. By taking a closer look at the availability of convergent sanctions, and at the specificities and conditions of such sanctions, one may identify instruments that function properly at the Member State level and which may serve as an example for other European jurisdictions. Ultimately, this analysis could contribute to the promotion and expansion of a learning process among Member States and, potentially, the European Commission in the area of sanctions for natural persons.

1.1. Custodial sanctions

The first common penalty identified in all Member States is custodial sanctions. The rationale behind the introduction of criminal sanctions is a recognition (or belief) that the threat of imprisonment for an individual constitutes the most effective deterrent in the context of competition law, especially compared to sanctions for undertakings. The risk of having to serve prison time is viewed as extremely undesirable for business executives. In addition, a credible threat of imprisonment also...
has a moral signalling effect, which in turn sends a spontaneously law abiding message which can only but reinforce moral commitment to the law.\textsuperscript{4622}

The United Kingdom is often considered a notable and representative European jurisdiction to have criminalized cartels.\textsuperscript{4623} The UK cartel offence was first introduced in 2002 to enhance the deterrence of the UK sanctioning system and, since then, the CMA may impose custodial sanctions for cartel agreements.\textsuperscript{4624}

Under German and Belgian law individuals implicated in bid-rigging cartels may also face custodial sanctions. Interestingly, the bid-rigging offences in Germany and Belgium were adopted prior to the introduction of the UK cartel offence.\textsuperscript{4625} Like in the UK, the adoption of a criminal bid-rigging offence in Germany and Belgium was also driven by deterrence considerations in this more specific area.

These three jurisdictions show some similarities (but also some differences) in the area of custodial sanctions.

The only fully convergent aspect concerns the fact that all jurisdictions have created a separate criminal offence, instead of criminalising competition law in a strict sense.\textsuperscript{4626}

Convergence is however more limited with respect to (i) the substantive scope of the offence, (ii) the maximum sentence, (iii) the prosecution powers, and (iv) the interaction with leniency.

First, as follows from the discussion above, the substantive scope of application of custodial sanctions differs to some extent among Member States. Under UK law, custodial sanctions are in principle applicable to any type of cartel agreement regardless of whether the agreement has been implemented or not. In contrast, under German and Belgian law, custodial sanctions are limited to bid-rigging cartels. More precisely, only the act of submitting a bid that has been rigged in a public or private tender falls within the scope of the criminal offence. The anti-competitive object or effect of the negotiations or agreements preceding the bid are irrelevant under criminal law.\textsuperscript{4627} From this point of view, it seems that this tenuous form of criminalisation is related to fraud rather than to the notion of hard core cartels in the area of (European) antitrust.\textsuperscript{4628} The most accepted reasons for the criminalisation of big rigging in the case of public procurement are mainly related to the public view violations’. A. L. Liman, “The Paper Label Sentences: Critique”, 1977 (86) Yale Law Journal, 619, at 630-631 quoted in W. Wils, “Is Criminalization” 34 of the online version of this paper. See also in the same line e.g. N. K. Katyal, “Deterrence’s Difficulty”, 1997 (95) Michigan Law Review, 2385-2476, at 2416 who notes that ‘the threat of jail has different meanings for different people. [...] For users of moderate wealth, the threat of jail may provide more of a deterrent than the monetary cost’, See also OECD, Cartel Sanctions Against Individuals 20.\textsuperscript{4622} W. Wils, “Is Criminalization” 35-36 of the online version of this paper. See also OECD, Cartel Sanctions Against Individuals 20.\textsuperscript{4622} W. Wils, Efficiency 175.\textsuperscript{4622} See further supra Chapter 12, section 2.\textsuperscript{4622} See further below the analysis in this section.\textsuperscript{4622} In addition, as discussed above, the UK government takes the view that its cartel offence does not qualify as competition law.\textsuperscript{4622} See also M. J. Freese, Sanctions 235 of the original version of this dissertation.\textsuperscript{4622} J. Keith And H. Farin, “Criminal Sanctions” 3. See also F. Wagner-Von Papp, “Criminal Antitrust” 18 of the online version of this paper; S. D. Hammond, Speech 15 May 2001, “The fly on the wall has been bugged”, available at https://www.justice.gov/atr/speech/fly-wall-has-been-bugged-catching-international-cartel-act
that wasting the tax-payers’ money is intolerable,⁴⁶²⁹ and to the fact that bid-rigging cartels frequently are bid-rotation arrangements which have an intrinsic tendency to be repeated over time.⁴⁶³⁰

Second, with regard to the applicable maximum penalty, a similar maximum sentence of five years is applicable in Germany and the UK, while the maximum sentence in Belgium is six months.

Third, convergence is also limited in the area of prosecution powers. In the UK, although custodial sanctions for cartel offences are imposed by a criminal court, the CMA is authorized to prosecute the case itself.⁴⁶³¹ Moreover, the CMA has discretion in choosing the cases it brings to the court's attention.⁴⁶³² In Germany and Belgium, on the other hand, administrative enforcement and criminal enforcement are basically separated.⁴⁶³³ This means that custodial sanctions (and criminal fines) are imposed by a court after the case has been investigated and brought to its attention by a public prosecutor. Public prosecutors are normally informed by the competition authority of the case in question, as the latter have an obligation to report criminal offences. This institutional construction implies that the role of competition authorities in the prosecution of bid-rigging offences is limited to the preliminary stage of the investigation.⁴⁶³⁴

Finally, the fact that the CMA has discretion to decide the cases that will be prosecuted, allows the CMA to complement its corporate leniency programme with criminal immunity for individuals by granting non-action letters. This is, however, not possible in Germany and Belgium. In these jurisdictions, the separation between administrative and criminal enforcement (also) means that administrative leniency (for individuals or undertakings) does not protect natural persons against criminal prosecutions for bid rigging cases.⁴⁶³⁵ Furthermore, in Germany, the principle of mandatory prosecution requires public prosecutors to pursue criminal facts that come to their attention.⁴⁶³⁶


⁴⁶³⁰ F. WAGNER-VON PAPP, “Criminal Antitrust” 18-19 of the online version of this paper.

⁴⁶³¹ Section 190(2) Enterprise Act.

⁴⁶³² See further supra. See also M. J. FRESE, Sanctions 235 of the original version of this dissertation.

⁴⁶³³ As M. FRESE notes ‘[t]his has the effect that criminal cases can even be brought against individuals that have already been treated to an administrative fine. However, if the criminal court comes to a conviction it repeals the administrative decision’. See further supra. See also M. J. FRESE, Sanctions 235 of the original version of this dissertation.

⁴⁶³⁴ See further supra Chapter 11, section 1.2.

⁴⁶³⁵ See also M. J. FRESE, Sanctions 235 of the original version of this dissertation.

1.2. Administrative fines for individuals

The second divergent sanction (with respect to the Commission’s system) identified in the analyzed jurisdictions is administrative fines for individuals.

Administrative fines also have the potential to deter individuals from committing cartel infringements. In contrast to criminal sanctions, administrative fines carry a lower moral condemnation and are thus meant to put a price to the infringement.4637

Administrative fines for natural persons are available in Germany and Belgium. While these jurisdictions show convergence with respect to the type of sanction, a close look at the specificities of these system again reveals certain similarities but also differences.

An important similarity is that, under both systems, administrative fines on individuals are imposed by the NCA in the same way as fines on undertakings.4638

However, the scope of application of such sanctions differ. While in Germany, fines for individuals are available for all types of (European) antitrust infringements, including thus both restrictive agreements and abuses of a dominant position, in Belgium this penalty is (only) foreseen for individuals involved in horizontal hardcore cartels.4639

The maximum level of fines also differs between both jurisdictions. In Germany, the maximum statutory fine for individuals is €1,000,000, whereas in Belgium, individual fines may not exceed €10,000. It is, however, important to recall that in Germany in large cartel cases, common individual fines may range between €200,000 to €250,000.4640 Although this amount is considerably higher than the maximum fine in Belgium, this difference is most likely due to the fact that Germany has consolidated experience with the imposition of this type of sanctions while in Belgium individual fines have only been introduced very recently.4641

Finally, under both systems the NCAs have complemented this type of sanctions with a leniency programme for individuals. There are, however, important differences between both systems. As examined above, the Bundeskartellamt’s leniency notice applicable to individuals is the same programme as the system applicable to undertakings and associations of undertakings.4642 Under this programme, automatic immunity is granted to individuals provided that the conditions for immunity are met, and there is a possibility for a discretionary reduction of up to 50% of the fine if the applicants makes a “significant contribution to proving the offence” and the other leniency

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4637 See also F. WAGNER-VON PAPP, “Compliance” 17 of the online version of this contribution; A. JONES AND R. WILLIAMS, “The UK Response” 13-14 the online version of this paper; see more generally R. COOTER, “Prices and Sanctions”, 1984 (84) Columbia Law Review, 1523-1560.
4638 See further supra Chapter 12, section 2.
4639 See further supra Chapter 12, section 3. See more generally Commission (*SWD/2014/0231 final*), Enhancing competition para 90.
4640 See further supra Chapter 12, section 3. See more generally Commission (*SWD/2014/0231 final*), Enhancing competition para 90.
4641 See supra Chapter 12, section 2.
4642 Bundeskartellamt Leniency Programme 2006, para 1.
conditions are met. However, the fact that individual applications are equated with undertaking’s applications implies that when an individual is first to qualify for immunity, an undertaking will no longer be eligible for full immunity. In Belgium, in contrast, individuals are not equated with undertakings. As a result, the fact that an individual qualifies for immunity does not prevent an undertaking from being eligible for a 100% reduction. In addition, in Belgium individuals who satisfy the relevant conditions are always eligible for full immunity from fines. This also implies that multiple persons may obtain immunity whereas in Germany only the first qualifying person or undertaking will obtain full immunity.

1.3. Director disqualification orders

Finally, the last divergent sanction identified concerns director disqualification orders. The competence to impose disqualification orders in the context of competition law may function as an additional deterrent, thereby preventing individuals from engaging in infringements. The applicability of this penalty is nevertheless generally perceived as a less serious threat than custodial sanctions and administrative fines for individuals.

At the Member States level, there is no further convergence in this area as this sanction is only available in the UK.

Yet it is interesting to recall that in the UK, this sanction is not limited to cartels, but can be imposed for any infringement of competition law - although in practice its use is limited to complement criminal enforcement. The CMA will not apply for a disqualification order against any director of a company who benefits from leniency. Moreover, the duration of a disqualification order may not exceed 15 years.

2. Lessons from the Member States: looking into the reasons for the (in)effectiveness of sanctions

The analysis has shown that in the jurisdictions that were examined, fines for undertakings are complemented through a range of sanctioning instruments, which reflect the different histories and the diverse political, cultural and economic factors that have shaped the development of competition law enforcement in each jurisdiction.

Furthermore, although certain differences remain with regard to the scope and specific elements of each sanction, it cannot be denied that relative tendencies of convergence can be identified in the area of administrative fines and custodial sanctions for individuals. The level of convergence in the

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4643 See for a more detailed discussion of this conditions supra Chapter 12, section 1.
4644 See also D. VANDERMEERSCH, “De mededingingsregels” 64.
4645 BMA Leniency Notice 2016, points 24-16. See also D. VANDERMEERSCH, “De mededingingsregels” 64.
4646 The deterrent effect of CDOs has been demonstrated by empirical studies. A report conducted on behalf of the former OFT found that, ‘the threat of director disqualification is seen as a serious one by both lawyers and companies, and many thought that a greater use of this sanction would improve deterrence’. OFT, “The deterrent effect of competition enforcement by the OFT, a report prepared for the OFT by Deloitte (November 2007), para 5.117; available at http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/of962.pdf.
4647 See also A. STEPHAN, “Disqualification Orders”.
4648 See further supra Chapter 12, section 2.
area of disqualification orders, on the other hand, is low as this instrument is only available in one of the explored jurisdictions.

While each of these penalties has, in principle, the potential to complement and improve sanctioning systems based solely on fines against undertakings and associations of undertakings – such as the Commission’s regime – the analysis of the application of these different penalties in practice has shown that not all of these instruments operate successfully. If there is no credible threat that the available sanctions will actually be imposed, the deterrent effect of these instruments can be seriously undermined.4649

Although the UK cartel offence was already first enacted in 2002 (and reformed in 2013), this jurisdiction still has very little experience with the (successful) enforcement of the offence. To date, only two cases, namely *Marine Hoses*4650 and *Galvanised steel tanks*,4651 have resulted in convictions and, in both cases, the individuals involved had pled guilty. In addition, the *Marine Hoses* case was essentially a US case.4652 In Germany and Belgium, on the other hand, the specific features of the criminal provisions for bid-rigging suggests that this type of offence should be rather considered as a fraud provision that also covers a very specific type of anticompetitive activity. Furthermore, also in these jurisdictions, (unsuspended) prison sentences play a very limited role in practice.4653 In the field of custodial sanctions, it appears that the difficulties to find the right formula to criminalize cartels combined with the complications that must be faced to obtain a conviction have led to fewer prosecutions and final convictions.4654 Although the threat of classical criminal sanctions and notably custodial sanctions is often seen as a strong element of deterrence, the extremely low number of successful cases raises the question whether criminalising cartels is an appropriate formula to make anti-cartel enforcement effective.4655

In contrast, administrative fines on individuals for competition infringements, are very frequently imposed by the Bundeskartellamt and play an active enforcement role in practice.4656 In Belgium, this provision has only recently been introduced and its enforcement role has not been consolidated yet. Finally, in the UK, competition disqualification orders have not been applied to date, presumably due to their complementary function in criminal cartel cases.4657

4649 OECD, Cartel Sanctions Against Individuals 20.
4651 CMA Press release of 15 September 2015, “Director sentenced to 6 months for criminal cartel”.
4652 See also supra Chapter 12, section 2.5.1.
4653 See also affirming this aspect more generally Commission (*SWD/2014/0231 final*), Enhancing competition para 92.
4654 See also affirming this aspect more generally *ibid* para 95. In this policy document, the Commission adds that ‘[a] range of Member States have examined the introduction of classical criminal sanctions in recent years and have opted not to do so after thorough deliberation (e.g. Belgium, the Netherlands and Sweden where an expert committee was set up to consider the question)’.
4655 See also OECD, Cartel Sanctions Against Individuals 20-21. This policy document clearly stresses that ‘despite the obvious advantages of criminal sanctions in the deterrence and prosecution of cartels, there can be a number of reasons why countries are reluctant to provide for sanctions against individuals in cartel cases, and in particular to criminalize participation in cartels. A country might consider, for example, that criminal sanctions are not compatible with its values and social norms, that imprisonment imposes significant costs on society and that non-criminal sanctions would be more cost effective, and/or that criminal sanctions actually might decrease the level of enforcement’.
4656 See for a more detailed discussion of the Bundeskartellamt’s practice supra Chapter 12, section 1.3.
4657 See also Commission (*SWD/2014/0231 final*), Enhancing competition para 92.
The analysis below will consider the question of why administrative fines for individuals are applied far more frequently than custodial sanctions and CDOs. This assessment will focus on a number of practical aspects that are decisive for the (un)successful or (in)effective operation of the sanctions concerned. This examination will, more precisely, take a closer look at the complex substantive design of a cartel criminal offence, the complicated co-existence of criminal and administrative regimes; the question regarding the allocation of responsibility for the prosecution of criminal cases, the need to ensure that sanctions for individuals are complemented with leniency programmes, the unwillingness to apply certain sanctions and the lack of moral condemnation of cartels. Finally, the question whether director disqualification orders should play a greater role will also be explored. The analysis of these questions will not only be based on the experience of Member States with the application of each specific type of sanction, but will also incorporate a more critical assessment.

2.1. The (complex) substantive design of a criminal cartel offence

One of the most important aspects to take into account when considering whether to introduce criminal sanctions against individuals in cartel cases is the question of a proper definition of the cartel offence. In particular, the question whether criminal sanctions against cartel participants should be imposed within the framework of the general competition law or whether a separate offence should be more narrowly defined deserves special attention.4658

A separate and concise definition of the actions that are subject to criminal penalties may arguably be desirable to ensure that those who can be subject to criminal sanctions can identify and understand what type of conduct entails the highest risks.4659 In fact, if the unlawful conduct has not been sufficiently defined or is not clear enough, defendants may argue that a criminal conviction would violate their fundamental rights and, thus, be unlawful.4660 Yet, if any interaction with the (European) competition law system is to be avoided, it is necessary to “carve out” or to explicitly exclude from the scope of application of the offence all conduct that does not violate (European) competition law. Doing so, without referring in any way to the antitrust system is, however, an extremely difficult and challenging task.

Such difficulties have been well illustrated by the experience of the UK. In this jurisdiction the criminal cartel offence was designed separately from the general (national and European) competition regimes. To define the prohibited behaviour, the original UK cartel offence specifically listed various categories of conduct subject to criminal sanctions and introduced the “dishonesty” requirement to signal the serious and immoral criminal nature of this conduct.4661 However, as the UK Government accepted, the dishonesty mens rea element made the offence incredibly difficult to

4658 See also OECD, Cartel Sanctions Against Individuals 22-23.
4659 Ibid 23. This policy document stresses that ‘criminal sanctions might have excessive deterrence if the conduct to which they apply is not clearly defined. Co-operation between competitors can be beneficial in many arrangements and the line between per-se prohibited conduct (including hard core cartels) and permissible conduct may not always be clear to those operating a business. In these circumstances, the threat of criminal sanctions might deter pro-competitive and innovative arrangements if acts to which criminal sanctions apply were not clearly defined’.
4660 In accordance with Article 7(1) ECHR, ‘[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed’. For discussion of the question whether the (former) cartel offence was sufficiently certain, see P. WHELAN, “Legal Certainty”.
4661 See further supra Chapter 12, section 2.1.
prosecute and put the United Kingdom ‘at odds’ with developing international best practice on how a hardcore offence should be defined.\textsuperscript{4662} The Government consequently decided to replace the dishonesty element and introduced a number of statutory exclusions and defences intended to identify the core substance of the cartel offence while avoiding the difficulties stemming from the need to prove ‘dishonesty’.\textsuperscript{4663}

Prior to these changes, the (interpretation of the) dishonesty requirement proved to be a deficient mechanism to provide a clear and precise definition of prohibited cartel activity.\textsuperscript{4664} While it is true that individuals who participate in cartels behave dishonestly in the general sense of the word, it is difficult to see how dishonest conduct can be equated with agreements that are naked in terms of economic efficiency.\textsuperscript{4665} In the same line of reasoning, it is questionable that the incorporation of exclusions and statutory defences based (more or less directly) on “secrecy considerations” will be capable of remediying or improving this shortcoming.\textsuperscript{4666} In light of the experience in the UK, it can be concluded that the enforcement of the criminal cartel offence is considerably hindered when the definition of the offence is based on considerations that are irrelevant to the harm and lack of benefits caused by cartels on the economy. If cartels are to be criminalized, this can only be done by reference to their economic impact.\textsuperscript{4667} After all, only the intrinsic naked nature of cartels is capable of justifying the idea that hard-core cartels must be \textit{per se} illegal.\textsuperscript{4668}

In Germany and Belgium, the complexities of the definition of a criminal bid rigging offence (in terms of competition law) are also apparent. In both jurisdictions, the definitional problems are also approached indirectly and somewhat “circumvented” because bid rigging cartels are not criminalised from the point of view of competition law. Instead, in Germany and Belgium the “bid rigging offences” originate from bids made in a fraudulent manner. This means that there is no need to prove any anticompetitive effects in order to impose custodial sanctions.\textsuperscript{4669} In Germany and Belgium “bid rigging offences” are thus seen as a more general type of fraud rather than as anticompetitive behaviour.

\subsection*{2.2. The complicated co-existence of criminal and administrative regimes}

If custodial sanctions are considered necessary to punish cartels agreements, it appears necessary to criminalize the applicable competition law provisions\textsuperscript{4670} and thus to allow the interaction between the criminal system (applicable to individuals) and the administrative cartel regimes (applicable to undertakings). However, both the coexistence of these separate regimes and their parallel working gives rise to several procedural issues.\textsuperscript{4671}

\textsuperscript{4662} Department for Business, Innovation and Skills, Competition for Growth: Consultation on Options for Reform (2011), at 32.
\textsuperscript{4663} See supra Chapter 12, section 2.1.
\textsuperscript{4664} A. JONES AND R. WILLIAMS, “The UK Response” 24 the online version of this paper; C. HARDING AND J. JOSHUA, \textit{Regulating} (2010), Chapter II. See also supra Chapter 12, section 2.1.
\textsuperscript{4665} Supra Chapter 12, section 2.1.
\textsuperscript{4666} Supra Chapter 12, section 2.2. A. JONES AND R. WILLIAMS, “The UK Response” 24 the online version of this paper.
\textsuperscript{4667} Supra Chapter 2, section 2.
\textsuperscript{4668} See also generally e.g. A. KOLEV, “The Abolishment” 14; See also e.g. M. FURSE, \textit{The Criminal Law} 215-216.
\textsuperscript{4669} See further supra Chapter 12, sections 1.4 and 3.4.
\textsuperscript{4670} Supra section 2.1 of this Chapter.
\textsuperscript{4671} See also stressing the importance of these issues e.g. A. JONES AND R. WILLIAMS, “The UK Response” 25 the online version of this paper; M. FURSE, \textit{The Criminal Law} 215-216. In the view of this last author ‘that the problem with the UK cartel offence as originally framed lies not in the specific language of the legislation, but with the deliberate
Custodial sanctions can by their very nature only be applied on natural persons under criminal law proceedings. In line with the ECHR, such proceedings essentially require adjudication by an independent court or tribunal.\(^{4672}\) As a consequence, prosecution and decision-making must be separated and a division of enforcement powers (possibly over separate institutions) is required. In other words, creating a criminal cartel offence on top of the administrative one implies that having in place a single administrative enforcement system is then no longer possible.\(^{4673}\) Instead the co-existence of two separate civil and criminal cartel regimes requires one administrative process for proceeding against companies and another for proceedings against natural persons.\(^{4674}\) This approach is indeed followed in the UK, where businesses involved in cartels are sanctioned under administrative proceedings and individuals under criminal proceedings.\(^{4675}\) The same can be stated about Germany and Belgium in respect of bid-rigging. This separation not only has important institutional consequences.\(^{4676}\) Furthermore, as further examined below, this approach leads to unnecessary complications for the position of an individual defendant and that of the undertaking that is the subject of an investigation by the competition law authorities.\(^{4677}\)

### 2.3. The allocation of responsibility for the prosecution of criminal cases

#### 2.3.1. Risks when the competition authority prosecutes the case

Operating different enforcement models (one judicial and one administrative), is logically a cumbersome task from a procedural perspective. Furthermore, this complex set up raises the question of who should be responsible for the prosecution of a criminal case.

There are various reasons why a competition authority could be allowed to pursue criminal cases, as the CMA does in the UK.\(^{4678}\) Firstly, competition authorities are arguably better placed than general prosecutors to investigate a case given their specific competition law expertise and knowledge.\(^{4679}\) On the other hand, it is essential to keep in mind that administrative and criminal

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\(^{4673}\) M. J. Frese, Sanctions 226 of the original version of this dissertation; A. Jones and R. Williams, “The UK Response” 25 the online version of this paper.

\(^{4674}\) A. Jones and R. Williams, “The UK Response” 25 the online version of this paper; P. Whelan, “Cartel Criminalisation and Due Process: The Challenge of Imposing Criminal Sanctions alongside Administrative Sanctions within the EU”, 2013 (64-2) Northern Ireland Legal Quarterly, 143-200 (hereafter: ‘P. Whelan, “Cartel Criminalisation”’).

\(^{4675}\) It should, however, be noted that while in the UK the CMA is involved in both types of proceedings, in Belgium and Germany the respective NCA is not involved in criminal proceedings. Supra Chapter 11, section 1.2.3.

\(^{4676}\) M. J. Frese, Sanctions 226 of the original version of this dissertation.


\(^{4678}\) See describing the CMA’s criminal competences supra Chapter 11, section 1.2.

\(^{4679}\) OECD, Cartel Sanctions against Individuals 23.
processes are essentially different.\textsuperscript{4680} In criminal cases, the authority acts as a public prosecutor, bringing cases before the criminal courts. In administrative cases, it acts as investigator, judge, jury, and executor.\textsuperscript{4681} This concentration of functions emphasises the need to ensure that one process is not compromised by the other. In particular, the application of different enforcement models (\textit{i.e.} a judicial model, on the one hand, and an administrative model, on the other hand), requires the use of different enforcement powers in the context of the collection and the use of evidence.\textsuperscript{4682}

In the UK, in order to ensure that any evidence collected during an administrative investigation is admissible in a criminal trial, the administrative investigation is conducted in line with rules for criminal procedure.\textsuperscript{4683} This approach, however, renders administrative proceedings overly complex and results in a highly costly enforcement framework.\textsuperscript{4684} Furthermore, the fact that the CMA has both administrative and criminal functions and uses the same standards for the collection of evidence emphasises even more the need to ensure that one process does not compromise the other.\textsuperscript{4685} Such need is well illustrated by the UK \textit{Marine Hoses} case, in which two different teams (separated by Chinese walls) had to be created within the former OFT to deal with the different proceedings.\textsuperscript{4686}

Nevertheless, competition authorities may not always be prepared and equipped with the resources to bring criminal cases. To successfully prosecute cases before criminal courts, staff for prosecution needs to be specifically build up.\textsuperscript{4687} This may not always be a cost efficient initiative, in particular when not many cases are expected.\textsuperscript{4688} These obstacles have been experienced by the (former) OFT, which had initial problems accommodating in its role under the Enterprise Act, especially as the new civil policy towards cartels had so recently been introduced.\textsuperscript{4689} In addition, the competition authority in the UK (together with the SFO) has been very selective in choosing the cases to pursue though criminal enforcement.\textsuperscript{4690}

\begin{footnotesize}
\begin{enumerate}
\item See stressing the differences between administrative and criminal procedures in the context of competition law N. BUCAN AND GUTTA, \textit{The Enforcement of EU Competition Rules by Civil Law}, Antwerpen, Maklu 2014, 334 p., at 22-24.
\item See also OECD, Cartel Sanctions against Individuals 25. This policy document underlines that ‘statements that can be used in civil procedures may be inadmissible in criminal procedures because of the right against self-incrimination, whereas documents obtained through criminal enforcement powers may not be admissible in civil trials. Evidentiary admissibility rules must ensure that evidence obtained in one procedure cannot be misused in the other’. See also A. JONES AND R. WILLIAMS, “The UK Response” 25 the online version of this paper; P. GILBERT, “Changes to the UK Cartel Offence” 2 observing that ‘bring[ing] criminal prosecutions is not easy. It is even harder for a competition authority when it is carrying out a civil investigation into the same conduct at the same time. As well as different standards of proof and rules of evidence, the two processes are fundamentally different’. See for a more detailed assessment P. WHELAN, “Cartel Criminalisation”.
\item See generally OFT, “Powers for investigating criminal cartels” (OFT 515), January 2004.
\item M. FURSE, \textit{The Criminal Law} 215-216.
\item See also A. JONES AND R. WILLIAMS, “The UK Response” 25 the online version of this paper.
\item \textit{Supra} Chapter 12, section 2.5.1.
\item See also OECD, Cartel Sanctions Against Individuals 25; P. GILBERT, “Changes to the UK Cartel Offence” 2 correctly stressing that ‘the OFT [was] expected to develop new skills on the job, the law was itself untested. A well-resourced defendant might exploit all types of different legal uncertainties to try to avoid conviction’.
\item OECD, Cartel Sanctions Against Individuals 25.
\item E. MORGAN, “Criminal Cartel Sanctions” 81.
\item \textit{Ibid}.
\end{enumerate}
\end{footnotesize}
Given that criminal proceedings are far more costly in terms of time and resources and risky than administrative cases, enforcers may be tempted to set aside these complexities by not initiating or abandoning criminal cases or only bringing administrative proceedings. This may indeed have occurred in 2009 in the UK, where the former OFT decided not to bring or to abandon criminal proceedings in a number of cases, stating that there was insufficient evidence for any individual to be charged with the cartel offence.

### 2.3.2. Risks when the competence is granted to public prosecutors

If the competence to prosecute criminal cartel cases is allocated to the public prosecutor, there is also an important risk that enforcement becomes less efficient. There are two main reasons for this. First, public prosecutors are usually entrusted with the general task of enforcing criminal law. Given that they are also dealing with (and burdened by) other (violent) crimes, there is a concern that public prosecutors may be less motivated to see anti-competitive cartels as a priority and to demand sufficiently effective sanctions. Second, public prosecutors are logically less specialised in competition law than competition authorities which implies, in turn, that they must invest additional efforts to successfully prosecute cases.

The fact that public prosecutors are indeed in charge with the all-embracing task of criminal law enforcement may indeed explain why in Germany public prosecutors do not recall criminal convictions for bid rigging. In the same line of reasoning, the maximum prison sentence for the bid rigging offense in Belgium is only six months and is most likely to be suspended in practice. In Germany, although criminal penalties for bid rigging are higher, they are most frequently suspended. The mild enforcement approach to bid rigging in both jurisdictions also indicates

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4691 See also stressing the costs of this approach Commission (/*SWD/2014/0231 final*/), Enhancing competition para 93; M. J. FRESE, Sanctions 226 of the original version of this dissertation; see also OECD, Cartel Sanctions Against Individuals 20-21; M. FRESE, The Criminal Law 215-216. This last author even argues that ‘the [former] OFT simply does not have the resources available to it to adequately fulfil a role as criminal investigator and prosecutor, […]’. It seems clear in particular that the OFT may feel somewhat aggrieved that in relation to civil enforcement, the fines it recovers from infringers do not flow to its budget, whereas all costs incurred in enforcement and it appeals flow from its budget’.

4692 A. JONES AND R. WILLIAMS, “The UK Response” 25 the online version of this paper. See also A. STEPHAN, “Disqualification Orders” 3 of the online version of this article, commenting that criminal cases ‘they proved costly, time consuming and unpredictable compared to administrative enforcement against undertakings’.

4693 See supra Chapter 12, section 2.5.4.

4694 See also F. WAGNER-VON PAPP, “Criminal Antitrust” 14 of the online version of this paper.

4695 OECD, Cartel Sanctions Against Individuals 23; W. WILS, “Is Criminalization” 40 of the online version of this paper. As W. WILS points out ‘if antitrust offences have to compete with manslaughter and child abuse cases for the attention of a (typically already overstretched) generalist public prosecutor’s office, they are most unlikely to be given much priority’.

4696 In the view of W. WILS, one of the essential conditions for the criminalisation of cartels is the need to have resourceful and dedicated enforcement agencies. W. WILS, “Is Criminalization” 40 of the online version of this paper. See also F. WAGNER-VON PAPP, “Criminal Antitrust” 14 of the online version of this paper. This author correctly suggests that this shortcoming could be remedied by ‘concentrat[ing] the powers of prosecution with a more specialised prosecutor’. While this possibility may indeed improve the prosecution of cartel cases, it is also important to keep in mind that it would also require considerable financial resources which may make this option a costly solution. Providing public prosecutor with specialised training on competition law – as it was done with national judges in the context of private enforcement – may thus be a less costly and thus suitable solution.

4697 See supra Chapter 12, section 1.4.
that, compared to other crimes, bid rigging is not considered as sufficiently reprehensible to justify a harsher punishment.\footnote{See for a more general perspective on this issue OECD, Cartel Sanctions Against Individuals 21.}

This analysis of the selected jurisdictions suggests that the introduction of custodial sanctions for individuals involved in infringements of Articles 101 and 102 TFEU entails important procedural complexities relating to the co-existence of administrative and criminal regimes, impose a high cost on society and is not an appropriate cost effective mechanism to sanction cartels.\footnote{See also K. OST, “From Regulation 1” 134. This author comments in relation to the situation of Germany that ‘[m]ost proceedings on bid rigging are stayed, sometimes settled if the perpetrator agrees to pay a fine. The main reason for this is seen in the burdensome procedure and the scarce resources of the judicial system. Due to the necessary procedural guarantees, criminal proceedings are even more ‘burdensome’ than fines proceedings (in particular with regard to evidence law). Further arguments against the assumption that criminalisation would lead to effective deterrence are that German law does not provide for short custodial sentences and longer sentences are often suspended’.}

In contrast, administrative sanctions for individuals do not require a separate procedure but can be integrated within the current administrative framework used to enforce European competition law at the Member State level. The existence of only one (administrative) procedural framework, as such, prevents all the issues stemming from the co-existence of two different systems and the different rules for the collection and use of evidence. In addition, the process of allocation of competences is also far simpler as competition authorities can be in charge of all cases. These procedural, practical and economic advantages are well illustrated by the German and Belgian sanctioning systems which provides for administrative fines for natural persons. Under the German and Belgian systems the competence to enforce competition law with regard to individuals remains within the Bundeskartellamt and the BMA respectively (even when the public prosecutor investigates bid rigging). The frequent use of fines for individuals in Germany suggests that the advantages of this sanctioning mechanism constitutes a more costly efficient way to tackle natural persons involved in cartels and, thus, to enhance deterrence.\footnote{See also OECD, Cartel Sanctions Against Individuals 9; F. WAGNER-VON PAPP, “Criminal Antitrust” 14 of the online version of this paper; A. STEPHAN, “The UK Cartel Offence” 22 of the online version of this article; K. OST, “From Regulation 1” 134.}

2.4. The need to ensure that sanctions for individuals are complemented with leniency programmes

It is generally recognised that sanctions for individuals must be accompanied by the possibility grant automatic immunity to individuals (under certain conditions).\footnote{See also OECD, Cartel Sanctions Against Individuals 21, stating that ‘other concern related to the criminalisation of cartels could be that criminal sanctions that include imprisonment can be an expensive form of punishment for a society and that other sanctions can be more cost effective. According to some economists, for example, a social cost/benefit analysis suggests that only fines (preferably civil fines) should be imposed on individual defendants, provided the defendant is able to pay a fine that has the same deterrent effect as the threat of imprisonment’.}

If no individual immunity is guaranteed, undertakings will no longer be inclined to apply for corporate leniency as this may increase the risk of individual liability. In these circumstances, corporate leniency programmes may lose their attractiveness and the current rate of cartel detection may be significantly reduced. This risk is most pertinent when the sanctions provided consist of custodial penalties.\footnote{See e.g. OECD, Cartel Sanctions Against Individuals 9; F. WAGNER-VON PAPP, “Criminal Antitrust” 14 of the online version of this paper; A. STEPHAN, “The UK Cartel Offence” 22 of the online version of this article; K. OST, “From Regulation 1” 134.}

\footnote{OECD, Cartel Sanctions Against Individuals 22. This work underlines that ‘[t]he threat of criminal sentences also might make the detection and prosecution of cartels more difficult because they might make individuals more careful, causing them to increase their efforts to hide cartels. In addition, individuals as well as companies might be even more reluctant to provide information in response to requests given the possibility of criminal procedures against individuals’. See also J. JOSHUA, “A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the}
natural persons as well as undertakings, will be more reluctant to provide information about cartels if individuals fear imprisonment, ensuring that criminal sanctions are complemented with leniency programs is crucial.\textsuperscript{4704}

In the jurisdictions where cartels may qualify as a criminal as well as an administrative offence, the competition authority may have discretion to seek prosecution under a criminal statute or to investigate an alleged cartel under an administrative statute.\textsuperscript{4705} This is indeed the case of the UK, where the discretion to prosecute criminal cases allows the CMA to grant non-action letters to individuals. More specifically, individuals who were employed by an undertakings that obtained corporate immunity also obtained automatic immunity.\textsuperscript{4706} However, the interaction between the administrative and criminal sanctions, on the one hand, and the individual leniency policy, on the other, is extremely complex and the CMA has a significant margin of discretion in deciding whether or not to grant criminal immunity in the UK.\textsuperscript{4707} Likewise, criminal immunity is also not given automatically in relation to Scotland.\textsuperscript{4708}

When the imposition of prison sentences is at stake, uncertainty as to the (non-)prosecution – or (non-) imposition of a criminal sentence – flowing from prosecutorial discretion puts at stake the proper working of (corporate and individual) leniency programmes.\textsuperscript{4709} The need for clear and transparent rules that ensure protection against criminal prosecution to individuals who come forward and cooperate\textsuperscript{4710} is not satisfied in the UK. This conclusion is only reinforced by the fact that no criminal immunity is granted in the UK to the employees of an undertaking that has obtained immunity under the Commission’s programme.\textsuperscript{4711} Arguably, this undesirable lack of coordination enhances the risk that leniency applications before one authority lead to criminal prosecution of the applicant’s employees or ex-employees by other authorities.\textsuperscript{4712}

The relationship between leniency for individuals and criminal sanctions becomes even more complex when the competence to criminally prosecute cartels is fully allocated to public prosecutors. This is due to the fact that in some jurisdictions such as Germany, the general rule is that the investigation and prosecution of criminal cases is mandatory.\textsuperscript{4713} The rule of compulsory prosecutions becomes extremely problematic in the context of leniency programmes as it implies that no protection can be granted in criminal big rigging cases.\textsuperscript{4714} This situation discourages

\textsuperscript{4704} OECD, Cartel Sanctions Against Individuals 9.
\textsuperscript{4705} Ibid 24.
\textsuperscript{4706} In this regard, it is important to recall that in certain cases, the granting of corporate immunity is subject to discretion. Still, if the CMA finally decides to grant corporate immunity, the employees of the undertaking are also granted blanket immunity. See further supra Chapter 12, section 2.4.
\textsuperscript{4707} Ibid.
\textsuperscript{4708} Ibid, “Applications for leniency” (OFT1495), Annexe B, B.1.
\textsuperscript{4709} F. WAGNER-VON PAPP, “Criminal Antitrust” 14 of the online version of this paper; C. FRANK AND A. TITZ, “Die Kronzeugenregelung zwischen Legalitätsprinzip und Rechtsstaatlichkeit”, 2009 ZRP, 137-140.
\textsuperscript{4710} OECD, Cartel Sanctions Against Individuals 9. See for more details on this condition for the effectiveness of leniency programmes supra Chapter 8, section 2.
\textsuperscript{4711} Ibid, “Applications for leniency” (OFT1495), para 8.6.
\textsuperscript{4712} See in this context OECD, Cartel Sanctions Against Individuals 9.
\textsuperscript{4713} Section 152(2) of the Criminal Procedure Code, StPO. See supra Chapter 12, section 1.5.
\textsuperscript{4714} According to F. WAGNER-VON PAPP, in Germany, immunity provisions ’are regarded with deep suspicion. The Kantian tradition in Germany is not easily swayed by utilitarian arguments. Arguments advanced against immunity provisions are (1) that they infringe the rule of law, because they prevent imposing the sanction that justice requires; (2)
individuals from coming forward and providing cooperation and, arguably, hinders the collection of evidence in bid rigging cartels. A similar observation can be made about Belgium, because – although prosecutors are able to prioritise the cases that they wish to prosecute – a non-prosecution policy has not been adopted with respect to bid rigging.

In contrast, the interplay between administrative sanctions and leniency is far more efficient. The enforcement of administrative sanctions is based on a set of self-binding rules issued by the enforcer, stating in which cases its discretion not to enforce will be exercised when this serves the public interest. This discretion allows competition authorities to adopt leniency policies including individual immunity for administrative sanctions for natural persons. Within an administrative enforcement framework, the introduction of individual immunity from sanctions is, therefore, unproblematic. This is well illustrated by the German and Belgian enforcement systems, which provide for leniency for individual administrative fines. While the protection granted under the Belgian system to natural persons is more generous than that offered in accordance with the German system, under both regimes natural persons which satisfy the applicable conditions are guaranteed automatic immunity from fines.

With regard to Competition Disqualification Orders, the interaction with leniency will depend on the legal nature of this measure. In the UK, as discussed above, CDOs are considered as an administrative instrument, which in turn allows the CMA to not apply this penalty when a company has been awarded reduction in fines or leniency by CMA or the European Commission. From this (leniency) perspective, CDOs can be compared to the Belgian system of (immunity for) administrative fines for individuals. It is true that the availability of immunity from sanctions with respect to CDOs in the UK, on the one hand, and fines for individuals in Belgium, on the other hand, may encourage cooperation by natural persons and, therefore, the detection of infringements. Nevertheless, it can also be correctly argued that the full availability of immunity (for all the individuals who cooperate in the case) will most likely diminish the number of cases in which CDOs and fines for individuals are effectively applied. This follows from the fact that most persons involved in a cartel infringement will want to cooperate once that cartel has been uncovered. If a certain type of sanction is available but never applied in practice, its deterrent effect can certainly be questioned.

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that they infringe the principle of equality; (3) that they infringe the principle of mandatory prosecution; (4) that they destabilise the public trust in a just legal order, (5) that deals with criminals are immoral, and (6) that such provisions foster unreliable evidence’. This author indeed recognises that it is uncertain whether the introduction of automatic criminal immunity for competition cases is be politically feasible. F. WAGNER-VON PAPP, “Criminal Antitrust” 15-16 of the online version of this paper. See also K. OST, “From Regulation 1” 134, underlining in the context of German law that ‘with a criminalisation of cartel law, a leniency policy would have to be provided for by criminal law, which in turn would give rise to political debate and also systemic legal problems’. See also P. KLOCKER AND K. OST, “Nach der Novelle ist vor der Novelle” in I. BRINKER, D.H. SCHUEING AND K. STOCKMANN (eds) Recht und Wettbewerb – Festschrift für Rainer Rechtd zum 65. Geburtstag Munich, CH Beck 2006, 703 p., at 242 (hereafter: ‘P. KLOCKER AND K. OST, “Nach der Novelle”’)

4715 F. WAGNER-VON PAPP, “Criminal Antitrust” 15-16 of the online version of this paper; C. VOLLMER, “Experience with criminal” 259.

4716 See supra Chapter 12, section 1.2 and 3.3.

4717 In particular, the BMA grants full immunity from administrative fines to all individuals who cooperate in the investigation. This means that multiple persons may qualify for immunity. In Germany, only the first individual or undertaking to report a cartel or prove its existence will be entitled to full immunity.

4718 See also noting this aspect A. STEPHAN, “Disqualification Orders” 8 of the online version of this article. In the words of this author "[t]he problem is that most firms involved in a cartel infringement will want to cooperate once that cartel has been uncovered. Indeed, the greater the level of cooperation, the more quickly the authority can conclude its
2.5. The (un)willingness to apply the sanction

The effectiveness of anti-cartel enforcement instruments can also be limited when competition authorities and/or judicial authorities are not willing to impose the sanctions available under a given legal system.4719

Compared to violent crimes, judges may be reluctant to impose custodial penalties in cartel cases which may thus not involve a sufficient degree of criminality. The view that cartels are operated by “respectable business people” who show good behaviour4720 and cooperate during proceedings, can induce courts to adopt a benevolent approach towards cartel participants.4721 When this occurs and cartelisation is perceived as a trivial offence, the deterrent effect of criminal sanctions and its moral signalising function is seriously undermined.4722

The benevolent approach of judges in the UK in cartel cases is particularly well reflected in the Marine Hoses case in which the judge even referred to the good character of the defendants before reducing the sentence.4723 Likewise, the acquittals in Galvanised steel tanks and the suspended prison sentence applied in this case,4724 illustrate the reluctance of courts to impose custodial sanctions when defendants plead not guilty.4725 This conclusion is also supported by the experience in Germany and Belgium with the application of custodial sanctions in bid rigging cases. As examined above, unsuspended sentences in this type of cases are, in both jurisdictions, rather exceptional.4726

With respect to CDOs, the (former) OFT stated in 2010 that, ‘[t]he OFT has not used its CDO powers to date for a number of reasons – for example because the conduct in question pre-dated the CDO power, because the relevant individuals benefited from immunity from CDOs under the leniency regime, or because of a lack of evidence’.4727 In addition to these reasons, it appears that there is not a general consensus about the appropriateness of CDOs, especially as this sanction is meant to complement the criminal cartel system. In particular, it can be argued that if cartel behavior is no

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4719 W. WILS, “Is Criminalization” 41 of the online version of this paper. In the context of criminalisation, this author correctly observes that ‘[f]or the threat of imprisonment to be credible, it is also essential for judges and juries to be willing to convict antitrust offenders and sentence them to prison’. See also in this context P. KUNZLIK, “Globalization and Hybridization in Antitrust Enforcement: European ‘Borrowings from the U.S. Approach”, 2003 (48-2) The Antitrust Bulletin, 319-353, at 345-346; P. KLOCKER AND K. OST, “Nach der Novelle” 242.

4720 See further supra Chapter 12, section 2.5.

4721 OECD, Cartel Sanctions Against Individuals 22.

4722 F. WAGNER-VON PAPP, “Criminal Antitrust” 18 of the online version of this paper; P. KLOCKER AND K. OST, “Nach der Novelle” 242.


4724 CMA Press release of 14 September 2015, “Supply of galvanised steel tanks for water storage: criminal investigation”.


4726 See further supra Chapter 12, section 1.6 and 3.4.

4727 OFT, “Director disqualification orders in competition cases: Summary of responses to the OFT’s consultation and OFT’s conclusions and decision document” (May 2010), at 2.6.
2.6. The lack of moral condemnation of cartels

From a general perspective, it has been observed that criminal competition cases can be more easily prosecuted if no clear evidence of a state of mind is required.4729

In the UK, the dishonesty condition was introduced in the cartel offence to signal the seriousness of the offence and to promote the idea that such behaviour should be seen as morally wrong.4730 While the application of the Ghosh test (which required a jury to make both a moral assessment of whether the defendant’s behaviour is dishonest by the standard of reasonable and honest people and an assessment of whether the defendant realised that he was acting dishonestly by this standard)4731 was already challenging enough in the context of common crimes such as theft. The difficulties entailed in this assessment were exacerbated in the context of cartels.4732 In the words of A. JONES AND R. WILLIAMS ‘[i]t was questionable […] whether juries would be willing to conclude that a defendant had acted dishonestly in concluding a cartel agreement, in circumstances where the jurors would be unlikely to have pre-existing instincts about the kind of conduct involved and also might be swayed by arguments that, for example, the defendant had not benefited personally and/or had justifications for how he had behaved (for example, trying to avoid redundancies or business closure’.4733

This was the main reason that led the government to remove the dishonesty requirement. However, the revision of the cartel offence did not address the issues following from the view that cartels are not considered as dishonest. Notably, the non-dishonest perception of cartel activity raises the question of why should this behaviour be criminalised at all.4734 The abolition of the dishonesty requirement was thus not only the consequence of the significant difficulties in the prosecution of the offence, but also reveals general unawareness and underestimation of the harming nature and seriousness of cartels.4735 If the dishonesty condition was removed to facilitate the prosecution of

4728 OFT, “Director disqualification orders in competition cases: Summary of responses to the OFT’s consultation and OFT’s conclusions and decision document” (May 2010), at 2.5. See also A. STEPHAN, “Disqualification Orders” 8 of the online version of this article. It is also interesting to mention in this context that the Institute of Directors argued that CDOs do not produce deterrence and that they have a disproportionate impact on small business where it is easier to argue that the director ‘ought to have known’ about the existence of the illegal conduct.
4729 OECD, Cartel Sanctions Against Individuals 23.
4730 See further supra Chapter 12, section 2.1.
4732 E. MORGAN, “Criminal Cartel Sanctions” 75; D. W. ELLIOT, “Dishonesty in theft”.
4733 A. JONES AND R. WILLIAMS, “The UK Response” 17 the online version of this paper. These authors further explain that ‘at the time the original criminal offence was adopted cartels were not perceived to be morally wrong. Rather, criminalisation was driven by a top-down, forward-looking process. […] complications can arise where a backward-looking approach to the criminal law is not adopted. In the context of the criminal cartel offences these difficulties were compounded by the decision to incorporate a dishonesty requirement within the original offence’. See also A. STEPHAN, “Disqualification Orders” 6 of the online version of this article; A. STEPHAN, “How Dishonesty Killed the Cartel Offence”, 2011 Crim. L. R. 446-455.
4734 A. JONES AND R. WILLIAMS, “The UK Response” 17 the online version of this paper.
4735 Department for Business, Innovation and Skills, Competition for Growth: Consultation on Options for Reform (2011), at 43; This consultation document highlighted that ‘recorded that a study carried out in 2007 had ‘found that only around six in ten people in Britain believe that price-fixing is dishonest and two in ten people believe that it is not. This suggests, in relation to the third aim, that there is only moderate support for a criminal cartel offence defined around dishonesty—and that juries may not be as ready to convict for an offence based on dishonesty as was originally hoped’; see also A. STEPHAN, “Survey of Public Attitudes”; R. KELLAWAY et al, UK Competition Law para 1.102.
cartels, but this type of behavior is not considered as morally wrongful, enforcement difficulties are most likely to re-emerge in practice in the form of general reluctance to apply the sanction. Most importantly, if cartel agreements are not seen as very serious infringements, the appropriateness of custodial sanctions must also be doubted.

In the words of R. WILLIAMS, ‘it does not seem possible to begin with a forward-looking offence in order to enhance enforcement and, without more, expect it to be successful in sending backward-looking signals of moral censure. The law cannot pull itself up by its own bootstraps in this way, any attempt to do so risks damaging both the process of cartel criminalisation and the criminal law more generally’. Criminal law and, thus, custodial sanctions are only meaningful if there is awareness and a general understanding of the reasons why cartels should be morally condemned. If this condition is not satisfied, a criminal cartel offence will not be able to produce the necessary deterrent effect that flows precisely from the moral signalling function of criminal law.

The introduction of administrative fines for individuals avoids the problems mentioned above while targeting and punishing the individuals who were responsible for the cartel. As enforcement experience in Germany shows, the Bundeskartellamt is clearly not reluctant to punish natural persons who had a certain level of responsibility within a company and were involved in cartel activity. On the contrary, under the German competition law system, fines for individuals are

4736 R. KELLAWAY et al, UK Competition Law para 1.102. For a discussion of these issues in the context of the original offence, see A. MACCULLOCH, “Honesty, Morality”; A. JONES AND R. WILLIAMS, “The UK Response” 17 the online version of this paper. As these authors correctly state ‘[e]ven if therefore the removal of the dishonesty requirement from the UK offence makes convictions more straightforward, this action alone will not guarantee that censure will follow convictions or indeed that judges will be willing to imprison those convicted’.

4737 P. M. WHELAN, “Section 47” 21 of the online version of this publication. This commentator observes that ‘the removal of ‘dishonesty’ brings with it a serious additional problem that needs to be overcome: the potential engendering of the phenomenon of ‘overcriminalisation’, where the Cartel Offence no longer aligns itself expressly with culpable or morally wrongful conduct’. In this regard, it has even been contended in well-established literature that the application of criminal penalties to morally-neutral conduct in fact ‘decriminalises’ the criminal law and may even lead to a change of people’s attitudes towards the meaning of criminality. H. PACKER, The Limits of the Criminal Sanction, Oxford, Oxford University Press 1968, 388 p., at 359. See in the same line F. ALLEN, “The Morality of Means: Three Problems in Criminal Sanctions”, 1981 (42-4), University of Pittsburgh Law Review, 737-783, at 738; D. GALLIGAN, Law in Modern Society, Oxford, OUP 2007, 380 p., at 228; P. ROBINSON, “The Criminal-Civil Distinction and the Utility of Desert”, 1996 (76-2), Boston University Law Review, at 201-214, at 202.


4740 A. JONES AND R. WILLIAMS, “The UK Response” 17-18 the online version of this paper; A. STEPHAN, “The Battle for Hearts and Minds: The Role of the Media in Treating Cartels as Criminal” in C. BEATON-WELLS AND A. EZRACHI (eds.) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement, Oxford, Hart Publishing 2011, at 381. In the words of this last author, ‘conviction may generate little stigma, little by way of deterrence may be achieved, and little by way of punishment may be justified. Consequently, the criminal law is liable to fall into disrepute, in the eyes of both prosecutorial agencies, and those subject to regulation, alike’.

4741 See also P. M. WHELAN, “Section 47” 23 of the online version of this publication, commenting that ‘a number of important advantages can be achieved if a cartel offence relates to conduct which is morally questionable, advantages which may be lost if morality is overlooked, such as a reduction in enforcement costs due to an internalisation of the moral norm’.

4742 See supra Chapter 12, section 1.3.
very frequently imposed and the level of such fines imposed is sufficiently high to enhance deterrence significantly. While in theory individual fines may amount to a maximum of €1,000,000, in practice, the fines imposed on natural persons involved in cartels commonly range between €200,000 and €250,000. In Belgium, on the other hand, fines for natural persons who committed a cartel infringement are significantly lower, amounting to a maximum of €10,000. The fact that the maximum amount of the fine in Belgium is lower than in Germany is most likely due to the recent adoption of this sanctioning instrument in Belgium. It can be predicted that, as Belgium gains experience imposing individual fines, the level of fines may raise if it is not considered enough to enhance deterrence. After all, this also occurred in Germany, where the level of fines for individuals was far lower during the early enforcement years.

Yet, it should be accepted that administrative fines for natural persons do not produce the moral stigma which results from the application of custodial (criminal) sanctions. Although such stigma may function as a deterrent, the fact that criminal convictions are so difficult to obtain and that custodial sanctions are infrequently applied, indicate that preference should be given to (administrative) fines for natural persons from an effective enforcement perspective.

2.7. Should there be a (greater) role for CDOs?

Using disqualification orders as an instrument to enforce and sanction cartel infringements can contribute to produce additional deterrence. It is true that restrictions on an individual’s career do not have the same punitive nature as custodial sanctions. Nevertheless, CDOs clearly damage the professional reputation and career potential of individuals and have important economic consequences. As a result, CDOs may operate effectively in dissuading business executives who are considering to engage in cartel activity.

CDOs get a greater public support compared to criminal custodial sanctions. This instrument also offers the advantage of being less costly than custodial sanctions. This is most likely due to the fact that CDOs are commonly considered as being of administrative nature which implies that there is no need to have two different types of proceedings (i.e. administrative and criminal) in place. At

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4742 Section 81(4)(1) GWB.
4743 Supra Chapter 12, section 1.3.
4744 Article IV.1(70)(2) CEL.
4745 As analysed above, administrative fines for individuals were also lower during the early enforcement years, see further supra Chapter 12, sections 1.1 and 1.3.
4747 W. WILS, “Is Criminalization” 38 of the online version of this paper.
4748 A. STEPHAN, “Disqualification Orders” 3-4 of the online version of this article.
4749 A. STEPHAN, “Disqualification Orders” 7 of the online version of this article. In a public survey which was conducted in 2007 in the UK by the ESRC Centre for Competition Policy, 48% of the respondents answered that individuals who took part in price fixing agreements should be sanctioned with ‘a ban from holding senior managerial positions in businesses’ while only 11% answered that imprisonment was appropriate. It is also interesting to mention that 42% of the respondents felt that individual fines are appropriate to sanction price fixing. A. STEPHAN, “Survey of Public Attitudes” 16 of the online version of this article.
4750 A. STEPHAN, “Disqualification Orders” 4 of the online version of this article. As this commentator points out CDOs do not involve the extreme cost of incarceration which has without any doubt important weight in the context of a cost balance exercise.
the same time, this also facilitates the interaction with the enforcement of administrative fines for undertakings as well as with leniency programmes.\textsuperscript{4751}

Given the advantages of disqualification orders, one may wonder why CDOs have not been applied in the UK to date. In the specific case of the UK, the (now) CMA has expressed its view that it will seek to apply this sanction in criminal cartel cases.\textsuperscript{4752} Given the scare enforcement of the criminal cartel offence, it is not really surprising that CDOs have not yet been imposed. In addition, although disqualification orders may be a more viable option than custodial penalties form a practical point of view, CDOs also entail a considerable disadvantages.

First of all, CDOs may also be very costly for society as a whole. In particular, human resources are wasted and individuals may become dependent on the state, thereby, causing an additional cost.\textsuperscript{4753} Therefore, even if CDOs may enhance deterrence from a general perspective, it is difficult to reach a consensus among Member States about the appropriateness and the effectiveness of this sanction in competition law cases.\textsuperscript{4754} This is well illustrated by the fact that only one of the jurisdictions explored in this comparative study, namely the UK, provides for this type of sanction. Furthermore, in the UK the question whether competition law infringements should be subject to CDOs led to a fervent debate and, although this sanction does exist in the books, it is not applied in practice.\textsuperscript{4755}

There are other reasons why the effective working of CDOs can be undermined in practice.\textsuperscript{4756} First, CDOs can only be imposed on company directors. This means that other persons who had an important degree of responsibility within the undertaking (such as managers) – but were not de facto directors – may easily circumvent the application of this sanction.\textsuperscript{4757} This issue may not only lead to unfair situations of selective punishment, but also raises questions about the appropriateness of this sanction. In fact, the analysis above has shown that in other jurisdictions, sanctions for individuals are imposed irrespectively of the official function exercised by the person involved in a cartel.\textsuperscript{4758}

Second, the duration of the time period of disqualification will depend to some extent on the question of how close the director is to retirement. The effect of this sanction may be muted if the company employer decides to compensate the individuals in question be granting a severance package or early retirement.\textsuperscript{4759} This aspect is illustrated by the British Airways case, in which the undertaking decided to support and even promote one of its executives who had been involved in price fixing.

\textsuperscript{4751}See above the analysis conducted in this section.
\textsuperscript{4753}M. J. Frese, Sanctions 236 of the original version of this dissertation.
\textsuperscripts{4754}Ibid.
\textsuperscript{4755}Supra Chapter 12, section 2.8.
\textsuperscript{4756}See also commenting on these reasons A. Stephan, “Disqualification Orders” 9 of the online version of this article.
\textsuperscript{4757}A. Stephan, “Disqualification Orders” 9 of the online version of this article; W. Wils, “Is Criminalization” 38 of the online version of this paper.
\textsuperscript{4758}See generally supra Chapter 12.
\textsuperscript{4759}See also A. Stephan, “Disqualification Orders” 9 of the online version of this article; W. Wils, “Is Criminalization” 38 of the online version of this paper. In particular, W. Wils points out that ‘[d]epending on the age of the person concerned, director disqualification may simply be the occasion to move into comfortable retirement, and the company could fully compensate its former director for any financial loss’.
while the trial for the cartel offence was still pending.\textsuperscript{4760} This attitude indeed shows that, somehow ironically, companies may remain quite loyal to their directors even if they were directly responsible for a competition law infringement and, thus, for the fines that they must face.

Finally, there are issues related to the enforcement of disqualifications orders. The proper working of this sanction requires that the individuals who have been sanctioned are effectively prevented from holding managerial positions within companies in the future. Despite the existence of criminal sanctions for breaching CDOs, it has been commented that this is difficult to guarantee.\textsuperscript{4761} Undertakings may be indeed be inclined to employ individuals mainly based on their skills, expertise and experience even if such person has been involved in a competition law infringement. This view is supported by the fact that CDOs do not appear to form a crucial obstacle for individuals to find work.\textsuperscript{4762} The limitations of CDOs as a means to sanction cartels combined with the controversial nature of this sanction suggest that this tool unlikely to constitute an effective deterrent of cartel behavior.

3. Complementing sanctions for natural persons with individual leniency

There is a wide consensus on the fact that individual sanctions for cartel infringements must be complemented with leniency programmes.\textsuperscript{4763} Individual leniency programmes have a great detection potential because they fully eliminate or significantly reduce the risk of sanctions for the persons responsible for the cartel. Given that, in contrast to corporate leniency, natural persons can be punished for their behaviour, their incentive to cooperate is considerably higher than when an undertaking applies for leniency. This is also reflected in the Commission’s application of its leniency system which contains an obligation for all the employees to continuously cooperate.\textsuperscript{4764} Although, as a general rule, employees normally cooperate in the Commission’s procedure, it is a fact that such willingness to cooperate is likely to diminish considerably if they believe that there is a risk of facing criminal prosecution in other jurisdictions or if they know that the undertaking plans to adopt some type of disciplinary action against them.\textsuperscript{4765}

That being said, the design of a leniency programme for individuals is a very complex subject. It is true that the introduction of such programmes is in general terms considerably easier when the applicable penalty for individuals consists of an administrative fine, instead than imprisonment. A more complicated issue in the context of individual leniency concerns, however, its interaction with the corporate leniency regime. In this regard, the analysis of the German and the Belgian systems which both incorporate fines for natural persons as well as individual leniency show an important...
degree of divergence between both systems. The most relevant difference is that under the German system, individuals are equated with undertakings, in the sense that the same system and conditions (i.e. the first comer condition, the sliding scale of reductions, etc.) are applicable for both companies and natural persons. This means that individual immunity will be granted depending on the chronological order and the scope of the application and that individual applications count to determine the ranking of corporate applications.\textsuperscript{4766}

Conversely, in Belgium, there is a specific individual leniency programme which is only applicable to natural persons. Under the BMA’s leniency system natural persons always obtain “immunity from prosecution”, instead a reduction in fines. Furthermore, individual immunity from prosecution is granted regardless of the chronological order of the (individual or corporate) leniency application and several individuals may be granted full immunity from fines.\textsuperscript{4767} Finally, individual leniency applications are not taken into account to determine the ranking or order of an undertaking’s application.\textsuperscript{4768}

At first sight, the German individual leniency system has a greater potential to encourage the race to immunity between individuals. This mainly is due to the fact that the sliding scale of reductions, and the value of the timing factor to obtain immunity and reductions are equally applicable to individuals and undertakings. On the other hand, the fact that a leniency application made (only) on the behalf of an individual is taken into account to determine the ranking an undertaking’s application requires further examination. One may for instance imagine the situation of an unsatisfied manager or representative who decides to submit a leniency application in his own name and, as a consequence, the undertaking were he/she was employed loses the benefit of immunity. As this brief example illustrates, the interaction between individual and corporation leniency applications may lead to additional complications when the interests of the individual in question and that of the undertaking are not fully aligned.

Conversely, the Belgium system is unlikely to create a race between individuals to obtain immunity. Although the mere existence of the individual leniency programme may foster cartel detection and qualitative cooperation in the investigation, on the other hand, granting immunity regardless of the timing of the cooperation to all persons who cooperate may undermine the individual fining system. If immunity is always granted and individual fines are never imposed this sanction will become rather theoretical and its effectiveness will be at risk.

At first sight, this discussion suggests that neither the German nor the Belgian individual leniency models may work optimally. Some middle way between both jurisdictions seems more appropriate to find the right balance between the need to encourage applications and foster detection without creating unnecessary complications or undermining the working of individual sanctions. By designing separate individual leniency programmes with a sliding scale of reductions for

\textsuperscript{4766} In this context, it should be recalled that natural persons can submit leniency applications on their own name or on behalf of the undertaking they represent. Only in the last scenario, the application will cover the employees of the undertaking in question.

\textsuperscript{4767} BMA Leniency Notice 2016, points 24-16. See also D. VANDERMEERSCH, “De mededingingsregels” 64.

\textsuperscript{4768} See also D. VANDERMEERSCH, “De mededingingsregels” 64.
corporations and undertakings and thereby limiting the interaction between both types of applicants, these objectives can be easier to achieve.\textsuperscript{4769}

\textsuperscript{4769} Yet, as mentioned above, given the complexity of this subject the question concerning the design of individual leniency programmes cannot be answered in a straight forward manner without being subject to thorough research. More specifically, a careful assessment must be made concerning the conditions relating the submission of evidence. If, in order to obtain individual immunity, natural persons must also provide the same evidence as undertaking, conflicts of interest will most likely arise within the same company, leading once again to undesirable complexities.
Main findings and final reflections

The fight against cartels is and will remain a priority for the European Commission and for the national competition authorities in the EU. The odds that a cartel is detected and sanctioned can only go up. Joaquín Almunia (former) Commissioner for Competition

For many years, enforcement of European competition law in the European Union had been largely in the hands of the European Commission, while the role of Member States remained somewhat limited. More than ten years ago, all NCAs did not only become fully competent but were also required to apply EU competition law when an infringement of Article 101 TFEU is suspected. This study sought to establish how the effectiveness of European anti-cartel enforcement can be enhanced taking into account the current decentralized enforcement framework on the one hand, and the lack of harmonization with regard to detection tools and sanctioning mechanisms, on the other hand. More specifically, it aimed to clarify whether the Commission’s anti-cartel enforcement system may serve as a model or blueprint for other competition authorities that seek to enhance cartel deterrence by fostering soft convergence. This examination has been delimited taking into account that an effective enforcement system for cartels requires three basic enforcement ingredients, namely the existence of:

(i) a clear and solid cartel prohibition,
(ii) well-functioning detection methods and
(iii) sanctions capable of producing sufficient deterrence.

In large part, effectiveness considerations lean on economic principles, while special attention is also given to the practical use and functioning of the different enforcement tools. To the extent that enforcement caveats (which could jeopardise the effectiveness of the system) have been identified in the Commission’s model, the selected national systems have been explored in more detail, in search of alternative solutions to improve and complement the Commission’s system. In what follows, the main findings of the study are summarized and some reflections and recommendations are discussed.

A. Findings of the Study

1. An attack to the spirit of the European competition system

Of all anti-competitive agreements, cartels most contravene the foundations of the free market economy. Cartel participants specifically agree to eliminate or significantly reduce the competition between themselves. Cartels do not only produce economic inefficiency, reduce overall consumer welfare and commonly lead to the division of markets. In addition, they are “naked”, meaning that they harm competition without producing any countervailing benefits. Taking into account these features, it has been concluded that cartels directly thwart the objectives of the EU competition system, namely, the production of economic efficiency and consumer welfare and the preservation of the internal market goal.
In this context, the next question became whether the flagrant and damaging nature of cartels is also reflected in the European competition rules, and more precisely in the application and interpretation of Article 101 TFEU. As demonstrated above, this question can certainly be answered affirmatively. Although Article 101 TFEU is broadly formulated and is designed to generally prohibit collective anticompetitive conduct, the analysis of the application and interpretation of the rules contained in Article 101 TFEU by both the Commission and the European Courts fully reflect the extremely harming nature of cartel agreements and the fact that they fully counteract the objectives of the EU competition system. While cartels are as a rule prohibited under Article 101(1) TFEU, they are at the same time never exempted in accordance with Article 101(3) TFEU. The clear and strict application of Article 101 TFEU in cartel cases naturally underpins the very essence of collusive activity and takes into account the distinctive features of this behaviour.

2. Decentralisation

The decentralisation of cartel enforcement constituted a gigantic step towards effective anti-cartel enforcement throughout the European Union. The reforms allowed the Commission to refocus its activity on the most harmful type of anticompetitive conduct, i.e. cartels. Furthermore, the modernisation package led to wider and more effective and active enforcement of Article 101 TFEU by NCAs. The creation of the ECN to facilitate the allocation of cases and to share information among authorities has also served to preserve coherence and uniformity in the application of the EU competition rules among the NCAs and to discuss how certain recurring legal and economic issues can be best addressed. Ultimately, the genuine spirit of cooperation that emerged in the framework of the ECN led to a process of soft convergence in which NCAs started to adopt common rules and enforcement instruments, even when they were not required to. From this perspective, the ECN had a further centralising effect and promoted voluntary convergence in anti-cartel enforcement. Given the important leading role of the Commission in the context of the ECN – and of EU competition law and policy more generally – it is not surprising that the Commission’s enforcement system was considered a model of inspiration for NCAs which started to align their systems with the Commission’s regime. Against this background, one may indeed wonder whether NCAs are following or being inspired by a fully appropriate and effective model. This question led us to analyse the different mechanisms at the Commission’s disposal to detect and punish cartels.

3. Investigative tools

Effective enforcement in increasingly sophisticated cartel cases cannot be achieved with blunt investigative tools. In the area of detection and evidence gathering, the Commission is equipped with the necessary instruments and powers to effectively discover and prove the existence of secret cartel agreements. The Commission’s arsenal contains both proactive and passive detection and evidence gathering tools that complement each and are fully necessary to tackle cartels. On the one hand, the Commission has the (proactive) powers to launch sector inquiries, to investigate complaints, to organise ex officio inspections in business and non-business premises, to require information and to conduct voluntary interviews, which help the Commission in increasing the detection probabilities and gathering information. In practice, these powers have demonstrated their effective role in the context of cartel discovery and evidence gathering. In addition, the protection of the rights of defence does not go further than what is required for this purpose and, therefore, the (effective working of the) Commission’s powers are not undermined.
A more relevant limitation is, however, found in the context of inspections in private premises, in which the Commission cannot impose sanctions for non-compliance. However, as the Commission needs a judicial authority in order to conduct such an inspection, non-compliance with such authorisation may lead to sanctions on the level of the Member State for breaching the authorisation. Arguably, although this subsidiary punishment suffices for the Commission to guarantee the success of inspections in private premises, it is submitted that NCAs should incorporate sanctions into their regimes to be able to enforce compliance with all their investigatory powers. With regard to passive enforcement methods, the Commission introduced its first leniency programme in 1996 which has been subsequently reformed in 2002 and 2006. While the 1996 Leniency Notice was not properly designed and its discovery capacity was limited, the design of the 2002 Notice as further improved in 2006 takes into account the relevant economic insights and has proved to be an effective tool to uncover cartel activity and to collect the necessary evidence to prove infringements. The revised (and more transparent) conditions contained in the 2006 Notice have certainty had a positive impact on the general working on the system. In fact, an extremely high proportion of cartels is detected based on leniency applications. At the same time, the fact that the Commission is capable of monitoring the market and to conduct ex officio investigations, can only enhance the effectiveness of this leniency system. Taken as a whole, it can be concluded that the Commission is equipped with the necessary investigatory powers to uncover cartels and collect evidence to prove the agreements, and that this set of powers and instruments can be an appropriate benchmark for NCAs that seek to reinforce their own systems.

4. Settlements

The Commission’s 2009 settlement procedure has also succeeded in attaining its objectives. There are two features that guarantee the success of the regime. First, the Commission remains in the driving seat throughout the course of the procedure and, second, it can determine which cases have the potential to produce substantial efficiency and are, accordingly, suitable for settlement. Even if the Commission grants companies a reduction when they settle their case, the well-designed features of the procedure combined with the flexible approach of the Commission in practice constitute an efficient enforcement combination and motivates an increasing number of cartel participants to follow this route. Emulating the Commission in this area can undoubtedly help NCAs to enhance proceedings and to reduce the enforcement burden in cartel cases.

5. Fines

The Commission’s fining policy has significantly improved in terms of effectiveness during the last few decades. The fining method prior to 1998 and the first Fining Guidelines did not sufficiently take into account the harm caused by or the profits of the cartel. Economic insights concerning the optimal amount of fines have been progressively incorporated into the Commission’s methodology and the current 2006 Fining Guidelines are largely based on harm and profits parameters and on considerations relating to the behavior of the undertaking. Taking into account economic principles as well as the behavior of the undertaking can effectively contribute to offset the damage and/or

4770 Nevertheless, this limitation underlines that the power of the Commission to inspect private premises is limited by the sensitive nature of this type of inspection and the more demanding need to preserve the right of defence in such cases.
benefits of a cartel while influencing the behavior of undertakings and discourage them to engage or play an important role in cartels. Despite the improved working of the Commission’s sanctions, an assessment of the Commission’s fining system inevitably casts some doubts on its effectiveness. Important arguments supporting this view concern among others the exclusive focus of the Commission’s fining system on undertakings, which is not seen as sufficient to deter individuals who are responsible for such offences, the frequent application of the turnover cap and the forthcoming phenomenon of recidivism. The limitations of the Commission’s fining system to attain optimal deterrence led to the question whether this regime could be improved on the basis of the different national methodologies to calculate fines for undertakings or whether the system should be complemented by targeting the individuals who are directly responsible for the infringement.

6. NCAs

Given the prevailing sanctioning autonomy of the Member States, NCAs have considerable leeway to develop their own fining method for undertakings that committed a (EU) competition law infringement. In principle, a comparison of national enforcement systems with the Commission’s regime may thus provide useful solutions for the caveats concerning the sanctioning policy of the Commission. Several main observations can be made as regards the national sanctioning systems for undertakings involved in cartel infringements.

First the evaluation of the sanctioning regimes in Germany, the UK and Belgium revealed a considerable level of convergence in the field of fines for undertakings. In particular, all the national sanctioning systems examined contained this type of sanction. Moreover, the key parameters of the calculation of fines also converged significantly with those used by the Commission in its 2006 Fining Guidelines. It can be argued that at least partially, these convergent aspects are the result of the influence that the role the Commission had on the Member States. Convergence in the fining methodology for undertakings is without any doubt a desirable feature, not only because it makes the punishment of infringements of Article 101 TFEU more uniform and thus fairer for undertakings, but also because it suggests that all national fining systems for undertakings take into account, at least to some extent, economic theory on how fines must be calculated to enhance deterrence.

Second, the level of convergence in the (selected) national fining systems is also limited. Some of the most relevant divergent aspects include the statutory framework for (the calculation of) fines, the existence of disgorgement measures and the absence of an entry fee in Germany; the impact of proportionality considerations and the absence of the entry fee in the UK; and the interpretation of the 10% turnover limitation in Belgium.

Third, although divergence can in principle improve the Commission’s method, this study has shown that only one of the identified divergent aspects has the potential to improve the Commission’s methodology. This is the existence of disgorgement measures in Germany which can be applied after the 10% turnover cap. In contrast to the Commission, the Bundeskartellamt is entitled to take into account the illegal gains of a cartel after capping the fine. By granting the Commission a similar competence when the illegal gains of a cartel can be established with a reasonable degree of certainty, fines will by definition be higher than gains and thus meet the key economic principle to be deterrent. In addition, if it can be demonstrated that the cartel members actually obtained profit equal or superior to their sanction, it will be more difficult to argue that fines are not proportional.

Fourth, it is submitted that the remaining differences as regards the national methods of calculation of fines can significantly hinder effective enforcement. In fact, when fines for cartels are calculated and imposed in one of the selected jurisdictions, the amount of the fine can be considerably lower
than the fines that would have been imposed if the Commission handled the case. This not only raises important issues in terms of fairness for the undertakings concerned. From an effectiveness perspective, significant divergence in the calculation of fines raises important doubts as to the appropriateness of NCAs’ calculation methods to produce sufficient deterrence for cartel members.

7. From corporations to individuals

Corporate fines are necessary but are not sufficient to ensure the effective enforcement of the antitrust rules. When the employees’ incentives to commit an infringement are not aligned with the undertakings incentives, punishing only the undertaking for its lack of supervision on its employees will not have a satisfactory deterrent effect, as only the undertaking will suffer the consequences of the infringement. The decentralization reforms enabled Member States to tackle this issue by granting them discretion to choose the type of sanction that they consider most appropriate to combat cartels. All the selected jurisdictions have chosen to complement their sanctioning systems for undertakings with other type of sanctions. These divergent national trends entail by definition a great enforcement potential to fill in the existing lacunae of the Commission’s system and more generally to contribute to the development of the EU competition law and policy system. This possibility to experiment with different types of sanctions, may arguably not only be seen as an “advantage” of the current decentralized system but even as a responsibility of the Member States.

8. New sanctions?

With respect to sanctions other than administrative fines for companies, a certain level of convergence can also be identified. In fact, the three selected jurisdictions provide for this type of sanction in the context of (EU) competition law. Nevertheless, practical experience in Member States with criminal sanctions suggests that imprisonment for individuals will not improve the current level of deterrence. On the contrary, the limited application of such sanctions in practice indicates that the adoption of prison sentences has several drawbacks that make this sanction unsuitable to enhance deterrence. The analysis of the reasons for such ineffectiveness include: complexities in the substantive design of a criminal cartel offence, the complicated co-existence of criminal and administrative regimes, the allocation of responsibility for the prosecution of criminal cases, the need to ensure that sanctions for individuals are complemented with leniency programs, and the (un)willingness to apply the sanction. Short custodial sentences and even longer sentences are often suspended. Based on the infrequent but highly complex use of prison sentences and on the substantial lack of consensus as regards the introduction of this type of penalty for competition law infringements, further pursuing this path does not appear the right way forward.

On the other hand, the trend towards the adoption of administrative fines for natural persons, shows that this type of sanction is capable of complementing the system focused on corporate fines and making it more effective. This is mostly due to the fact that key issues regarding the different procedural administrative and criminal frameworks can be avoided. In particular, competition authorities can remain in charge of enforcement, there is no need to design a concrete offence, and leniency programmes can also be adopted without facing major obstacles. Fast and effective enforcement is crucial for a truly deterrent effect. Compared to prison sentences, administrative fines for natural persons can no doubt lead to faster and thus more effective enforcement. In addition, and quite importantly, in contrast to imprisonment, there is general willingness on the part of the stakeholders and the legal community to use this framework. This (more) positive attitude and
eagerness to apply administrative fines for natural persons is crucial for the success of the system. Only if sanctions are frequently applied and feared by potential cartel members, one can talk about effectiveness. The introduction of systems of administrative financial penalties for individuals, as a means to complement fines for undertakings, has a number of intrinsic advantages that make them an attractive and viable path towards more effective anti-cartel enforcement.

B. Final reflections

These findings have important implications on the decentralised enforcement of EU competition law (in cartel cases). On the basis of these conclusions, not only NCAs but also the Commission can reinforce their respective enforcement systems. In addition, these findings may also influence the general debate about the further development of the EU competition law enforcement system and may provide useful insights to potentially adopt and implement any future legislative action.

The future of European antitrust enforcement can only be envisioned through the lens of a common competition culture shared by the European Commission and NCAs. In this context, the modernisation and decentralisation reforms have been an essential development. The creation of the ECN has accomplished a number of achievements that went beyond all expectations in terms of both convergence and effectiveness. It is precisely this potential of the ECN that can form a solid basis for future achievements and developments in the field of anti-cartel enforcement. All NCAs enforce the same material rules and several Member States have also voluntarily aligned (some aspects of) their sanctioning and detection tools with those of the Commission. In fact, soft convergence initiatives on procedural matters within the ECN have led to the adoption of a number of valuable recommendations and should continue to be pursued in the future.

Nevertheless, it seems that the process of soft convergence has reached its limits and that soft law instruments alone are unlikely to provide all NCAs with an effective anti-cartel arsenal. The deficits or enforcement obstacles on the level of Member States show that there is a scope for further legislative harmonisation of NCAs’ investigative and sanctioning powers in the application of EU antitrust rules. This objective is crucial since effective enforcement in increasingly sophisticated cartel cases can only be achieved through equally sophisticated and sharpened investigative and sanctioning tools.

It should be admitted that, as far as efficiency and effectiveness are concerned, the European model contains an important number of well-designed and appealing features and instruments. As already discussed, most of the Commission’s enforcement tools function properly and are capable of detecting secret cartels, gather evidence to prove infringements and sanction undertakings accordingly. Yet, soft convergence of even legal transplants are not sufficient to guarantee that NCAs follow the Commission’s model to the extent that consistent and effective enforcement is ensured. This is well illustrated by the German system where the legislator directly transferred some rules of Regulation 1/2003 into the German competition system in 2005. As examined above, the 10% turnover limit that is applicable in the calculation of fines for undertakings did not result in a

4772 G. PIRUZZELLA, “The Public Consultation” 1.
uniform and coherent interpretation of this rule. The same can be stated about the Belgian system where – regardless of the extremely high level of convergence in the calculation of fines – the 10% turnover cap is also interpreted differently. As long as the main foundations of the sanctioning systems of NCAs are only subject to national legislation, uniformity and coherence is at risk.\textsuperscript{4773} After more than a decade of experience with decentralized EU competition enforcement, and taking into account the far reaching alignment of national systems, it can be firmly stated that a certain level of harmonisation is desirable and even necessary in order to preserve the effectiveness of the EU anti-cartel system. From this point of view, further harmonization can be considered a prolongation of the spontaneous convergence process and thus as a natural development. Denying that harmonization is (at least) desirable may actually counteract the strong and fruitful willingness of Member states toward enhanced uniformity and convergence.\textsuperscript{4774}

Nevertheless, pursuing a certain level of harmonisation does not mean that maximum convergence of the existing sanctioning regimes is necessary.\textsuperscript{4775} While removing the divergent elements that constitute an obstacle to effective enforcement is certainly desirable and even necessary, it is equally appropriate to ensure some degree of flexibility to make room for future developments. In this regard, convergence initiatives within the ECN can play a significant role to foster consistency in the quantification of fines for undertakings across the Union. By bringing the rules for the calculation of fines for undertakings closer together, fines will be more consistent throughout the EU and undertakings may regard them as more acceptable. Conversely, substantially diverging approaches on the calculation of financial sanctions may not only be questionable in terms of deterrence, but may also jeopardise the acceptability of fines in all jurisdictions and undermine the very legitimacy of the system of parallel enforcement competences within the ECN.\textsuperscript{4776}

This being said, even if the enforcement shortcomings of NCAs could be solved by further aligning national systems with the Commission’s system (voluntarily or on the basis of harmonisation), it is clear that the potential of the Commission’s sanctioning system to enhance deterrence is also limited. In particular, it is submitted that only a combination of the Commission’s and the Member States’ sanctioning mechanisms is likely to guarantee an improved level of effectiveness by filling in the enforcement lacuna contained in the Commission’s fining regime. This, in turn, cannot but stress the increasingly urgent need for the Commission to look into and deeply assess (the effectiveness of) its own enforcement system.

The fact that the Commission has only been equipped with fines for undertakings while NCAs are frequently entitled to complement such fines with other types of administrative and/or criminal sanctions (for natural persons) not only affects the perception of the optimal level of fines but also raises important questions as to the ((in)effective) design of the Commission’s fining policy, its validity, and, ultimately, its legitimacy. This issue becomes even more sensitive taking into account that NCAs and the Commission apply the same substantive rules and that they have parallel competences within the ECN. Indeed, in practice the parallel competences to enforce Article 101 TFEU imply that, depending on the jurisdiction where the case is allocated, an infringement of

\textsuperscript{4773} See for a similar reasoning K. OST, “From Regulation 1” 3.
\textsuperscript{4774} See reaching a comparable conclusion L. PARRET, \textit{Side effects of the modernization of EU competition law}, Nijmegen, Wolf Legal Publishers, 309 p., at 193
\textsuperscript{4775} See also G. Pitruzzella, “The Public Consultation” 1.
\textsuperscript{4776} G. Pitruzzella, “The Public Consultation” 1.
Article 101 TFEU could lead to (a combination of) administrative fines for the undertakings, fines for individuals and imprisonment. While there is no need to mention that this situation is difficult to accept by individual undertakings, it also highlights the issue of which (combination of) sanction(s) is most appropriate to effectively target cartel cases. Taking into account that Commission and NCAs are dealing with the same provisions, it only makes sense to have a uniform and consistent and effective set of sanctioning tools.

In conclusion, the success of the modernisation and decentralisation reforms is an outstanding illustration of the grand achievements that are possible within the European structures when different Member States opt to work side by side, inspired by common principles toward the same goals. One may not take such accomplishment as a given fact or a predestined outcome. On the contrary, these accomplishments can only be the result of daily, continuous and above all joint efforts on the part of all European competition authorities. While interjurisdictional learning is clearly visible in the enforcement systems of the Member States from top (i.e. Commission) to bottom (i.e. Member States) and horizontally (i.e. among Member States), these benefits are significant enough to warrant consideration by the Commission as a leader of the network. In particular, it is incumbent upon the Commission to establish and maintain an effective and dynamic mechanism to keep itself up to date with cutting-edge developments in the ECN. If innovativeness, flexibility, and responsiveness to effective national frameworks are to be maintained, it is time to develop new concepts and to pursue new ambitious projects within the EU. The spirit of mutual cooperation among European competition authorities, combined with increased harmonization and convergence provides a genuine basis to strengthen the effectiveness of the EU anti-cartel system and, thereby, make the internal market function better at the service of Europe’s businesses and citizens.

See also G. Pitruzzella, “The Public Consultation” 2.
ANNEX I: Legislation, decisions & reports

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– Judgment of the General Court of 18 June 2013, Case T-406/08, Industries chimiques du fluor (ICF) v Commission


– Judgment of 16 September 2013, T-386/10, Aloys F Dornbracht GmbH & Co KG v Commission

– Judgment of the General Court of 13 December 2013, Case T-399/09, Holding Slovenske elektrarne d.o.o. (HSE) v Commission


– Judgment of the General Court of 27 February 2014, Case T-91/11 InnoLux v Commission

– Judgment of the General Court of 27 February 2014, Case T-128/11, LG Display Co. Ltd and LG Display Taiwan Co. Ltd v Commission
– Judgment of the General Court of 14 March 2013, T-587/08, Fresh Del Monte Produce, Inc. v Commission


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– Judgment of the General Court of 21 May 2014, Case T-519/09, Toshiba Corp. v Commission


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ANNEX III: Speeches

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B. Other speeches


