Studienvereinigung Kartellrecht Conference
14 March 2012, Brussels

Recent developments regarding the Commission's cartel enforcement

Alexander ITALIANER
Director General
Directorate General for Competition
European Commission

Introduction

Ladies and Gentlemen,

I always look forward to this annual tradition of participating in the Studienvereinigung Kartellrecht Conference and would like to thank Frank Montag and the Board members for inviting me again.

Over the last year we have maintained our strong anti-cartel enforcement activity and 2011 has also seen a steady flow of immunity applications, covering a range of European and global cartels in different industries. In the period 2010-2011 we concluded 11 investigations against 83 corporations and the fines imposed amounted to 3.5 billion Euros. Today, I will talk about a selection of issues related to cartels, in light of the Commission's and the Courts' recent practice.

I will begin with a few words on the EU administrative competition law enforcement system; will then refer to our fining policy, as well to the progress made recently with cartel settlements; I will end on the relationship between actions for damages and our leniency policy.

1. The EU administrative system

I think we made a lot of efforts to improve the transparency, accountability and efficiency of our enforcement system in the last two years. The system did not have any major flaws, but we listened carefully to the debate on due process that had been opened by some of our stakeholders.

We went through this reality check and fine-tuned those aspects that could be improved, taking into account the suggestions of many of you, which resulted in the Antitrust Best Practices package which was finally adopted in October last year.

In essence, the EU enforcement system is anchored in the rule of law and fundamental rights. Without any false modesty, it is an excellent system and we have made it even better. And the last few months have been a confirmation of this stance.

Recent case law confirmed what we had always defended, which is that our administrative enforcement system complies with Article 6 ECHR and that the European Courts provide a thorough and effective review of our decisions in the competition policy area, including as regards the amount of the fines imposed.

Take, for instance, the landmark *Menarini* ruling of the European Court of Human Rights of last September, which related to a challenge of a fine of €6 million imposed by the Italian competition authority. The company Menarini alleged that the authority could not combine the role of investigator, prosecutor and adjudicator. The same challenge is also often brought against the Commission.

The European Court of Human Rights ruled that the Italian antitrust system is compatible with Article 6 ECHR on the right to a fair trial. A key element for the analysis of the Court in Strasbourg was that the Italian courts had 'full jurisdiction' to review the NCA's decision. And

because the institutional set-up of the Italian competition authority is so similar to the Commission's, this judgment came as a welcome indication that the EU institutional framework is sound.

Similarly, we welcomed in December the judgments of the European Court of Justice in the *Chalkor* and *KME* cases.

The ECJ held that when ruling on appeals against Commission competition decisions, the judicial review carried out by the General Court complies with the principle of effective judicial protection under the EU Charter of Fundamental Rights.

The ECJ acknowledged that the review by the EU Courts involves a review of both the law and the facts. This means that Courts have the power to assess the evidence, to annul the contested decision and to alter the amount of the fine.

These rulings further clarified that the EU Courts cannot use the Commission's margin of discretion in complex cases as a basis to dispense with an in-depth review of the law and the facts.

As far as the Commission is concerned however, these recent developments should allow us to put to rest institutional debates and concentrate on our core business - on enforcing the law. In that context we are pleased to see that despite their meticulous scrutiny of our decisions, the EU Courts in the 80 or so judgments they issued in 2011 upheld to a large extent the majority of our decisions.

And this brings me straight to the second set of issues I wanted to discuss: our fining policy.

2. Fining parameters: enforcing the rules in light of recent jurisprudence

2.1 Basic principles of fine-setting

What is the starting point for setting a fine, what principles lay at the root of the fines that we impose?

The first step is to think about what fines are here for. Fines should be punitive, because the offender should pay for his illegal behaviour. They should also strongly deter the infringer from ever repeating the infringement. Through a fine, potential other offenders should also receive a clear message which is "do not even think about doing that too".

But companies are pragmatic creatures; what they go after is profit, and rightly so.

This means that companies will *only* be deterred if the sanction exceeds the gain they expect to derive from the infringement, given the risk of being caught and fined.

So in order for a fine to be deterrent, it must be related to the *ex ante extra profit* that the company *expects* to gain from the cartel and *not* to the profits that it *actually* gained.

In practical terms, it would be almost impossible for any competition authority to properly quantify the expected gains of a particular cartel.

Instead, an efficient, transparent and deterrent sanctioning system would require the enforcement agency to identify upfront and in general terms the level of *ex ante* profits associated with a particular type of competition infringement. And this is exactly what the Commission has done through its Fining Guidelines.

Our basic principle is that serious, long lasting breaches that affect a high value of sales cause more harm to the economy than other practices.

Cartels are clearly one of the most serious competition law infringements, which is why we apply a gravity percentage of between 15-30% in cartel cases. Of course, the exact figure varies depending on a number of factors, including the type and the scope of the cartel, the combined market position of the cartelists and the way the cartel functioned.

Precisely because cartels are so harmful by their very nature and through their mere existence, we stand firmly on our position and fine them accordingly. Of course, not all cartels are the same. And our Fining Guidelines allow us to take the different facets of individual cartels into account when deciding the appropriate gravity percentage. We can also increase or reduce the fine depending on the role of the individual participant.

We welcome the fact that the Court has now endorsed the key elements of our fining policy introduced by the 2006 Fining Guidelines in the three cases it has examined, *Sodium Chlorate*, *International Removers* and *Chloroprene Rubbers*. This strengthens our position further and consolidates legal certainty.

For example, the Court confirmed the use of cartelised sales as the basis for the fine calculation; it stated that the gravity percentage for cartels should be above 15%; that the fine can be increased by 100% for each year of participation; that we can use the "entry fee" for cartel cases; and that the fine can be increased by 90% for a multiple repeat offender.

The Court has also confirmed, in the *Elevators and Escalators* case, that the way we impose fines is in line with the principle of legality of penalties as laid down in Article 7 of the European Convention of Human Rights.

In addition to these elements, there are some other important concepts from recent jurisprudence linked to fines that I would also like to highlight.

2.2 Parental liability

One of these issues is parental liability.

The EU Courts have last year fully confirmed the legality of the so-called "parental liability presumption". By virtue of this principle, the Commission is allowed to presume that a parent company that holds 100% or close to 100% of the shares of its subsidiary has actually exercised decisive influence on that subsidiary's conduct and that therefore these entities constitute one single undertaking.

It is then up to the company to rebut this presumption by submitting sufficient evidence showing that the subsidiary behaves independently on the market.

The purpose of this provision is not to impose the highest possible fine. It reflects the fact that at the end of the day, it is the undertaking as such - and not only the subsidiary - that is responsible for the infringement and that pockets the benefits of the cartel. And, in line with our overall objective of deterrence, this approach, together with that on recidivism, should spur undertakings to roll out compliance programmes throughout the group. In the absence of this provision, it would be far too easy to escape a deterrent fine through intricate company-internal constructions.

The General Court made it clear in the *Elevators and Escalators* case that this principle of rebuttable presumption does not run counter to the presumption of innocence laid down in Article 6 (2) of the European Convention on Human Rights.

So the principle has been confirmed, but the Courts find that sometimes we do not sufficiently substantiate our arguments in practice. This is what happened in the three cases where the Courts annulled the Commission's parental liability findings on the ground of insufficient reasoning when we had rejected the rebuttal attempts made by the parties.

We have of course taken careful note of the Courts' concern. In fact, in our more recent decisions we have already taken extra steps to ensure that the reasons for rejecting the rebuttal arguments are clearly spelled out and thoroughly reasoned.

By contrast, in some recent cases the Courts found that our level of reasoning was sufficient and rejected the appeals, including the most recent ECJ order on Total/Elf Aquitaine's appeal in the *Methacrylates* cartel.

We are also pleased to see that the General Court confirmed in two judgments that parental liability can also apply to a joint venture:

In *Fuji (Gas Insulated Switchgear "GIS" Case*), the Court held that the Commission had proven that two minority shareholders (each having 30% and 50%) had actually exercised decisive influence and management power on the joint venture's commercial policy. They could therefore be held jointly and severally liable with their joint venture.

In the *Chlorophene Rubber* case, this was very recently confirmed a few weeks ago for a 50-50% joint venture scenario. The judgment contains interesting points and Advocate General Kokott might come back to some of these in her presentation later today.

2.3. Recidivism

Allow me a word on recidivism too. The *Thyssen Krupp (Elevator/Escalators Case*) judgment seems to establish a new general principle.

According to this principle, the Commission can use recidivism as an aggravating factor *only* when the parent company was an addressee of the earlier decisions.

The previous Michelin-test of 2003 simply required the Commission to show that the original decision could have been adopted against the parent. And this because the parent controlled the subsidiary at that time, and still did at the time of the new decision.

We have noted, however, that in another judgment in the *Shell* case, rendered the same day as the *Thyssen Krupp* judgment, the General Court confirmed a recidivism uplift, although the legal entity in that case was not an addressee of the previous Commission decision.

In order to have more clarity on this point from the ECJ, we have cross-appealed the *Thyssen Krupp* judgment.

3. Settlements: an evolving practice

I will move to a different topic now: our evolving practice with cartel settlements.

We have adopted five settlement decisions since the procedure was introduced, and a number of other cases are currently being handled. The very first Commission settlement decisions were adopted in 2010 in the *DRAMS* and *Animal feed* cases. We then gained more experience with the three settlement decisions adopted last year, *Consumer Detergents* , *CRT Glass* and *Refrigeration Compressors.*

The three 2011 cases helped us to further streamline the settlement process and set the procedural standard for the next cases. The practice will of course evolve through further experience.

So what makes a successful settlement? What have we learned with these first cases?

To start with, we learned that companies are generally very interested in following the settlement route. As one of the settling parties in a recent case said, settlement allowed them to deal with the infringement quicker, put the cartel behind them and move on to a more positive corporate environment instead of having to pursue a case in the Court for years. So for businesses, this is an attractive alternative to the traditional cartel procedure.

Settlements actually account for more than 30% of the total amount of cartel fines imposed so far under VP Almunia's mandate. We are now seeing companies starting to approach the Commission proactively to express their interest in a possible settlement.

We wanted to increase efficiency with the new settlement tool, and this aim has been accomplished.

In particular, there is far less drafting work, as evidenced by a simple comparison with traditional cartel cases, such as *Car Glass* or *Heat Stabilizers*, where the decisions ran to hundreds of pages. Our settlement decisions ranged on average between 20 and 40 pages.

We also wanted to shorten the length of the proceedings and reduce the number of appeals. For example, decisions such as *Pre-stressing Steel* and *Bathroom Fittings* generated more than 40 separate appeals. Even though settlement decisions can be appealed, this is less likely because under a settlement the parties expressly and unequivocally acknowledge their involvement in the cartel.

We have also learned that some cases are not suitable for settlement and that cases must be properly screened before entering into settlement.

Past cases have taught us that many elements need to be considered from the outset: the number of undertakings involved and their expected interest in settling quickly; the number and proportion of successful leniency applicants; foreseeable conflicting positions of undertakings on attribution of liability; the potential impact of aggravating circumstances, and so on.

I must also point out that settlements are not an investigative shortcut. A thorough investigation, before the settlement process starts is essential. This allows us to better scope the case and deal efficiently with issues that arise. In the same vein, settlements are not bargains on fines – they are built on factual evidence. Companies should not forget this point.

Finally, we have learned that both sides need to be very committed to the process. A settlement is much more intensive than a normal procedure, requires a more pro-active attitude from both sides and must be built on trust and good communication between the Commission and each party.

For example, a company in a recent case stated that the Commission's availability and readiness to discuss issues and concerns without any delay is extremely important in settlement. From our perspective, the same requirement applies to companies. As concrete experience shows, urgent and complex issues do come up in settlements on a daily basis. And I also stress here that the Commission is careful to treat the companies fairly and equally.

Under the EU Settlement Notice the companies benefit from a 10% fines reduction. It is sometimes questioned whether this is a sufficient incentive for companies to settle. However, it must not be forgotten that settlements also offer other advantages than just a fine reduction.

Companies benefit from a streamlined decision and clear savings in process, litigation and defense costs. The settlement route provides companies with an "exit" route which is a major advantage in terms of corporate governance. On the basis of our experience in these five settlement cases, companies have indeed recognized and appreciated these overall benefits.

4. Continued importance of the leniency policy

Before I close, I wanted to mention the relationship between our leniency policy and actions for damages, an issue that was also debated at length in the last months.

The issue of the interface between public and private enforcement has received particular attention in the last year, notably due to the *Pfleiderer* judgment of the Court of Justice. This interface is particularly complex when it comes to access to evidence held by competition authorities.

Evidence is indeed crucial for the enforcement work of competition authorities, and for private damages actions as well.

Claimants in damages actions often find it difficult to obtain the information and evidence they need to substantiate their claims. At the same time, proper protection for leniency programmes is absolutely crucial for the detection and the investigation of secret cartels. So we need to find a balance between the need to guarantee effective civil redress for victims, and the need to protect leniency programmes. Given the secret nature of a cartel, it goes

without saying that an effective public enforcement is a prerequisite for any private enforcement since most private actions follow on from decisions of competition authorities.

The Commission's position is that the specific characteristics of corporate leniency statements – which are especially prepared for the purposes of the leniency application – must lead to a special kind of protection, different from that afforded to pre-existing documents.

We have held this policy line for a long time and we believe it strikes the right balance between the different interests. In this respect we are pleased that the Amstgericht Bonn on 18 January, following the *Pfleiderer* judgment of the Court of Justice, refused access to such leniency statements.

Of course, we want to make sure that this policy is effectively implemented. The most secure way to do this would be through rules applicable in all procedures and ensuring the right balance in the entire EU.

This is why the Commission has included a legislative proposal in its Work Programme for this year, seeking to clarify the interrelation of private actions with public enforcement by the Commission and National Competition Authorities, in particular as regards the protection of leniency programmes.

Close

To sum-up, I have chosen to speak about a selection of issues related to cartels today because cartels unfortunately continue to be a reality. The Commission and National Competition Authorities uncover new ones constantly.

As competition law enforcers, cartel behaviour is not something we can tolerate. I can assure you that our strict enforcement policy will not change, especially in these difficult economic times when cartels impose an extra cost on consumers and on the companies that play by the rules.

If I may use a traffic analogy that we have used in our recent brochure on compliance with competition rules, I count on you to counsel your clients judiciously and advise them to "drive safely", and in case of bad driving to resort to the leniency notice. I hope companies and their advisors will take the advice.

Deleted: If I may use a traffic analogy that we have used in our recent brochure on compliance with competition rules,

Thank you.