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The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?

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Alan Riley

Abstract

This paper argues that the European Commission's Directorate General for Competition, under its new Competition Commissioner Joaquin Almunia, is now facing acute problems in its investigation and prosecution of cartels, which stem from the successful cartel busting era of Commissioner Kroes. The core argument is that the Commission's procedures emerged at a time when the aim was to consult extensively on the development of competition law, and not to prosecute and fine delinquent business entities. These antiquated procedures, which have not been substantially reformed since they came into force in March 1963, involve extensive documentary responses in which the Commission acts as investigator, prosecutor and judge and only allow the Commission to hand down half a dozen decisions condemning cartels per year.

This paper argues for a comprehensive modernisation of the Commission's anti-cartel regime, stripping away the limitations on the application of the leniency programme; streamlining the contentious procedure to encourage greater throughput of cases and reforming the sanctions regime to allow individual sanctions to ensure personal accountability for price-fixing by corporate executives.

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THE MODERNISATION OF EU ANTI-CARTEL ENFORCEMENT: WILL THE COMMISSION GRASP THE OPPORTUNITY?

CEPS Special Report/January 2010

ALAN RILEY*

1. Introduction

The European Commission has been tremendously successful in the last few years in busting major European and international cartels. Numerous cartels have been brought to light by the hard work of the Directorate-General (DG) for Competition in market sectors as diverse as vitamins¹ and gas insulated switchgears.² The Commission is clearly bearing down with significant deterrent effect on price-fixing, which Justice Scalia has correctly referred to as the “supreme evil of antitrust”.³

Yet, the Commission’s anti-cartel enforcement policy has never been subject to a fundamental review. Since the inception of the first Leniency Notice⁴ in 1996, the DG for Competition has reviewed either that Notice⁵ or the Fines Notice⁶ without undertaking a review of the entire anti-cartel enforcement regime, its law, procedures and practices.

This paper argues that the Commission should use the opportunity of the current review of Council Regulation (EC) No. 1/2003 of 16 December 2002⁷ to undertake such a fundamental review to remove potential legal challenges to the operation of its anti-cartel policy, reshape its procedures so that cases can be more efficiently dispatched and ensure that sufficient deterrents exist to further suppress price-fixing.

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¹ See Case COMP/E-1/37.512 – *Vitamins* (notified under document number C(2001) 3695), OJ L 6, 10.1.2003, p. 1.

² See Case COMP/F/38.899 – *Gas Insulated Switchgear* – C(2006) 6762 Final, non-confidential version for information purposes only.

³ See *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LLP* (02-682) 540 U.S. 398 (2004), US Supreme Court.

⁴ Refer to the Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207, 18.7.1996 (hereafter the ‘Leniency Notice 1996’).

⁵ Two reviews have been undertaken since the Leniency Notice 1996, which led to the Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 45 19.2.2002, p. 3 (hereafter the ‘Leniency Notice 2002’) and the Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17 (hereafter the ‘Leniency Notice 2006’).

⁶ The first fines notice was adopted in 1998, as the Guidelines on the method of setting fines imposed pursuant to Art. 15(2) of Regulation No. 17/1962 and Art. 65(5) of the ECSC Treaty, OJ C 9, 14.7.1998, p. 3 (hereafter the ‘Fines Notice 1998’), followed by the Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003, OJ C 210, 1.9.2006, p. 2 (hereafter the ‘Fines Notice 2006’).

⁷ Regulation No. 1/2003 is currently subject to an operational review. For a Commission view, see European Commission, *Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation No. 1/2003*, SEC(2009) 574 final, Brussels, 29 April 2009(d).

Along with considering the extent to which the Leniency Notice itself can be improved, there are also a number of important procedural questions to consider. One in particular is whether the Commission's procedures – derived from an earlier era in which a handful of carefully selected cases were brought each year with the aim of developing and clarifying antitrust policy – really assist the Commission in the effective dispatch of a large number of cases with substantial fact content and which are quasi-criminal in nature. Furthermore, given the nature of the cases and the very high fines they attract, it is questionable whether the Commission's procedures comply with the European Convention on Human Rights (ECHR). A central, specific concern is whether the Commission's own contentious procedures are in compliance with Art. 6.

Equally, it is open to question whether the penalty system envisaged in the Fines Notice is fit for purpose. For instance, considering the size of the fines now being imposed, is it still appropriate for fines to be based on turnover calculations rather than on the level of overcharges imposed by cartels? There is no targeting of complicit individual executives even though they may directly benefit from price-fixing. In addition, there are notable due process concerns that arise from the fining policy, including recidivism and questions as to the adequacy of the legal base for fines.

In sum, this paper argues that with the reform of Regulation No. 1/2003 there is a major opportunity for the Commission to undertake a modernisation of its anti-cartel enforcement regime, which would allow it to process more cases, impose more fines, target complicit executives and effectively future-proof the Commission against the ECHR and other due process legal challenges. The Commission, in other words, has the opportunity to modernise its anti-cartel enforcement regime to substantially increase both its efficiency and deterrent effects.

Section 2 of this paper examines the unrecognised success of the European Commission in deploying its Leniency Notice in busting price-fixing cartels. Ways to enhance the operation of the Leniency Notice are considered in section 3. In section 4, the paper assesses the extent to which the current procedures can bear the weight of numerous cartel cases and the progressively heavy ECHR obligations, and looks at how to reduce the Commission's workload through procedural reform. Section 5 examines ways to increase the effectiveness of the penalties levied by the Commission, especially whether penalties can be extended to individuals and if so what penalties should be levied. Section 6 offers conclusions.

2. The development of the Commission's anti-cartel enforcement regime

For most of the period after the coming into force of the EEC Treaty in 1958, it was recognised that while price-fixing cartels should be the principal target of the Commission, in reality it was not likely to deal with many such cases. This was for two principal reasons. First, owing to US influence, the most widespread, public international cartels had vanished after World War II as a result of the vigorous anti-cartel activity of the US Antitrust Division.⁸ This prudent disappearance was further encouraged by the appearance of the first competition laws in a number of EU member states⁹ and the coming into force of what was then Arts. 85 and 86 of the EEC Treaty, now Arts. 101 and 102 of the Treaty on the Functioning of the European Union

⁸ See W. Wells, *Antitrust and the Formation of the Post-War World*, New York: Columbia University Press, 2002, for a discussion of the extent of US influence on antitrust development. Such influence extended not only to conquered nations such as Germany and Japan, but also through the reach of the US economy – amounting to 50% of global GDP in 1945, which allowed the Antitrust Division to terminate many pre-War international cartel operations.

⁹ See D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford: Oxford University Press, 1998.

(TFEU or ‘Lisbon Treaty’).¹⁰ Once underground, it became very difficult for the Commission to discover information against price-fixing. The oligopoly problem, whereby behaviour that looks collusive is actually the natural response by undertakings in an oligopolistic market to price leadership, made it even more difficult for the Commission to successfully sustain the prosecution of cartel cases.¹¹

Second, a paper published by Professor George Stigler in 1964 suggested that most cartels tended not to last over time and tended to break up naturally.¹² The consequence of his work was that while price-fixing was recognised as the most serious form of antitrust behaviour in theory, many regulators came to believe it was rare in practice. Consequently, it is understandable that many regulators took the view that seeking out price-fixing cartels was not to be considered a major priority.

Given these factors, it is not surprising that the number of cartels uncovered by the Commission between 1958 and 1998 hovered at approximately one per year.¹³

These factors of the covert operation of cartels, the oligopoly problem and the understanding of the economic literature among regulators also affected the work of the Antitrust Division. After the immediate post-war legal challenges to international price-fixing cartels, the Division found itself only rarely dealing with price-fixing cases.¹⁴ If a price-fixing case was found, it would usually be a bid-rigging case against the state and the cartels that were found tended to have a minor economic impact, with very few of them having any international dimension.¹⁵ It was also the case that only limited economic sanctions were ever imposed in practice. No undertaking received any fine near the then maximum level of \$10 million, and very few executives went to prison.¹⁶ Therefore, although price-fixing constituted a criminal offence under the Sherman Act, the deterrent effect was distinctly limited.

The year 1993 saw an abrupt change in the approach of the Antitrust Division to price-fixing. The Division decided to use the Federal Sentencing Guidelines, which permitted the US authorities to seek a fine of up to twice the gain or twice the loss.¹⁷ This permitted the US

¹⁰ On 1 December 2009, the Lisbon Treaty came into force and the current designation of the principal operative provisions of the EU competition rules changed from being Arts. 81 and 82 of the EC Treaty to Arts. 101 and 102 of the TFEU.

¹¹ The Commission found this to its cost in the proceeding on *Wood Pulp*. See Cases 89/85, 104/85, 114/85, 116–117/85 and 125–129/85, *A. Ahlstrom Oy and Ors v. Commission* [1988] ECR 5193.

¹² See G. Stigler, “A Theory of Oligopoly”, *Journal of Political Economy*, Vol. 72, No. 1, 1964, p. 44.

¹³ See C. Harding and J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control and Corporate Delinquency*, Oxford: Oxford University Press, 2003, Chapter V and Table V.1: “Cartels dealt with by the Commission 1964-1987”.

¹⁴ The major case that the Antitrust Division dealt with post-War was the GE Equipment bid-rigging case in 1959. For a discussion of the case, see C.R. Leslie, “Trust, Distrust and Antitrust”, *Texas Law Review*, Vol. 82, No. 3, 2004, pp. 516, 567 *et seq.* and 652.

¹⁵ See J.L. McDavid, “International Cartel Enforcement and EC Competition Policy”, in B. Hawk (ed.), *International Antitrust Law & Policy: Fordham Corporate Law 1999*, Huntington, NY: Juris Publishing, 1999, pp. 57-58.

¹⁶ For a discussion of the position in relation to criminal sanctions prior to the coming into force of the Corporate Leniency Programme in 1993, see G. Werden, “Sanctioning Cartel Activity: Let the Punishment Fit the Crime”, *European Competition Journal*, Vol. 5, No. 1, 2009, pp. 19, 21 *et seq.*

¹⁷ The Sentencing Guidelines were adopted in 1987 under the authority of the US Sentencing Commission. The statutory provision 18 U.S.C. § 3571(d) reads, “[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the

authorities to side step the \$10 million cap. In addition, the Division decided to actually apply the individual criminal penalties against complicit corporate executives, including not only fiscal penalties but also jail sentences. Then the Division decided to focus on international cartel cases rather than on domestic cases, which would usually be left to state attorney generals. The reasoning behind this decision was that ordinarily cartels operating in part of the US would impose less damage on US commerce than would international cartels, where an entire product sector across the US may have been affected.

Most crucially, the Division introduced a new corporate leniency programme.¹⁸ The distinguishing feature of this programme was the willingness of the Division to provide legal certainty to a cartel member by abandoning its prosecutorial discretion. Where the Division had no knowledge of a cartel, the first cartel member through the front doors of the Justice Department receives legal immunity from federal antitrust action for the corporation in terms of immunity from fine, and for participating corporate executives in terms of both fine and jail sentences.

The triple impact of a focus on international cartels, high penalties (including jail sentences) and the leniency programme have produced spectacular results. Since 1997, the Division has recovered just under \$4 billion in fines as a result of leniency, with over 50 cartels uncovered. Corporate executives are now regularly serving jail sentences, with over 31,000 days of jail time handed down in 2007.¹⁹

Clearly, the success of the US authorities could not be ignored by the Commission. Here was a workable tool for uncovering price-fixing that had to be adapted and applied to a European environment. Initially, the Commission took an understandably cautious approach and adopted a Leniency Notice in 1996 that missed a number of features of the US programme.

Although it was criticised, the 1996 Leniency Notice did provide the Commission with experience of running a leniency programme.²⁰ It also received 188 applications for some form of fine cancellation or reduction between 1996 and 2002; in 17 cases, a fine was not imposed or a very large or substantial reduction in fine was granted.²¹ It is true that some of the cases in which substantial fine reductions were granted were derivative cases, i.e. the cartels were uncovered in the US and then the cartel members sought whatever leniency options were available in Europe. Still, these derivative cases did at least give the Commission experience of dealing with heavyweight, international cartel cases.

In 2002, the Commission adopted a new Leniency Notice that was much more heavily influenced by the US corporate leniency programme – a lower evidence standard was applied and the scope of immunity was extended to undertakings already under investigation by the DG for Competition. This was followed in 2006 by further refinements, which notably introduced a marker system, allowing leniency applicants the opportunity to preserve their priority while

defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process”.

¹⁸ Details on the Department of Justice Corporate Leniency Program can be found on the website <http://www.justice.gov/atr/public/guidelines/0091.htm>.

¹⁹ See S.D. Hammond, “Recent Developments, Trends and Milestones in the Antitrust Division’s Antitrust Criminal Enforcement Program”, Paper presented at the Department of Justice, Antitrust Division, 56th Annual Spring Meeting in Washington, D.C., 26 March 2008.

²⁰ For a discussion of the difficulties surrounding the 1996 Leniency Notice, see A. Riley, “Cartel Whistleblowing: Toward an American Model?”, *Maastricht Journal of European and Comparative Law*, Vol. 9, No. 1, 2002(b), p. 67.

²¹ Refer to European Parliament, Parliamentary questions: Joint answer given by Ms Kroes on behalf of the Commission to written questions E-0890/09, E-0891/09, E-0892/09, 2 April 2009.

gaining more time to obtain evidence regarding the cartel. The Commission also introduced an oral evidence-taking procedure to protect leniency applicants against the prospect of evidence tendered to the Commission being deployed against applicants in civil cases in the US courts.²²

It would be surprising if these developments in EU leniency procedures had not had some impact on the number of cartel cases flowing into the Commission. The figures are dramatic. Under the 2002 Leniency Notice, the Commission received 117 applications for a cancellation of fine and 116 applications for a reduction in fine, together with 58 conditional offers of immunity.²³ Under the 2006 Leniency Notice, as of December 2008, the Commission had received 50 applications for immunity and 30 applications for a reduction in fine.²⁴

The impact of leniency in terms of the overall enforcement against price-fixing can be derived from the statistic that of the 52 statements of objection that the Commission issued between 2002 and 2008, 46 of them stemmed from evidence obtained from a leniency applicant.²⁵

This success has fed through to the number of cartel cases that have been successfully prosecuted and the scale of the fines that have been imposed. The number of cartel prohibition decisions rose from 11 in 1990–94 to 28 in the period 2005–09. Instead of issuing 1 or 2 cartel prohibition decisions per year, as was the case prior to the introduction of the Leniency Notice, the Commission is issuing between 6 and 8 per year.²⁶ The size of the fines has also risen sharply, with all the largest fines being imposed in this decade and none of the top-fine firms fined less than €370 million. Currently leading the list, Saint Gobain faced a fine of €96 million for its participation in the *Car Glass* cartel.²⁷ Thyssen Krupp was fined €479 million for its participation in the *Elevators and Escalators* cartel,²⁸ Hoffman La Roche €462 million for its participation in the *Vitamins* cartel,²⁹ Siemens €396 million for its participation in the *Gas Insulated Switchgear*³⁰ cartel and Pilkington €370 million for its participation in the *Car Glass* cartel.³¹

While these figures are impressive and highlight the immense amount of work put in by DG Competition officials to achieve these results and deter cartels, they also underline some of the problems faced by the Commission in managing the caseload. Between 6 and 8 cases per year

²² This was necessary as potential applicants were being deterred from making applications for fear their corporate statement submitted to the Commission could be discovered under US civil discovery procedures. Some US courts, despite direct Commission intervention, have refused to suppress civil discovery orders on the grounds of international comity. See for example, *Re: Vitamins Antitrust Litigation* 217 F.R.D. 1 (N.D.Cal 2002). This issue is discussed further below.

²³ European Parliament (2009), op. cit.

²⁴ Ibid. In about 20 cases, the original EU leniency applications were pursued by the national competition authorities rather than by the Commission.

²⁵ European Parliament (2009), op. cit.

²⁶ For a full set of statistics on the Commission's anti-cartel enforcement activities, see the European Commission's document on cartel statistics (retrieved from <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>).

²⁷ See the Summary of a Commission Decision of 12 November 2008 (awaiting the full decision, not yet published) (Case COMP/39.125 – *Car Glass*), OJ C 173, 25.7.2009, p. 13.

²⁸ Refer to Case COMP/E-1/38.823 – *Elevators and Escalators*, C(2007) 512 Final (decision published for information only, final decision not yet published in the *Official Journal*).

²⁹ Case COMP/E-1/37.512 – *Vitamins*, op. cit.

³⁰ Case COMP/E/38.899 – *Gas Insulated Switchgear*, op. cit.

³¹ Case COMP/39.125 – *Car Glass*, op. cit.

when the Commission was granting 58 conditional offers of immunity under the 2002 Notice³² suggests that the Commission is facing a continued, substantial and growing backlog of cartel cases. This view is reinforced by the information provided in the parliamentary answer to the questions on leniency posed by Sharon Bowles, MEP. In that answer the Commission indicated that it was taking three months from the granting of conditional immunity to an applicant to launch ‘dawn raids’ on the premises of the other members of the cartel. It was then taking three to four years from the raids to the adoption of a prohibition decision against members of the cartel.³³

Hence, while the Commission is actually seeing more leniency applications than the US per year and is imposing heavier fines than the US, it is actually building up a sizeable cartel backlog that can only grow if current procedures are maintained. Furthermore, with a backlog in cartel cases involving potentially enormous fines and later damages and with potentially perishable witness evidence and due process questions surrounding a delay in penal cases, this backlog could seriously undermine the great success the Commission has so far achieved.³⁴

3. Reviewing the Commission’s Leniency Notice

The Commission’s 2002 and 2006 Leniency Notices have been tremendously successful in bringing a large number of cartel cases to the Commission. The review of Regulation No. 1/2003 does provide an opportunity to consider the extent to which the leniency programme can be further developed to bring in more leniency cases and cut cartel activity across Europe.

There have been some criticisms of the 2006 Leniency Notice that suggest the Notice could be amended to considerably improve its effectiveness.³⁵ In particular, the Antitrust Section of the American Bar Association (ABA) took the view that the danger with some of the reforms introduced by the Notice was that they could actually have the effect of reducing the incentive to make leniency applications. “The Sections’ gravest concern is that the net effect of these changes will be to introduce a level of uncertainty, unpredictability, and discretion into the Commission’s leniency program that will actually impede the ‘race-to-the-enforcement

³² Figures for conditional offers of immunity under the 2006 Leniency Notice are not yet available. conditional offers of immunity are probably the best source of information on the number of actual cartel cases being dealt with by the Commission, as they avoid the danger of double-counting from raw leniency application figures or confusing the number of undertakings with the number of cartels in the figures for statements of objections.

³³ European Parliament (2009), *op. cit.*

³⁴ Delay is not just a matter of embarrassment for the Commission and concern at the prospect of losing access to evidence. There is also the danger that an unreasonable delay may result in the reduction of the fine or even annulment of the decision. In Case C-185/95P, *Baustahlegewebe v. Commission* [1998] ECR I-8417, the fine was reduced because of delay. In Case T-213/00, *CMACGM v. Commission* [2003] ECR II-913, while taking a strong line against a fine reduction for delay, the Court of First Instance took the view that a delay that infringed the rights of the defence may result in the annulment of the original decision.

³⁵ See the ABA Sections of Antitrust Law & International Law, “Comments in Response to the Commission of the European Communities’ Request for Public Comment to the Draft Commission Notice on Immunity from Fines and Reduction in Fines in Cartel Cases”, ABA, Chicago, November 2006; see also J.M. Griffin and K.R. Sullivan, “Recent Developments in Leniency Policy and Practices in Canada, the European Union and the US”, Paper presented at the ABA “Advanced International Cartel Workshop” in San Francisco, 30 January–1 February 2008.

authority’ that leniency policies were designed to create not just in Europe, but around the world.”³⁶

This concern was reinforced by a more detailed analysis of the 2006 Notice provided by Griffin and Sullivan in 2008. The Griffin and Sullivan paper raised a number of concerns, as listed below.

1) *Notification in writing increases the civil liability risk*

Under the 2006 Notice, the Commission notifies an undertaking in writing that leniency will not be available. From the perspective of a potential leniency applicant, this adds an additional risk of civil liability – as the notification would be discoverable in US civil proceedings – to a failure to obtain leniency. It may well deter leniency applicants who are in any way unsure that they will obtain leniency.

2) *The evidence standard for fine reduction acts as a deterrent to file*

To obtain a fine reduction, a leniency applicant must provide substantial added value with evidence that is significant and compelling. While it is understandable that the Commission would not want to offer fine reductions for little or no evidence, this high evidence standard can act as a barrier to leniency applicants coming forward. What is more, it is unclear what exactly is required by ‘substantial added value’. Therefore, leniency applicants may well doubt they can reach this standard, reducing the flow of applicants into the Commission.

3) *The marker system is unusable by applicants*

Griffin and Sullivan had two criticisms of the new marker procedure under which a leniency applicant can put a marker down preserving priority, while being granted a period in which to fully report the price-fixing to the Commission. These criticisms were that it is discretionary and that excessively detailed information is required.³⁷ They point out that detailed evidence requirements in relation to a marker application are unprecedented anywhere in the world where a marker system is deployed. As a consequence, leniency applicants are likely to be doubly deterred from applying for a marker, by its discretionary nature and by the evidence requirements.

Although officials at the DG for Competition are able in practice to reduce the negative effects of some of the difficulties created by the 2006 Notice, it will undoubtedly deter some nervous undertakings and their executives from applying for leniency. The US experience of the Corporate Leniency Programme underscores the need for as much legal certainty as possible to encourage undertakings to come forward.³⁸

That experience also raises the question of whether added features of the US experience might also be worth considering in the EU system, notably Amnesty Plus. In the US system, leniency applicants who are not first through the door are invited to disclose evidence of further cartels, for which they receive immunity and a greater discount than they would have otherwise received on the first cartel. Amnesty Plus has permitted the Antitrust Division to systematically

³⁶ ABA (2006), *supra*, p. 2.

³⁷ Griffin and Sullivan (2008), *op. cit.*, p. 21.

³⁸ This is a point emphasised by Leslie in his 2006 analysis of the principles underlying the US leniency programme in C.R. Leslie, “Antitrust Amnesty, Game Theory and Cartel Stability”, *Journal of Corporation Law*, Vol. 31, 2006, p. 453.

roll up cartel formations across several connected market sectors.³⁹ An express Amnesty Plus programme could provide similar benefits in Europe to the Commission.⁴⁰

Another major feature of the modern US system is the protection from full civil damages offered to leniency applicants. The DG for Competition faces the same problem that the US authorities do in that leniency applicants may refuse to come in because of the fear of damages claims brought by plaintiffs who have sustained damage from overcharges arising from price-fixing. That being stated, the enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which permits federal courts to de-treble damages for leniency applicants, has considerably enhanced the incentive for applicants to come in and confess.⁴¹

It could be argued that reducing the exposure of leniency applicants to damages is unnecessary in the Union, as the prospect of civil damages is remote. Yet, given the increasing number of cartel cases being detected by the Commission and national competition authorities it is likely that many more damages claims will be brought in Europe. In addition, the reform of civil procedural rules, whether at the EU or national level, is likely to encourage more civil damages cases. Meanwhile, one cannot ignore the rise of firms such as Cartel Damages Claims⁴² and the arrival of Hausfeld LPP⁴³ in Europe, which are likely to lead the way in increasing the number of civil plaintiff actions.

To protect the leniency process and the flow of leniency applications, the Commission should give serious consideration to how leniency applications can be protected from civil damages. At first sight, the concept of ‘real and effective judicial protection’ in Community law suggests that reducing plaintiffs’ rights to full compensation is not possible under the *acquis*.⁴⁴ It is submitted here, however, that there are a number of legal strategies to protect leniency applicants, among which two examples are given below.

First, it can be powerfully argued that as a matter of logic and Community public policy there is no loss to any plaintiff from immunity for the defendant leniency applicant. Not only is immunity valuable as a matter of Community public policy, as without immunity applicants’ anti-cartel detection and enforcement is substantially undermined, but as a matter of logic as without leniency applicants there can be no damages claims. The general public policy argument is underpinned by the parallel logical argument that plaintiffs feed from the evidence obtained from leniency applicants and that together they provide a very potent argument for the Court of Justice to provide an exception to the right to real and effective judicial protection in EU law.

³⁹ For instance, information provided to the US Justice Department in the lysine case led to the opening up of several more cartel investigations in parallel market sectors.

⁴⁰ The Commission could provide for an Amnesty Plus procedure that would provide an additional tool for breaking open cartels and encouraging cartel confession. But it would not be able to deploy the parallel Penalty Plus procedure, which requires leniency applicants to give information on all cartel activity or face the prospect, if a cartel is subsequently discovered, that substantially higher fines and jail sentences will be imposed. It would be difficult to run this element of the US procedure in the EU for fear of breach of the self-incrimination case law of Art. 6 ECHR.

⁴¹ See Hammond (2008), *op. cit.*, p. 15. Under the 2004 Act, leniency applicants may pay only single damages for their part of the loss caused. They are required to provide support to the plaintiffs, and this support is considered by the judge when deciding to de-treble a damages claim against a leniency applicant.

⁴² See the website “Cartel Damage Claims” (<http://www.carteldamageclaims.com/>).

⁴³ See the website of the firm Hausfeld LLP (<http://www.hausfeldllp.com/>).

⁴⁴ Refer to Case C-295-298/04, *Manfredi v. Lloyd Adriatico* [2006] I ECR 6619.

Second, it would be possible as suggested by the UK's Office of Fair Trading to construct a procedure whereby the plaintiff makes full recovery but the leniency applicant is able to recover all or some of the damages paid from the other members of the cartel. In such circumstances, the plaintiff would be fully satisfied while the leniency applicant would also be protected.⁴⁵ This may be another alternative (given the powerful public policy case) that may appeal to the Court of Justice.

Limited damages or some form of immunity from damages would only protect a leniency applicant in respect of civil claims arising from Art. 101(1) TFEU. They would not protect the leniency applicant from foreign damages claims. The prospect of foreign claims remains the chief threat to the operation of the Commission's own leniency programme. More specifically, the formidable combination of US treble damages and the availability of extensive discovery procedures under the Federal Rules of Civil Procedure has the potential to deter prospective leniency applicants who may face American civil actions, where they may not be eligible for de-trebling. The difficulty for the Commission is that documents generated by virtue of its request for a written corporate confession or request for answers to questions posed under Art. 18 could be seized through a discovery request by plaintiffs seeking civil damages in US courts. The Commission created an oral statement procedure under the 2006 Leniency Notice, but that procedure itself raises a number of concerns as to due process and the danger of embellishment, which are discussed further below.

One approach to dealing with this problem would be to rely on international comity. The US federal courts as a matter of international comity should not grant discovery of documents created by EU leniency applicants that stem from requests by the Commission in pursuit of EU antitrust policy. Unfortunately, despite direct intervention by the Commission, a number of US courts have refused to take an international comity approach to requests for discovery and have ordered the discovery of documents created in pursuance of an EU leniency application.⁴⁶

In such circumstances, alternative approaches to protecting the Commission's leniency procedures need to be considered. It is vital to remember that leniency is the key to the discovery of price-fixing cartels, and price-fixing cartels remain the most heinous form of anti-competitive activity. In view of the importance of leniency to EU antitrust policy, it is worth considering what alternative approaches can be found to protect the Commission's leniency procedures.

One alternative approach can be drawn from the British Protecting of Trading Interests Act of 1980. Section 6(2) of that Act permitted an undertaking subject to punitive damages in a foreign court to claw back the non-compensatory element of the damages in British courts from the plaintiffs.⁴⁷ It would be possible to insert into Regulation No. 1/2003 a provision permitting EU leniency applicants to claw back the non-compensatory element of any foreign damages claim in member state courts, where the damages claim involved a discovery order by a foreign court permitting discovery of documents generated by leniency applicants in pursuance of its leniency application before the Commission. This would include a written corporate confession and responses to Art. 18 decisions.

⁴⁵ See Office of Fair Trading (OFT), *Private Actions in Competition Law: Effective Redress for Consumers and Business*, OFT, London, 2007.

⁴⁶ See *Re: Vitamins Antitrust Litigation* 217 F.R.D. 1 (N.D.Cal 2002), op. cit.; see also K. Nordlander, "Discovering Discovery – US Discovery of EC Leniency Statements", *European Competition Law Review*, Vol. 25, No. 10, 2004, p. 646.

⁴⁷ Section 6(2) was drafted directly to provide British undertakings with the means of recovering the non-compensatory element of US treble-damage antitrust awards in British courts.

Such a clawback provision would provide valuable added protection for the Commission's leniency procedures. Leniency applicants would know that their damages would be limited in any subsequent US civil proceedings to the level of single damages as under US law for US leniency applicants, and equally that Regulation No. 1/2003 would limit the scale of damages paid in civil actions in the EU as well. This level of protection should then ensure that the flow of leniency applicants to the Commission could be maintained irrespective of potential US or European civil claims.

The Commission's current defence to the disruption of its leniency procedures by US discovery requests is the oral statement procedure created under the 2006 Leniency Notice. Under this procedure, an oral statement is made to the Commission that is then recorded as the Commission's own document. As the Commission's own document, it is not discoverable by foreign courts and therefore the immediate risk of discovery is removed. As a consequence, the oral statement procedure encourages leniency applicants to come forward without fear of direct discovery as a result of confession to the Commission. At the same time, Art. 19 of Regulation No. 1/2003 does not provide for any penalties to ensure the accuracy of such oral statements, so there is at least a danger that the quality and integrity of oral statements could be compromised by the lack of any effective sanction for accuracy and completeness.⁴⁸ This danger is reinforced by the need for leniency applicants to demonstrate significant added value. This incentive to embellish is compounded by the fact that the 'significant added value' standard is vague and difficult to assess.

It could be argued that there is an effective sanction in that leniency can be withdrawn if the oral statement turns out to be untrue. Any attempt to withdraw leniency is likely to result in considerable litigation, however. Moreover, direct sanctions for inaccuracy and embellishment would also be likely to directly focus the minds of the leniency applicants and their advisers on providing accurate information.

Corporate confessions written by the leniency applicant and protected by a clawback regime are a much better source of material for the Commission with which to prosecute. There are two good reasons for this view. One is that such documents are likely to be more considered than oral statements. Another reason is that because they are protected by clawback, they can be fully disclosed to other members of the cartel, who can if they so wish challenge the evidence presented.⁴⁹

The discussion in this section suggests that by reforming the Notice and in parallel undertaking key reforms to Regulation No. 1/2003 (summarised in the appendix), the effectiveness of the leniency notice could be appreciably enhanced. Still, there appear to be three core issues for the Commission to grapple with. The first is that there needs to be a willingness to abandon prosecutorial discretion in order to foster legal certainty and thereby encourage more applicants to come forward. The second is recognition that a high standard of document-based evidence deters applications. The third is a readiness to consider greater incentives to encourage more applicants to come forward with evidence of cartel activity, including the protection of leniency applicants from civil claims and Amnesty Plus.

⁴⁸ See Killick's discussion of the problems that can arise from leniency applicant information in J. Killick, "Leniency, Incentives to Lie and Due Process: The Lessons of the Stolt-Nielsen Case", *Competition Law Insight*, June 2008.

⁴⁹ An oral statement procedure also has a limited application to the corporate confession and will not protect other documents generated specifically for the purpose of responding to the Commission's requirements under the 2006 Leniency Notice.

4. Improving the efficiency and quality of due process in cases involving price-fixing

In this part of the paper, the case is made that two major factors, the development of ECHR case law and the success of the Commission in busting cartels, are likely to force the Commission to consider a major reassessment of its contentious procedures by which it acts as investigator, prosecutor and judge. It is further argued that such a reform could actually strengthen the position of the Commission, allow cartel cases to be dispatched more rapidly, add to the incentive to settle and increase public support for the Commission's work.

Throughout the 1970s and 1980s, complaints were made regarding the lack of separation of powers and violation of the ECHR, principally Art. 6. It is nonetheless difficult to sustain those complaints based on the nature of most cases then faced by the Commission or on the state of the law at the time. Cartel cases were very rare under EU procedures; fines were small and the ECHR case law was unclear and underdeveloped. Furthermore, the EU's investigatory and contentious procedures reflected the core administrative focus of the DG for Competition. More specifically, its focus entailed the search for the correct approach to dealing with often complex and difficult antitrust issues in the course of procedures, at the end of which a worked-out and detailed exemption decision would be published that would provide guidance on Commission antitrust policy for a particular market sector or business practice.

The Commission now faces two major new factors that markedly alter this initial analysis. One is the growth and development of the ECHR case law, which raises critical questions as to the legal security of Commission procedures, notably with respect to the nature of the contentious procedures and the scope of judicial review. Another factor is the growth of a very large number of penal cartel cases owing to the success of the leniency programme, which creates a continuing basis for an ultimately successful legal challenge against the existing contentious procedures.

There is extensive literature on the subject of the conflict of the case law of the European Court of Human Rights (ECtHR) and European Community law.⁵⁰ The literature raises a wide range of issues, such as the validity of the power to ask questions by decision under the threat of the exercise of penal power, the over-narrow scope of judicial control over the power to undertake unannounced inspections or the limited scope given to legal professional privilege in Community law. Almost all of these issues are connected to the administrative nature of the Commission's investigative and contentious procedures and the lack of independent judicial oversight.

The key ECHR issue, it is submitted here, is the compatibility of the Commission's contentious procedures with Art. 6 ECHR. A successful legal challenge on this issue would force a fundamental redesign of the competition procedures.

⁵⁰ The most notable and detailed contributions to the debate recently are A. Andreangeli et al., *Draft Report of Working Group III: Enforcement by the Commission – The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System*, Global Competition Law Centre, Bruges, 2009 and W. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention of Human Rights", *World Competition: Law and Economics Review*, Vol. 33, No. 1, 2010, forthcoming (available on the SSRN website). See also I. Aslam and M. Ramsden, "EC Dawn Raids: A Human Rights Violation?", *Competition Law Review*, Vol. 5, No. 1, 2008, p. 61 and W. Wils, "The Combination of the Investigative and Prosecutorial Function and Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition: Law and Economics Review*, Vol. 27, No. 2, 2003, p. 201 and also A. Riley, "The ECHR Implications of the Draft Competition Regulation", *International and Comparative Law Quarterly*, Vol. 51, No. 1, 2002(a), p. 55.

Any ECHR discussion of the Commission's contentious procedures commences with an analysis of whether the Commission's procedures are criminal for the purposes of the Convention. This is central. If it is the case that the Commission's procedures are criminal for the purposes of the Convention, then the intensity and scope of application of the Convention upon these procedures is much more substantial.

It is of course correct that Art. 23(5) of Regulation No. 1/2003 provides that Commission decisions imposing fines "shall not be of a criminal law nature". Yet, as the ECtHR has made clear in many cases since *Engel* in 1976,⁵¹ the national designation of 'criminal' is not decisive and cannot be so for fear of circumvention of the Convention standards set out in Art. 6. The test is set out in the so-called '*Engel*' criteria. The national designation is taken into account by the Strasbourg Court but it is not decisive; the core standards that bear upon the Court's analysis are the nature of the offence and the nature and severity of the penalty. In respect of the nature of the offence, the Court will look at whether the norm is addressed to a specific group or is of general application. It will also look at whether the sanctions imposed are compensatory or are intended to be punitive and to have a deterrent effect.⁵²

It is difficult to argue any other conclusion than that the Commission's contentious procedures are criminal for the purposes of the Convention. Arts. 101 and 102 TFEU (ex-Arts. 81 and 82) are of general application across the entire EU economy. The objective of the competition rules is the general public interest of maintaining free competition across the economy. It is clear from the Commission's 2006 Fines Notice⁵³ as well as its press releases when cartel decisions are published⁵⁴ and the case law of the EU courts that the intent is to punish and deter.⁵⁵

⁵¹ Refer to *Engel and others v. Netherlands* [1976] 1 EHRR 647.

⁵² See in particular *Öztürk v. Germany* [1984] 6 EHRR 409 and *Bendenoun v. France* [1994] 18 EHRR 54.

⁵³ As noted in the Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003, op. cit.

⁵⁴ For instance,

- Competition Commissioner Neelie Kroes said, "[t]hese companies must learn the hard way that breaking the law does not pay and that repeat offenders will face stiffer penalties. The companies' elaborate precautions to cover their tracks did not prevent the Commission from revealing the full extent of their determined efforts to rip-off their customers" (European Commission, "Commission fines plastic additives producers €173 million for price-fixing and market-sharing cartels", Commission Press Release, IP/09/1695, Brussels, 11 November 2009(b)).
- According to Kroes, "[i]ndustrial customers all over Europe suffered from this cartel for several years. The Commission will not tolerate such economic damage to Europe's industrial base" (European Commission, "Antitrust: Commission fines suppliers of calcium carbide and magnesium-based reagents over €61 million for price-fixing and market-sharing cartel", Commission Press Release, IP/09/1169, Brussels, 22 July 2009(c)).
- Kroes asserted that "[t]here is probably not a household or company in Europe that has not bought products affected by this 'paraffin mafia' cartel, with all that implies in terms of paying over the odds, higher costs and economic damage. Such illegal cartel behaviour cannot and will not be tolerated by the Commission, and companies' managers and shareholders should take note" (European Commission, "Antitrust: Commission fines wax producers €76 million for price-fixing and market-sharing cartel", Commission Press Release, IP/08/1434, Brussels, 1 October 2008).

⁵⁵ For example, refer to Case C-289/04P, *Show Denko KK v. Commission* [2006] ECR I-5859, Opinion of Advocate-General Geelhoed, para. 23:

As regards the first step, in particular as regards gravity, the Commission considered the infringement to be a very serious one. Although in the case of a collective infringement like a cartel, where the gravity is thus similar for each participant, it is arguable that a common

The criminal law nature of Commission procedures has not gone entirely unnoticed in Luxembourg. As long ago as 1991, Judge Vesterdorf, acting as Advocate-General in the polypropylene case, opined that in

view of the fact – in my view confirmed to some extent by the judgment of the Court of Human Rights in the *Öztürk* case – that fines which may be imposed on undertakings pursuant to Article 15 of Regulation No. 17/62 do in fact notwithstanding what is stated in Article 15(4) [the identical prior provision to Article 23(5) of Regulation No. 1/2003], have a criminal law character, it is vitally important that the Court should seek to bring about a state of affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights.⁵⁶

When criminal charges have been set out, the Convention requires that they be heard by a tribunal that fully complies with the independent and impartial tribunal criteria contained in Art. 6(1), where there can be an opportunity to be heard, present evidence and cross-examine witnesses. That is clearly not the case in respect of the Commission’s contentious procedures, where the Commission prosecutes and makes the decision, and there is little room to challenge the Commission’s evidence or cross-examine witnesses.

In addition, the persons making the final prohibition decision, in the shape of the commissioners, do not actually attend the hearing. Hearings are only attended by officials who advise the commissioner for competition and then the other members of the college.⁵⁷

The Commission has two principal defences. The first is to contend the significant exception for disciplinary and minor offences in *Le Compte*⁵⁸ and *Öztürk*,⁵⁹ where in such cases those heard at first instance do not have to comply with Art. 6, this requirement only applying on appeal. There is a clear question of how far price-fixing cartels, “the supreme evil of antitrust”, which the Commission itself deems to have widespread and damaging effects on the EU economy,⁶⁰

starting amount should be set for all the undertakings involved in the cartel; the Guidelines acknowledge that the Commission may apply differential treatment to the members of the cartel in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures that it has sufficient deterrent effect.

⁵⁶ Refer to Case T-1/89, *Rhone Poulenc SA v. Commission* [1991] ECR II 867, 85.

⁵⁷ The OECD has criticised this approach to hearing cases, holding that no other “jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission”. It goes on to say that “the Commission is too large to effectively deliberate and decide fact intensive matters”. It then points out that “when the Commission decides a matter, it has typically not heard directly the case against the proposed decision” and that no “Commissioner including even the Competition Commissioner will have attended the hearing”. See OECD, *OECD Country Studies, European Commission – Peer Review of Competition Law & Policy*, OECD, Paris, 2005, p. 63.

⁵⁸ Refer to *Le Compte et al v. Belgium* [1983] 5 EHRR 533.

⁵⁹ *Öztürk v. Germany* [1984], op. cit.

⁶⁰ See the comments of the Commission press releases above as to the extent of damage to the EU economy caused by price-fixing. In European Commission, “Commission fines producers of power transformers €67.6 million for market-sharing cartel”, Commission Press Release, IP/09/1432, Brussels, 7 October 2009(a) concerning the power transformers cartel, Kroes was noticeably trenchant:

Customers and taxpayers all over Europe suffered from this cartel for a number of years. The Commission has now put an end to this rip-off by the self-appointed ‘Gentlemen’. The Commission will not hesitate to increase fines for repeat offenders until they have learned the lesson that cartels do not pay. (Emphasis added.)

can be aligned with traffic offences and professional disciplinary offences. Moreover, one of the principal justifications in *Öztürk* is that minor offences like traffic offences could be dealt with by a tribunal that is not compliant with Art. 6 in order to give the state some flexibility in dealing with a large number of minor cases. With a backlog of around 60 cases in a context in which no more than 8 decisions are handed down per year, is again difficult to see how this policy, which underlies the ‘minor offences’ criteria, applies to cartels.

The second defence is to argue, as Wils⁶¹ has recently done, that *Jussila*⁶² can be interpreted as cutting back the application of *Engel* and effectively creating a two-tier standard of application of ‘criminal’ for the purposes of the Convention. Wils argues that there is a core application of criminal to which Art. 6(1) fully applies, and then a further non-traditional ‘criminal’ standard, to which Art. 6(1) has more limited application. There are some serious questions here as to whether this two-standard approach could have the effect of dismantling the autonomous notion of ‘criminal’ under the Convention. The keystone of the policy of the autonomous definition of criminal is that it is necessary to maintain such an independent notion to avoid circumvention. These two standards as described by Wils would appear to threaten the autonomous notion of criminal. Furthermore, the Court appears to take a much more nuanced approach:

[T]he autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, No. 80), customs law (*Salabiaku v. France*, judgment of 7 October 1988, Series A, No. 141-A), competition law (*Société Stenuit v. France*, judgment of 27 February 1992, Series A, No. 232-A) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, No. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees *will not necessarily apply with their full stringency* (see *Bendenoun* and *Janosevic*, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an

[Through the] ‘*Gentlemen’s Agreement*’, the cartelists therefore not only harmed their direct customers but also European electricity consumers. (Emphasis added.)

The European Commission has imposed fines totalling €7,644,000 on seven companies – ABB, AREVA T&D, ALSTOM, Fuji Electric, Hitachi and Toshiba – for violating the EC Treaty’s ban on cartels and restrictive business practices (Art. 81). Siemens also participated but was not fined because it revealed the existence of the cartel in question to the Commission. Between 1999 and 2003, Japanese and European producers of power transformers operated an oral market-sharing agreement, referred to as a ‘Gentlemen’s Agreement’, where they agreed that the Japanese members would not sell power transformers in Europe and that the European members would not sell power transformers in Japan. The power transformers in question are used to modify the voltage in electricity transmission networks. The fine for ABB was increased by 50% because it had previously taken part in a similar infringement.

At the time of the infringement, the parties’ combined annual sales in the European Economic Area (EEA) were estimated to be worth around €100 million.

In setting the fines, the Commission took into account the amount of sales of the companies involved as well as the very serious nature of the infringement and the geographic scope of the cartel.

⁶¹ Wils (2010), op. cit.

⁶² Refer to *Jussila v. Finland* [2007] 45 EHRR 39.

administrative or non-judicial body: *a contrario*, *Findlay v. the United Kingdom*, cited above). (Emphasis added.)⁶³

Clearly, the Court is showing some concern about the overgrowth of the *Engel* criteria. It allows for the possibility that Art. 6(1) will permit criminal penalties to be imposed at first instance by an administrative or non-judicial body. Even so, that is a long way from saying that the Commission's procedures are compliant with Art. 6. The key words used in this paragraph are "will not necessarily apply with their full stringency".

It is open to considerable doubt that if the Strasbourg Court were to look at the Commission's contentious procedures they would do otherwise than apply the full force of the traditional interpretation of the case law.

The Court is here suggesting a limit on the application of the traditional case law in technical cases like tax surcharges, which have been viewed as administrative in nature and which often involve very large numbers of cases. The Commission by contrast is in a very different position from the fields of penal administrative law such as tax law. In a traffic offence or tax surcharge case, an official makes a summary adjudication rejecting a claim. The Commission, on the other hand, is adjudicating after an extensive and detailed procedure – something that is far more akin to the substantive role of a court of first instance (CFI) and which complies with Art. 6 ECHR.

Aside from the issue of fines (discussed below), the Commission also has the difficulty that price-fixing is demonstrably the most serious form of antitrust activity, for which, unlike almost all other antitrust law, there is no real possibility of any balancing factor that can be weighed in the cartelists' favour. Another problem is that the language used by officials regarding cartels further highlights the seriousness of price-fixing and clearly seeks to impose enormous reputational damage on the cartelists.

As put by Neelie Kroes, EU commissioner for competition, when "we break up cartels, it is to stop money being stolen from customers' pockets".⁶⁴ According to her predecessor, Mario Monti, "[c]artels are like cancers on the open market economy, which forms the very basis of our Community".⁶⁵ Numerous other examples could be cited from Commission press releases and speeches by officials using the same sort of language.

If the Commission considers price-fixing to be so heinous and uses such language about price-fixing, patently with the intention of further damaging the reputation of those caught price-fixing, it is to say the least doubtful that the ECtHR will give the Commission the benefit of the more nuanced approach of the Court in *Jussila*.

This doubt is compounded by two other factors, the first of which is parallel, actual criminality. Clearly, in some states such as the UK, the same facts may likewise be deployed to bring criminal proceedings against defendant executives. This is not the case of any of the offences referred to by the Court in *Jussila*, for which the full application of Art. 6(1) may not be necessary. There is also a form of ancillary criminality that directly interacts with Union law. In *AKZO*, documents were handed over and EU legal procedures were accepted in relation to a

⁶³ *Ibid.*

⁶⁴ See N. Kroes, "Antitrust Reform in Europe: A Year in Practice", Presentation at the International Bar Association and European Commission Conference, "Anti-trust reform in Europe: A year in practice" in Brussels, 10 March 2005.

⁶⁵ See M. Monti, Opening Address at the "3rd Nordic Competition Policy Conference" in Stockholm, 11 September 2000.

dispute over legal professional privilege, because not to do so could have resulted in national criminal proceedings being instituted against the defendants for obstruction.⁶⁶

Second, there is the issue of the size of the fines. An argument can be made that the fines are relatively small given the size of the undertakings involved. On closer examination, however, this argument is not really made out. For the defendant undertakings, the size of the fines may well amount to several percentages of worldwide turnover. When the fines are two, three, four or five percent of turnover, the fines are not relatively small. What is more, the overall size of the fines cannot be ignored. These fines are the largest fines in the West for any civil or criminal offence.⁶⁷

It is therefore very likely that defendant undertakings will eventually prevail on this issue before either the Luxembourg or Strasbourg Courts.

The further major change that brings the Commission's administrative procedures under increasing pressure, and which has already been alluded to, is the sharp rise in the number of cartel cases being dealt with by the DG for Competition owing to the success of successive Leniency Notices.

How far this latter penal process can be contained effectively and fairly within existing procedures is open to question. As a practical matter, can such heavyweight administrative procedures – entailing a detailed statement of objections, reply and oral hearing, followed by an extensive draft decision discussed by a committee consisting of representatives of national competition authorities and a final decision imposing fines agreed by the Commission and translated into 19 official languages – ensure prompt and effective dispatch of cases?

This procedure is appropriate where only a very small number of cases are dealt with each year and where extensive consultation and policy development are envisaged. It is nonetheless difficult to see how this procedure is appropriate in cases involving price-fixing, where there is rarely or not at all going to be a policy issue involved. It is for instance quite difficult to see what substantive legal or policy involvement a national competition authority in the Advisory Committee can have. Officials at the national competition authority are going to neither quibble the evidence nor argue that price-fixing does not constitute an extremely serious breach of Art. 101(1) TFEU.

Applying this administrative procedure to cartel cases creates a major backlog that undermines the legal security of the defendants and imposes enormous pressure on DG for Competition officials to process cases. The Commission has made valiant attempts to reduce the backlog, most recently by adopting a Settlement Notice, under which defendants admit their price-fixing offence and receive a discount on the fine they would otherwise receive.⁶⁸ Clearly, the settlement procedure will reduce the cartel backlog to some extent. Still, the limited nature of the discount available to defendants, with only a maximum 10% reduction on offer, suggests that only limited use will be made of the discount.⁶⁹ It is also to be noted that in *Veljanovski's*

⁶⁶ Andreangeli et al. (2009), op. cit., para. 11.

⁶⁷ The author uses the term 'the West' deliberately. Recently, the only larger fines that have been imposed anywhere have been those by the Russian Federation tax authorities in the *Yukos* case. See for instance, *OAO Neftyanaya Kompaniya Yukos v. Russian Federation*, Application No. 14902/04, January 2009.

⁶⁸ See the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1.

⁶⁹ There is also the additional problem that in order for the Commission to save any major resources in a case all the defendants have to agree to settle. If only a handful settle then the Commission has to adopt two procedures – a settlement procedure against those who have agreed to settle and full prosecution

(2009) latest tables on fines levied under the 1998 Fines Notice between 1999 and 2009, over 40 of the 56 appeals resulted in fine reductions of greater than 10%.⁷⁰

It is put forward here that the Commission needs to seriously consider cutting the Gordian knot of the problem of potential legal challenge and administrative delay by creating a separate procedure for cartel cases with an independent tribunal presided over by a judicial panel.⁷¹ Such a procedure would commence with a statement of objections and reply as now, but then the procedure would proceed before the panel in open court, the judicial panel having been appointed by an independent process. The panel would make a ruling on liability and fines, having heard the Commission's recommendation based upon its own guidelines. This initial stage would then be formally confirmed by the Commission, and if defendants so chose they could challenge that decision of the Commission before the EU General Court (EUGC, the ex-CFI).⁷² In a potentially subsequent stage of the process, the panel could also consider defendant proposals to compensate victims or claims from the plaintiffs themselves for compensation, which would largely short-circuit the civil litigation process, assuming there is no challenge before the EUGC or such a challenge upholds the original decision. There are four compelling reasons in favour of the Commission adopting such a procedure.

First, the Commission would cut its workload. In most cases, it would prosecute with little advantage gained in terms of workload saved. It is nevertheless at the stage of drafting the prohibition decision that the Commission would save a considerable degree of effort. As a decision would be handed down by an independent judicial panel, the Commission would no longer have the burden of drafting a detailed prohibition decision. As most cartel cases are based on leniency applications, the defendants would lose before the panel. In such instances, the Commission would usually only need to draft a short form decision confirming the judgment in the case.

Second, the prospect of mandatory hearings in open court would create a major incentive for defendants to settle. This point has often been overlooked, because in US federal procedures there are two strong pressures on defendants to settle: the prospect of having to defend their price-fixing behaviour before a jury, and the prospect of jail and criminal sanction. Jury and jail are only part of the incentive to settle, however. Another important part of the incentive is the

against those who have not so agreed. It is difficult to see how such cases can save the Commission many resources, and they may actually involve more.

⁷⁰ See C. Veljanovski, *European Commission Cartel Prosecutions and Fines 1999-2009*, Case Associates, London, 2009, p. 15. Note the table on p. 15, which lists over 50 undertakings fined by the Commission and then the level of fine reduction. In almost all cases, the fine reduction is greater than 10%.

⁷¹ The Commission has the power to propose such changes under Art. 103 TFEU, which permits the Council in consultation with the European Parliament to adopt regulations and directives to give effect to Arts. 101 and 102, and in particular in Art. 103(2)(d) to "define the respective functions of the Commission and the Court of Justice of the European Union in applying the provisions laid down in this paragraph". It could be argued that there was a threat to the 'inter-institutional balance' among the EU institutions to create an independent tribunal operating a Commission procedure. The counter argument, however, is that Art. 103 was deliberately inserted into the Treaty, permitting the Council to calibrate the inter-institutional balance between the Commission and the EU courts. In any event, all decisions of the independent tribunal would ultimately be controlled by the EU courts.

⁷² As a practical matter, given the evidence available to the Commission through leniency applications and unannounced inspections under Arts. 20 and 21 of Regulation No. 1/2003 (the dawn raid power), the Commission is going to win almost all of these cases. Nevertheless, the Commission would retain the power to override a decision of the judicial panel, in which case the decision could be challenged before the EUGC by the defendants by application for an act of annulment.

prospect of having to defend price-fixing in open court in front of the media and thereby, employees, customers and shareholders. Currently, the Commission waives that incentive entirely by making oral hearings optional and secret.⁷³ An independent judicial panel operating in public in Brussels before the European antitrust press corps with TV cameras in the hearing would create a major incentive for most defendants caught red-handed through evidence obtained in leniency applications and dawn raids to settle.

Third, most of the prospective legal challenges the Commission faces in respect of its procedures would be greatly reduced if there were separate procedures with an independent panel in place. Such new procedures would be able to sustain an Art. 6 ECHR challenge. Likewise, issues associated with access to the file would no longer be in question, as they would be immediately dealt with by the panel running the case. Furthermore, with an independent judge in place, there would be opportunities to deal with other due process concerns, such as the scope of judicial warrants prior to unannounced inspections. The panel would be able to provide an initial warrant, which could then be backed up by a local enforcement warrant at the national level.

Fourth, the creation of a separate procedure with an independent panel would permit the Commission to run civil individual sanctions against complicit executives in parallel with the proceedings against defendant undertakings. The independent tribunal would be able to deal with both corporate and individual culpability contemporaneously and efficiently, while also enhancing deterrence by virtue of the heavy corporate and personal sanctions that are to be levied. The prospects for individual sanctions are discussed further below.

There is also a compelling argument that given the very significant powers the Commission can wield against cartels, it is important for their legitimacy that some additional democratic accountability is maintained over those powers. In the proposed reforms to the Commission's contentious procedures, the European Parliament could play a vital legitimising and scrutiny role. The judges for the independent panel would have to be appointed in a demonstrably independent process. That process would probably involve an initial selection of judges being made by an appointments board of national and EU judges, and those names would be put forward to the commissioner for competition for nomination. To ensure democratic accountability, those judges would be confirmed before a committee of the European Parliament. Such a process would also reinforce the independence and authority of the judges in carrying out their duties.⁷⁴

It is true that the House of Lords Select Committee on the European Union looked at and rejected the case for an independent competition tribunal.⁷⁵ Yet, the argument in the House of Lords report focused on the problem of merger cases and the creation of a separate competition court within the EU judicial structure. That is not what is proposed here. The focus of this proposal is to create a new procedure for the Commission, not for the Court. The aim here is to bring efficiencies to the Commission and enable individuals to be held responsible for their

⁷³ Eventually, the case is heard before the EUGC in open court; however, by that point the case is seen as 'old news'. The evidence is mired in technical arguments that obfuscate the underlying legal liability and the focus is on technical questions of judicial review.

⁷⁴ The author envisages that given the number of cases and the intensive nature of the workload, the tribunal would need at least one panel of three judges. Hence, the Parliament would have to consider running a large enough confirmation process for that number of judges.

⁷⁵ See House of Lords Select Committee on the European Union, *An EU Competition Court*, 15th Report Session 2006–2007, Subcommittee E, HL Paper No. 75, London, 2007. See also L. Lovdahl Gormsen, "A Judicial Panel for European Competition Cases: Why the House of Lords was Right", *Journal of Business Law*, 2009, p. 294.

actions in price-fixing cases. A full review by an independent judicial panel in open court would bring many defendants to settle. For other defendants, a judgment handed down by an independent panel would have sufficient legitimacy to substantially reduce the incentive to challenge the Commission's decision.

A separate cartel procedure and an independent judicial panel would allow the Commission to head off legal challenges to its existing regime, to deal with more cases more rapidly, to introduce individual sanctions and to demonstrate through open public prosecution the valuable work it is undertaking in bringing price-fixers to book.

5. Re-examining the penalties available to the Commission in cartel cases

This part of the paper considers critical issues that have been raised in respect of the Fines Notice, which are arguably compelling but pro-defendant, as well as a broader series of arguments that take the view that the Commission is under-sanctioning price-fixers, particularly individual executives.

The Commission has recently come under severe criticism concerning its 2006 Fines Notice⁷⁶ from Sir Jeremy Lever QC in an Opinion paper for the German employers' organisation, BDI.⁷⁷ One does not have to accept all the arguments⁷⁸ put by Lever to recognise that he does raise a number of serious questions as to the Commission's fining policy.

One core point raised by Lever is the focus on the calculation of damages by reference to the turnover criteria.⁷⁹ His argument is that for instance one can have a very incompetently run cartel that has little actual effect on the market, but it can be hit with a very large fine. Arguably, the focus on heavy penal sanctions should be on those antitrust violators that have had a considerable market effect and have made substantial profits. Against this view is the hard legal point that under Art. 101(1) TFEU, price-fixing is an 'object' offence and therefore there is no need to examine the effects of the price-fixing. At the same time, that argument only addresses the legality issue, not the size of the fine to be imposed, where the Commission does have discretion.

There is a strong case for saying that the Fines Notice should be amended to provide less focus on the application of the turnover criteria in calculation and greater focus on the actual effect of the cartel on the market. This may well result in lower fines for badly run cartels riven by cheating but much heavier fines for very profitable and well-run cartels. There is also a legitimacy question surrounding the present approach to fining that could threaten popular support for the Commission's policy. There will always be strong popular support for taking away the ill-gotten gains of profitable cartels. It is questionable, however, how much support the

⁷⁶ Refer to the Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003, *op. cit.*

⁷⁷ See J. Lever, *Opinion: Whether and if so how, the EC Commission's 2006 guidelines on setting fines for infringements of Arts. 81 and 82 of the EC are fairly subject to serious criticism*, BDI Law and Public Procurement, Berlin, 2009. For a defence of the current system, see P. Lowe, "Cartels, Fines and Due Process", *GCP: The Online Magazine for Competition Policy*, 30 June 2009, p. 1.

⁷⁸ For instance, Sir Jeremy challenges the application of the upper limit of 10% of worldwide turnover and the notion of turnover as an acceptable basis for providing a primary determinant of the fine to be levied. The author accepts that the turnover is a somewhat artificial cap but does not see what could easily replace such a cap (see the Opinion by Lever (2009), *supra*, paras. 5 *et seq.*).

⁷⁹ *Ibid.*, para. 10 *et seq.*

Commission can garner for heavy fines for failing cartels that were not profitable, and an argument can be made that the cartel was merely trying to preserve employment.⁸⁰

Lever raises four other major issues. Debatably, there is also a fifth issue, being the lack of guidance for undertakings in a situation where they are unable to pay, which is also discussed below.

1) *Parent–subsidiary problem in the application of the fine*

A problem that is identified in his Opinion paper is the lack of guidance in the Fines Notice as to when a parent will be liable for the price-fixing activities of its subsidiaries.

One is left in doubt as to whether, even though a parent had control of the subsidiary at the time of the infringement, only the subsidiary is liable and only its turnover is taken into account if the parent did not know of or acquiesce in the infringement; or whether, if the parent had the ability to control the infringing undertaking at the time of the infringement because the parent–subsidiary relationship then subsisted, the parent is responsible because of its failure to exercise its power of control to prevent the infringement.⁸¹

There are two reasons why this issue is especially important. To begin with, as a practical matter and considering the application of the worldwide turnover fine, parental responsibility can significantly increase the fine. In addition, providing a clearer definition of responsibility could work effectively with a policy of encouraging greater use of compliance programmes and the deployment of individual sanctions.

2) *Recidivism*

In his Opinion paper, Lever opposes the application of recidivism to undertakings and argues that there are other penalties that can be applied to executives who continually engage price-fixers, such as dismissal.

The Commission’s approach to recidivism seems to me to betray a failure to understand the relevant differences between individuals (*personnes physiques*) and corporate undertakings (*personnes morales*). Individuals can certainly have a propensity to commit offences, usually of a particular kind (e.g. the serial rapist, the professional burglar). But corporations as such do not have propensities.⁸²

The author disagrees with Lever on this point of principle and argues that a recidivist penalty is appropriate where there is a strong connection between one price-fixing offence and another. For instance, where the price-fixing entails the same or a similar market, the corporate connection between the two instances of price-fixing is close and there is some connection of personnel, it is submitted that there is a place for a recidivist penalty.

⁸⁰ Clearly, as a rational economic argument imposing a price-fixing floor does not stand up to much close examination. Either the business was viable (in which case short-term finance could be obtained to keep the business going) or it was damaging other competitors by its continued existence and its engagement in price-fixing (in which case it should be merged or go out of business). Yet, from the point of view of maintaining public support for a high deterrent policy, the imposition of heavy corporate fines on failing cartels is politically unwise. Arguably, the better solution here is to impose personal sanctions on individual executives.

⁸¹ Lever (2009), op. cit., para. 18.

⁸² Ibid., para. 27.

Unfortunately and as Lever points out, too often there is no obvious link between the two offences, which may take place many years apart and without any personal connection between them. There is also a parent–subsidiary take on this argument. The situation could arise that two subsidiaries of a multinational parent could each participate without knowing that the other was involved in a cartel and without knowledge of the parent, the result of which being that when the second cartel is discovered the fine may well be doubled. Again there is no personal connection between the two offences and indeed no knowledge of the other offence.

Moreover, despite the prospect that a subsequent instance of price-fixing could result in the fine being doubled, there is no guidance in the Fines Notice on the principles for the application of a recidivist penalty. For instance, there is no indication of what can count as a similar infringement for the purposes of applying the penalty.

Equally, there is no limitation period for the application of the recidivist penalty. Hence, a price-fixing offence caught in the first week of the operation of Regulation No. 17/62 in March 1963 is still live according to the Fines Notice, and could result in a doubling of the fine under the 2006 Fines Notice. There is a strong argument for taking the view that some form of limitation period should apply to a price-fixing offence that would have the effect that after a certain period the offence is ‘spent’ and is no longer live for the purposes of calculating a recidivist penalty.

This point raises a further question. There is no explicit reference to a recidivist penalty in Regulation No. 17/62 or Regulation No. 1/2003. Consequently, there is a question as to whether the legal basis for a recidivist penalty is actually the Fines Notice 2006. Under the case law of the ECtHR, the legal basis and legal certainty must be assessed at the time of the infringement,⁸³ but is the time of the infringement the time of the first infringement or the second? Recent case law in the ECtHR in *Achour v. France*⁸⁴ suggests that it is at the time of the second infringement that the legal basis must be assessed. This implies that the Commission may only be able to rely on any recidivist penalty after the 1998 Fines Notice and the doubling of the fine on the basis of recidivism after the coming into force of the 2006 Notice.⁸⁵

3) *Lack of recognition of the positive effect of compliance programmes*

Lever also points out that there is no encouragement in the Fines Notice for undertakings to deploy effective compliance programmes. In fact, no reference at all is made to compliance programmes. Nevertheless, there is a very strong argument for distinguishing between an undertaking that made every effort to ensure compliance with the law and those that made no effort or were complicit.

⁸³ There is also a broader issue here in relation to the legality of the Fines Notice for the purposes of the ECHR. Art. 7 of the ECHR provides for the principles of non-retroactivity, legal certainty and foreseeability to apply to criminal sanctions. It is open to question whether containing such sanctions in an administrative document that can be changed at will by the executive without legislation complies with Art. 7. Also open to question is the extent to which the Fines Notice is sufficiently foreseeable and whether the application of a new Fines Notice to all existing cases amounts to the retroactive application of a penalty. Still, it is argued below that the introduction of an independent judge to a new EU cartel procedure could provide a solution to this potential ECHR challenge facing the Commission.

⁸⁴ Refer to *Achour v. France* [2007] 45 EHRR 2, para. 36.

⁸⁵ For an extensive discussion of the issues concerning time limitation periods and recidivism, see K. Nordlander, “The Commission’s Policy on Recidivism: Legal Certainty for Repeat Offenders?”, *Competition Law Review*, Vol. 2, No. 1, 2005, p. 55.

As a matter of public policy, the Commission should surely be deploying its Fines Notice to encourage compliance with the Community prohibition on price-fixing. This issue also plays into the broader question of the role of individual fines, which is discussed below.

4) *Damages*

In the Opinion paper, Lever raises the issue of taking into account the total cost of the case to the defendants, which will include damages to be awarded to victims. He makes an interesting suggestion that the Commission's contentious procedures could be divided into two stages. The first stage would be one where liability was established and fines levied. In stage two, defendants would come forward with their plans for compensating the victims.⁸⁶ The author maintains that this idea may fit more comfortably into a new structure for contentious procedures as discussed above, which involves an independent judicial panel. For instance, the judicial panel could hold separate civil-settlement procedures immediately following settlement of the public competition-enforcement case.

5) *Inability to pay*

The Fines Notice 2006 offers very little information on the Commission's policy on ability to pay.⁸⁷ While clearly the Commission wishes to deter unjustified applications for fine reductions on the basis of inability to pay the fine levied, there are good policy arguments for a tough but more detailed policy statement.

The major policy issue is that although a very vigorous fining policy must be adopted in respect of price-fixing cartels, there is a danger of engendering a major policy failure, particularly in an era of economic crisis, if fining policy is applied too rigorously and the consequence is that otherwise viable firms go bust. This would create a perverse outcome of the Community's antitrust policy, of increasing concentration and undermining competition.

A revised Fines Notice would seek to make clear to business that in almost all circumstances fines must be paid in full. Yet, a revised Notice would also seek to set out alternative means of payment, such as payment by instalments and deferred payments that would permit firms struggling to operate in a failing economy to pay the fine in full over time. Greater detail over alternative payment schemes for firms would also assist firms in raising finance to pay the fines by giving finance houses and insurers some understanding and security as to the rules that apply in such circumstances.

A revised notice could also provide more guidance to firms that are likely to actually be unable to pay. Owing to the exceptionally bad economic conditions, we face a much greater problem of inability to pay. Firms that are unable to pay are less failing firms than they are firms operating in a failing economy. An outline of the conditions that would be imposed on undertakings before a fine reduction were granted, those under which fine

⁸⁶ Lever (2009), op. cit., para. 34.

⁸⁷ The Fines Notice 2006, para. 35 contains this statement:

In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

reductions may be granted and the types of fine reductions that may be possible would provide some guidance to firms struggling in very difficult economic conditions.

Along with these criticisms of the existing Fines Notice, which may be said to favour defendants, the existing approach to fining policy in Regulation No. 1/2003 and the Fines Notice fails to provide the Commission with an effective deterrent, especially in respect of individual sanctions and prescription.

Currently, Regulation No. 1/2003 only provides for fines against undertakings⁸⁸ – no individual in his or her capacity as an employee, director or officer can be fined or otherwise penalised.

In other areas of antitrust law, an individual fine is not appropriate; however, there are two good reasons for considering individual penalties for price-fixing.

1) *Individual sanctions*

Given the seriousness of price-fixing and the damage to EU competitiveness, it is questionable whether a corporate fine can be viewed as sufficient. The prospect of facing an individual sanction and public condemnation would appreciably reinforce the message of the unacceptability of price-fixing.

There is also the recognition that the corporate fine provided for under Regulation No. 1/2003 does not deter the ‘rogue director’. In most major antitrust cases, it is difficult to imagine a situation in which the interests of an employee are divergent from that of the employer in relation to the alleged antitrust infringement. For example, if one took the cases of abuse of dominance such as Microsoft or Intel or the settlements involving E.ON or RWE, the antitrust issues involved in those cases entailed the core business model of the undertaking, which were decided at board level.

By contrast, in price-fixing cases there can be a temptation for individual executives to engage in price-fixing, no matter how clearly price-fixing is outlawed in company procedures and despite extensive compliance training. Employee compensation linked to profit and turnover, while necessary to encourage strong commercial performance, can have the perverse effect of encouraging employees to secretly take part in price-fixing in order to fatten and enhance their overall compensation packages.

There are several potential penalties that the Commission could consider:

- *An individual fine.* This would be capped to a multiple of gross annual benefits of the suspect individual underpinned by a rule that provides a doubling of the corporate fine if the individual is assisted in payment of the fine by the employer undertaking.
- *Director disqualification.* This could be applied to individual executives who are directors; it could also be applied to senior employees not holding director status as a form of public condemnation. The length of prohibition from serving as a director would be determined based on the extent and length of participation and the overall seriousness of the impact of the price-fixing. Director disqualification would apply to holding the position of director in any public or private company in any jurisdiction of any member state, and not just the member state in which the director or employee was resident.

⁸⁸ Although conceptually a fine could be imposed on an individual as an undertaking qua undertakings, the author has not been able to find any case in which an individual has actually been fined.

- *The expulsion of aliens from EU territory.* Most international business executives need to be able to travel into the EU, the world's largest single market. Prohibition from entering EU territory for a term of years would make it difficult for them to act as senior-level executives as well as significantly damage their reputations.

There is also a strong argument here for the creation of an EU individual leniency notice. In the US system, the ability of individual executives to make leniency applications underpins the corporate leniency programme. Undertakings understand that if they do not make a leniency application, then for fear of personal fines and a jail sentence one or more of their executives will make an individual leniency application. This acts as a considerable additional pressure on undertakings to file for leniency. Equally, sanctions could be lifted from those leniency applicants who are granted full immunity to reinforce the incentive to come in and provide evidence on cartel activity. If, as discussed above, the EU adopts powers to impose fines or director disqualification (or both), there is a compelling case for the Commission to introduce an individual leniency application procedure.

2) *Extending the prescription period for cartel cases from 5 to 10 years*

Currently, no matter how much damage is done or profit made by a defendant undertaking engaged in a cartel, if the cartel ends and remains secret for 5 years then the Commission is unable to bring a case against the undertaking as time has expired.

For most antitrust issues, a short period of 5 years is workable because the questions are already in the public domain or relatively easily accessible. With Microsoft, for instance, the company was hardly hiding its business practices. Similarly, it was not unreasonable for the Commission to suspect that there might well be a denial of third-party access questions in relation to the business operations of E.ON and RWE.

By contrast, cartels operate entirely in secret and illegal behaviour can often be hidden effectively by arguments that price rises are merely the impact of parallel price movements in oligopolistic markets. Given the seriousness of the damage that price-fixing can do to the economy and the secretive nature of price-fixing that, save for a leniency application, could remain undisclosed, there is a very strong case for a longer prescription period. A period of up to 10 years would recognise the covert nature of price-fixing and the seriousness of the offence.

The above analysis of the difficulties that surround the present policy and approach to penalties for price-fixers reflect a broader problem that the procedures and practices of the Commission's control of anti-competitive behaviour were never really designed to deal with a heavily penal-orientated caseload. In essence, the majority of the problems discussed above are a consequence of trying to use a fundamentally administrative system to manage a now substantially penal caseload.

Finally, if an independent panel were introduced, the potential ECHR questions hanging over the Fines Notice – such as whether the Notice had an adequate legal basis for imposing sanctions, foreseeability and retroactivity – would disappear. The Commission's Fines Notice would represent its recommendations to the tribunal, and not a definitive executive statement preparatory to actually imposing a penalty.⁸⁹

⁸⁹ An independent tribunal would not affect the operation of the leniency procedure. The Commission would grant immunity as now to the immunity applicant, but unlike now, the leniency applicant would not be prosecuted, again enhancing the incentive to come in and seek leniency. The leniency applicants for fine reductions would usually settle with the Commission, given the incentives to do so as discussed

6. Conclusions: Time to modernise EU anti-cartel enforcement

The current review of Regulation No. 1/2003 provides an ideal opportunity for a fundamental review and modernisation of the Commission's anti-cartel enforcement regime. The Commission is increasingly facing the problems of dealing with the success of the Leniency Notice, while the Commission's procedures are facing the prospect of more numerous ECHR challenges. In addition, the growth of individual sanctions against price-fixers in member states is threatening to undermine the primacy of the Commission's procedures.

Effective modernisation would permit the Commission to tackle all these issues. A modernised regime for anti-cartel enforcement would deliver a sharper leniency programme, which would generate even more leniency applicants and result in a larger number of cartels being uncovered. Individual sanctions against executives would reinforce deterrence against price-fixing and a separate cartel procedure presided over by an independent judge would permit the DG for Competition to dispatch cases with greater speed while avoiding the prospect of an ECHR legal challenge.

The Commission would then be able to deploy a legally unassailable, efficient and effective regime for anti-cartel enforcement, enjoying substantial legitimacy across the Union.

above. These settlement agreements would then be confirmed by the independent tribunal. In this much more adversarial procedure, it is very unlikely any member of the cartel would both indicate it intended to openly defend a prosecution and seek a fine reduction.

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Appendix. Recommended reforms to Regulation No. 1/2003

As suggested in the paper, a number of reforms are proposed to the Leniency and Fines Notices. This appendix outlines the principal reforms proposed to Regulation No. 1/2003:

- 1) amending Art. 19 to provide for sanctions for incomplete or inaccurate statements made in the course of oral statements to the Commission;
- 2) limiting damages payable under Art. 101(1) TFEU (ex-Art. 81(1)) by a holder of confirmed immunity under the Leniency Notice. This may be structured in a number of ways, such as directly by way of removing of any joint and several liability, together with an immunity to any damages; setting a smaller limit on the interest paid; and granting the leniency applicant the right to counter-sue against the other members of the cartel for recovery of damages paid;
- 3) permitting the clawback of foreign damages for price-fixing in the national court of a member state where an EU leniency applicant has been forced by a foreign court to disclose evidence that was specifically requested by the Commission in pursuance of an EU leniency application;
- 4) introducing civil penalties against individuals, including civil fines and director disqualification, together with a power to exclude alien executives from Union territory;
- 5) extending the prescription period from 5 to 10 years for price-fixing cases;
- 6) creating a maximum limitation period for recidivism of 10 years. Therefore, after 10 years a penalty becomes spent;
- 7) introducing separate contentious procedures overseen by an independent judicial panel for price-fixing cartels. These procedures would provide for the prosecution of price-fixers in open court by the Commission, along with the establishment of an appointments board to select the members of the judicial panel, with formal nomination by the Commission and confirmation by the European Parliament;
- 8) establishing powers for the independent panel to provide for a pre-inspection warrant procedure, as well as other ancillary matters to do with investigation and operation of the contentious procedures; and
- 9) providing for a confirmation procedure for any decision by the independent panel by the Commission. This decision would be capable of being challenged before the EU General Court.

Powers would be attributed to the independent panel to rule on the civil liability of price-fixing defendants and to make awards to victims.

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