



**EUROPEAN COMMISSION**

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## **Fighting cartels in Europe and the US: different systems, common goals**

Check Against Delivery  
Seul le texte prononcé fait foi  
Es gilt das gesprochene Wort

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The speakers here at this panel at the IBA in Boston come from all over the world. Even more countries are represented in the audience, all with different legal systems.

Yet our goals are the same: we all think cartels should be fought wherever possible. Our goals are similar because our analysis of cartels is basically the same: we consider them harmful, because they obstruct competition, harm consumers and stifle innovation.

We could even say that, broadly defined, our methods are the same. Most anti-cartel enforcement regimes use a carrot-and-stick approach, with fines and sanctions on the one hand, and leniency programmes and settlements or plea bargaining on the other.

Now let me look at some differences. Not because I want to dwell on what divides us, but as a vehicle to explain the policies that I want to discuss today, specifically our policies regarding fines, leniency, settlements and compliance in EU enforcement.

There are differences of language. They say that Britain and the US are two nations divided by a common language. Something similar might be said about competition law in Europe and the US. We use the word "undertakings," you speak of "companies." The difference has implications for parental liability: The DoJ targets an identified legal entity. We target the group to which the infringing entity belongs.

There are also more substantive differences. I think it is safe to say that the attitude towards criminal sanctions is probably the most important difference in the approach towards cartels on both sides of the Atlantic.

## **Criminal Sanctions**

I would like to use a quote by former deputy assistant attorney general Scott Hammond to illustrate the US point of view. 'Cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition.' Participation in a cartel, he continues, is seen in the US as 'a property crime, akin to burglary or larceny,' and should be treated accordingly.<sup>1</sup> Cartels in the US count as a serious crime. This approach is based on the idea that jail time is a strong disincentive for individuals to participate in a cartel.

The EU enforcement system is, by contrast, an administrative one, built around financial sanctions against undertakings, not individuals. Fines against companies are exclusively set as a deterrent against cartels: there are no treble damages. The current legal framework of the European Union does not provide for criminal sanctions, and, in particular, custodial sanctions. This is what the debate about criminal sanctions usually refers to, imposed through a procedure involving a public prosecutor and a trial before a court.

I should make a caveat. Based on article 86 of the Treaty, the Commission proposed this July to establish a European Public Prosecutor's Office (EPPO), but this will be limited strictly to fighting fraud with EU funds. So a role for the EU in a criminal procedure is not a theoretical impossibility, although the current Treaty restricts it to the financial interests of the EU. At a first meeting of Justice Ministers on Monday, the proposal received a positive reception.

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<sup>1</sup> <http://www.justice.gov/atr/public/speeches/283738.pdf>

I should make another remark: some critics have argued that, due to the size of our fines, we do in fact have a criminal enforcement system which should therefore be subject to a higher standard of proof. The ECHR's confirmation of the Menarini judgement has put this issue to rest. The ECJ and General Court have also both stressed that while our fines may be considered criminal in the specific sense as defined by the ECHR, all required safeguards are in place.

The General Court, for instance, has the power to assess evidence, to annul the contested decision and to alter the amount of the fine. As regards fines, it has indeed unlimited jurisdiction, which means that it can substitute its own decision for that of the Commission. In this regard, Advocate General Wathelet recently presented an interesting opinion in the Telefónica case.

Regulation 1/2003 introduced a decentralised system of enforcement involving both the European Commission and the competition authorities in the Member States. It does not harmonise sanctions for antitrust infringements. There is a common basis: both Commission and Member States may fine companies, but the Member States remain free to set up other sanctions for fighting anti-competitive behaviour. That is why many Member States also allow for individual sanctions. Such sanctions on individuals may take multiple forms.

Let us look at several types of individual sanctions. The majority of Member States allow for the fining of individuals, however, this is not carried out in practice everywhere. The severest individual sanction, namely custodial sentences, are also provided for in several countries, but again rarely imposed.

In some Member States authorities can also issue director disqualification orders, which ban individuals from leading a company.

From this overview of criminal sanctions it becomes clear that many Member States provide for some type of sanction on individuals for antitrust infringements, but that such sanctions are not often imposed in practice. Classical criminal procedures have only very rarely resulted in successful prosecution in the field of competition and have seldom led to significant penalties.

Whatever the case, consistency between criminal and administrative procedures is important. In its anti-cartel enforcement manual (2009), the ICN calls for consistency when applying leniency in criminal and civil cases, in order to avoid uncertainty.

And that brings me to my next topic, fines and leniency.

## **Fines and Leniency**

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in

the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

The question to ask therefore is not whether the fines are too large or too small, but rather whether they are an adequate deterrent. If fines are set too low, they will not act as a deterrent in large infringements or for large players. Our 2006 guidelines on fines reflect this notion. Instead of basing fines on a lump sum as was the case before 2006, fines are now based on a number of factors: the value of relevant sales related the infringement, and gravity and duration of the infringement. Fines can be increased to take the size of the company into account.

Though fines should act as a deterrent, they should also be fair. There is a cap on the fine of 10 per cent of a business's total turnover in the year preceding the decision. Additionally, if a fine would force a company out of business, companies can, under certain very strict conditions, apply for a reduction in the fine.

We consider the fines we impose an appropriate and effective deterrent. Breugel, an independent think tank, argued in a recent report that our fines were too low even to be a deterrent. I was surprised when I read this. It is not a criticism we very often get.<sup>2</sup>

Fines do not seem to deter everyone. Cartels are like weeds, they are difficult to eradicate. This is illustrated especially by recidivism: Under the 2006 guidelines, we have had fifteen repeat offenders in altogether ten cases. Some companies were third-time offenders. There is no three-strikes-and-you're out rule. One company even has the dubious honour of having received four previous Commission fines, and only managed to avoid a fifth thanks to an immunity application under our leniency programme.

This illustrates that fines by themselves are not adequate to eradicate cartels. The *Rand Journal of Economics* published the results of a behavioural experiment into cartel-like behaviour. These showed that leniency improves anti-trust efforts.<sup>3</sup>

This is also our experience. What makes our fines especially effective is the combination with our leniency programme. The European Commission has been running a leniency policy since 1996. It has been adapted in 2002 and 2006. The procedure is well known: The first company to report an unknown cartel can receive immunity. Other participants can receive reductions in fines up to 50 per cent, depending on the order in which they report the cartel to the Commission.

It is clear that the introduction of the leniency programme has been highly successful in increasing the number of cartel decisions adopted by the Commission. Looking at the long term perspective, we can make several observations.

1) The size of fines has increased over time since 1969. Before 1998, the average fine

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<sup>2</sup> Mario Mariniello, *Do European Union Fines Deter Price Fixing?* Breugel Policy Brief, Issue 2013/04, May 2013.

<sup>3</sup> Maria Bigoni, Sven-Olof Fridolfsson et al, *Fines, Leniency and Rewards in antitrust*. In *RAND Journal of Economics*, Vol 43 No 2, pp 368-390.

(34 decisions) amounted to 2 million euro per company. Following the adoption of the 2006 Fines Guidelines, this increased to €50 million. This is a twenty-five fold increase. These figures are nominal value, unadjusted for inflation.

2) The number of cartel decisions has increased substantially since the mid-1990s. Before the introduction of the first leniency programme in 1996, the Commission adopted on average just one cartel decision each year. After 1996, the adoption of cartel decisions by the Commission shows a steady trend of on average five decisions per year. This is true for the entire 1996–2013 period.

This increase in cartel decisions was, at first, not due to leniency alone, because after 1996 the number of ex officio cases also increased. Currently, however, the greater majority of our cases are leniency cases.

The success of our leniency programme is also indicated by the number of leniency applicants. Since the entry into force of the 2002 Leniency Notice, we have had a total of 291 applications for immunity, and 278 applications for a reduction in fines. On average, the Commission receives two immunity and two leniency applications per month. Perhaps the best indication of success, beyond bare statistics, is that all Member States of the European Union have now adopted leniency programmes. This was by no means the case in all countries. Instrumental in this regard was the European Competition Network's Model Programme, a blueprint for an effective leniency programme which has been very successful in inspiring policy in the Member States.

## **Settlements**

We have recently been adding a new element to the toolkit: settlements. This instrument was created in 2008 and first implemented in 2010. The cartel settlement procedure allows the Commission to speedily resolve a cartel case with companies. It works as follows: once the Commission has completed its investigations into a cartel, we may ask the participants whether they are interested in a settlement. Rather than going to court, the participants then agree to the Commission's findings. There is a shorter statement of objections and no hearing. And, though it is theoretically possible, to date there has been no appeal.

In return, the companies receive a ten per cent reduction in cartel fines. It allows them to start over with a clean slate, prevent further bad publicity, and avoid costly litigation of which the success is not guaranteed.

Our settlements should not be confused with the US practice of plea bargaining. Our settlements are used to speed up an administrative procedure. Plea bargaining in the US is an investigative tool in a criminal case. Plea bargaining shows similarities with our leniency programme: the first applicant receives full immunity; those that follow can receive reduced punishments. There are also differences. In the US, plea bargaining takes place throughout the investigation. EU settlements only begin once the Commission has concluded the investigation. In the US plea bargaining is concluded with one party at a time, in the EU settlements are concluded with all (or nearly all) parties at the same time.

The Commission has to date successfully concluded seven cartel cases in very different sectors by a settlement decision, covering altogether 35 undertakings and 71 legal entities.

Not all settlement procedures lead to a decision. In the Smart Card Chips case, the Commission decided to discontinue settlement discussions due to lack of progress. The case is now dealt with under the ordinary procedure. This illustrates the Commission's determination about cartel enforcement. We are happy to pursue settlement procedures when appropriate, but will revert to ordinary procedures if the settlement is not making sufficient progress.

Even though settlements are relatively new to us, the benefits are already clear. First of all, we have been able to shorten the administrative phase of cartel procedures by up to two years. The most recent settlements have been concluded in three years' time. The traditional procedure takes at least five.

Secondly, and more importantly, we have made very significant savings in time and resources when it comes to litigation. Thanks to settlements we avoid spending time and resources on appeals. The ordinary procedure could easily lead to dozens of appeals, which in EU courts take on average at least another five years. Savings in resources mean that we can redeploy our cartel enforcers on new cartel cases, which improves the deterrence of our enforcement.

## **Compliance**

I have spoken about the role of the Commission and Member States, but one other stakeholder deserves mentioning in the context of cartel enforcement, namely, the companies themselves. More and more businesses run competition compliance programmes, as part of a conscious strategy to limit the risk of infringements. To be successful, they require the visible support of senior management. Programmes start with a thorough risk assessment, and are aimed at increasing staff awareness of dangers, by providing them with clear advice and training.

Compliance can also be stimulated through positive incentives, proper internal reporting mechanisms and regular monitoring. Some businesses may even decide to introduce private sanctions against employees which do not follow the company's compliance rules. This is fine, as long as these are in line with (labour) law.

The Commission supports compliance efforts in several ways. We spread information on EU rules, engage in dialogue with businesses, and have published a brochure in all EU-languages on compliance aimed at small and medium businesses in particular. We do not pretend that here is a single model for a successful compliance policy or that we have all the answers. Best practices should come from businesses themselves. These can be found in the 'compliance corner' on our website with useful examples from both business organisations and national competition authorities.

In the end, we believe that companies are themselves responsible for complying with competition rules, though we are happy to help them by giving guidance and providing information.

One important note, though: We do not mitigate fines for companies that operate a compliance programme. This would be a reward for trying, but failing to abide by the law. The proof of the pudding is in the eating. Companies are obliged to respect the law and comply with competition rules.

This may sound disappointing to a company that has invested in a compliance programme, yet has been brought into in a cartel by some of its employees. However, an effective compliance strategy will bring its own reward and has tangible benefits. First

of all, it may help avoid businesses from participating in a cartel altogether. And secondly, it may limit damage even if it does not prevent it. A compliance programme could help a company detect a cartel early on, and so make it possible to apply for immunity. This, we feel, is a very strong incentive to employ a compliance programme.

## **Conclusion**

In conclusion: Commission, Member States and companies all play a role in the European struggle against cartels. Fines, leniency, settlements and compliance are the cornerstones of our policy. Though we operate different systems in the US and Europe, we both have effective means of achieving a common goal: countering anti-competitive behaviour. And we work together to realise this goal. Cartels operate globally, so should we. A meeting like the one today, in which we share experiences and discuss best practices, serves to underline this basic fact.