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Assessing the Effectiveness of Competition Law Enforcement Policy in Relation to Cartels

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ABSTRACT

Despite the high fines for cartel infringements it is claimed that the current competition law enforcement lacks deterrent effect for the avoidance of cartel infringements and is procedurally fragile. This article analyses the current competition law enforcement policy in relation to cartels. More specifically, the article assesses the effectiveness of the policy in deterring the formation of cartels and pursuing the goals of competition law by analysing the theory of deterrence, case law, procedural norms, imposed fines and academic literature. The main conclusions are that wrong targets are aimed at under the deterrence principle, the proceedings are of a criminal law nature and require a separation of powers, and that the current level of fines does not pose a threat on the economy and continually fail to deter price-fixing.

Key words: Article 6 ECHR, Cartels, Competition law, Criminal proceedings, Deterrence.

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1.0 Introduction

A competitive market is the source for economic growth and increased efficiency by enabling resources to flow freely within the European Union. It is the force behind lower prices, improved quality and innovation, increasing the competitiveness of European industry in the world market and enabling the strive towards the ultimate goal of welfare maximisation.

The European Commission (hereinafter Commission) has been granted wide powers under Regulation 1/2003² to maintain undistorted competition by ensuring compliance with Article 101 of Treaty on the Functioning of the European Union (hereinafter TFEU)³ on the prohibition of concerted practices. The Commission investigates only the most ‘hard-core’ international cartels. Investigations can be started on the Commission’s own initiative, on complaint or based on a leniency application under which the first participant of the cartel to ‘blow the whistle’ to the Commission receives total immunity. The collected evidence and proposed remedy are presented to the accused in a ‘statement of objections’. The accused can access the investigative file and had an opportunity to reply in writing and at an oral hearing. The decision is adopted by the College of Commissioners on the recommendation of the Competition Commissioner.

The anti-cartel enforcement is based on the theory of deterrence. The objective of the theory is to deter undertakings from creating a cartel in the fear of the potential fine. The calculation of the fine is explained in the Guidelines on the method of setting fines with the current one been revised in 2006 (2006 Guidelines).⁴ The calculation procedure can be divided into two stages, for in the first stage the basic amount being calculated. The basic amount is linked to the undertaking’s annual turnover in the relevant product market, taking a proportion of up to 30% depending on the gravity of the infringement. Thereafter, to reflect the duration of the infringement the amount is multiplied by the number of years and as an ‘entry fee’ a proportion between 15% and 25% of the annual turnover of the relevant product market is being added. In the second stage the basic amount will be adjusted taking into account aggravating (such as recidivism with up to 100% increase, obstruction of investigations or being the instigator of the cartel) and mitigating (such as termination of the infringement with the start of investigation, limited role in the cartel or anti-competitive conduct being authorised by national measures) circumstances. Furthermore, the Commission may increase the fine to ensure sufficient deterrent effect as far as the total fine will not exceed the upper limit of 10% of the undertaking’s global annual turnover, or alternatively reduce it taking into account the undertaking’s ability to pay.

Despite that the highest fines for cartel infringements exceed 700 million euros per undertaking and within the last decade the Commission has experienced an increase in the number of cases decided, it is claimed that the current competition law enforcement lacks deterrent effect for the avoidance of cartel infringements (Hodges 2011; Motta 2008; Veljanovski 2007) and is procedurally fragile (Möschel 2011; Forrester 2009; Riley 2010). The purpose of this article is to assess the effectiveness of the current competition law enforcement policy in relation to cartels. More specifically, assess the effectiveness of the policy in deterring the formation of cartels and pursuing the goals of competition law. I do acknowledge that it is impossible to objectively assess the effectiveness of the policy as it is unknown how many cartels exist in reality, how many have ceased to exist or have not been formed due to the created deterrence. Therefore, the assessment as to the effectiveness of different approaches is subjective, mainly based on philosophical reasoning, logic and guesswork.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1 (hereinafter Regulation 1/2003).

³ Article 101 TFEU on the prohibition of cartels provides that ‘...agreements, [...] decisions [...] concerted practices [...] which have as their object or effect the prevention, restriction or distortion of competition’ shall be prohibited as incompatible with the common market.

⁴ Guidelines on the method of setting fines imposed pursuant to art. 23(2)(a) of Regulation 1/2003 [2006] OJ C210 (2006 Guidelines).

The article creates an overview of the problems undermining the enforcement of competition law by analysing the theory of deterrence, case law, procedural norms, imposed fines and academic literature. The main conclusions of the article are that wrong targets are aimed at under the deterrence principle, the proceedings are of a criminal law nature and require a separation of powers, and that the current level of fines does not pose a threat on the economy and continually fail to deter price-fixing. Furthermore, it is claimed that for the enforcement policy to be more effective and legitimate a separation of powers is needed and that individual penalties along with imprisonment should be introduced.

The article can essentially be divided into two parts followed by a conclusion. In the first part the effectiveness of the current anti-cartel policy is assessed. This is done by analysing the theory underlying enforcement; thereafter the enforcement procedure and the means of enforcement, i.e. the fines, will be assessed. In the second part of the article possible solutions and alternative approaches are offered to tackle the issues raised in part one. It is claimed that for the enforcement policy to be more effective and legitimate a separation of powers is needed and that individual penalties along with imprisonment should be introduced.

2.0 Effectiveness of Current Anti-Cartel Policy

The Commission's competition law enforcement involves a number of issues which require attention for the increase of effectiveness.⁵ In this part of the article the current anti-cartel policy will be analysed. First, the theory underlying enforcement, second, the enforcement procedure and in the last section the means of enforcement, the fines, will be assessed.

2.01 Deterrence Based Enforcement - Aiming at wrong targets

The purpose of competition law enforcement is to ensure that competition on the market is not distorted (Hodges, 2011).⁶ To pursue that aim the theory of deterrence is followed to regulate the performance of the competitors. The theory of deterrence relies on rational economic reasoning of companies (Hodges, 2011). It expects a decision on whether to infringe the competition law to be made upon *ex ante* calculations weighing the 'possible future profits' gained by disobeying against the 'possible fines' that could be faced, taking into account the probability of being caught. By increasing the fines the balance between the factors moves towards the 'possible fines', reducing the profitability of the violation, which will not go unnoticed by the actors and will have an effect upon their behaviour. The underlying logic could be described as the higher the fine, the bigger the deterrence.⁷

However, the decisions of undertakings are made by individuals who can act irrationally or the rationality of the decision hides in different goals of self-interest rather than the overall economic rationality of the company. Employees of a company may take decisions which represent their interests, for instance, through a bonus pack or promotion, and are rational from their viewpoint, while from the company's perspective they may be irrational. The balance on the possible profits against possible fines scale may be totally in favour of the latter, which indicates that companies' behaviour may not be solely based on calculations and rational economic reasoning but individual desires. For addressing the latter concentrating on psychological or sociological behaviouralism might prove more beneficial, in terms of deterrence, than the economic theory in determining the level of penalty.

⁵ For the purposes of this article 'competition law' is used as referring to competition law in regards to cartels, despite that at times the issues overlap and the term could also cover the abuse of dominant position, merger control and state aid.

⁶ Recital 1 of Regulation 1/2003, states the purpose to be 'to establish a system which ensures that competition in the common market is not distorted'. Hodges (2011: 285) while referring to K Yeung, W Wils, RH Lande and EM Fox in footnotes 133, 134, 135 and 136 respectively, states the purpose of modern competition law 'to be the promotion of economic efficiency by facilitating competitive markets (...) with (...) associated goals (...) to protect consumer choice or sovereignty, or to preserve competitive structure and open market values' (emphasis added).

⁷ Nonetheless, one should not forget that fines need to be in proportion with the committed offence.

Therefore, an increase of the fines against the company would not have the expected growth in the level of deterrence.

This is not to say that the deterrent effect will not improve at all because of greater fines. Provided that at the shareholder or executive level incompliance is not considered attractive, it seems reasonable to expect that the higher the potential fines the greater internal controls will be imposed by a company to ensure compliance with the competition law and with greater internal control the probability of discovery is higher. Nevertheless, the company's success-rate in controlling its internal operations is questionable for two reasons. Firstly, the company's surveillance team will be faced with the complexity of detecting a cartel just as the European Commission is. Secondly, an adequate surveillance system intended to ensure compliance through internal system control, reports and sanctions on employees might appear ineffective in creating the *ex-ante* incentive or the *ex-post* deterrence on the behaviour of the employees. It is very difficult to identify or control behaviour as the individuals' incentives of bonuses, promotion or even continuation of employment may outweigh the risk of discovery and the imposed sanctions (Hodges, 2011). Even if the employee's incentives do not outweigh the disincentives in economic sense, momentary financial pressures or social desires might push the employee to act irrationally with short-term personal perspectives in mind. Thus, it seems that the imposition of fines on the companies in the name of deterrence will not produce the desired outcome of the compliance rate, provided that the fines are not that high as to threaten the existence of the firm or have any other indirect effect on the actions of individuals (Hodges, 2011).⁸

Christopher Hodges raises a hypothetical question whether in a fight to encourage fierce and lawful competition between companies, can these "macro-effects" be achieved by concentrating only on the "macro-level" actors as such? (Hodges, 2011: 274). It can be implied from the above paragraphs that for higher compliance the enforcement targets that are being addressed under the deterrence theory should be revisited. Aiming at the corporate entities is not wrong but the individuals who make the decisions should not be forgotten (Wils, 2006).⁹

2.02 Procedure and the ECHR

The Commission has been granted powers of investigation, prosecution and adjudication, in regards to competition law, under the Regulation 1/2003. Therefore, the institution acts as a police, judge and a jury. Since the late 1970s, cases have been brought before the European Court of Justice raising human rights arguments, such as right to a fair hearing by an independent tribunal, against the Commission's powers in dealing with competition law matters.¹⁰ An appeal from an undertaking found guilty by the Commission, however, requires more Commission's resources to be spent on the case, which otherwise could be used for investigating new infringements increasing the effectiveness of the anti-cartel law enforcement (Harding and Gibbs, 2005).¹¹ In this section it will be argued that the competition law enforcement procedures are of a criminal law nature and thereafter the ambiguities surrounding the need for compliance with Article 6 of the European Convention of Human Rights (hereinafter ECHR) will be laid down.

2.2.1 Fines of a Criminal Law Nature

Article 23(5) of Regulation 1/2003 declares that the fines imposed by the Commission for antitrust violations are not 'of a criminal law nature'. However, when looking at the weight of the fines it is difficult to be convinced of their claimed administrative nature. 'The amount of the fines would not be a cause for criticism if they were confined to a disgorgement of the ill-gotten gains' but the major

⁸ Fines that heavy would raise problems of proportionality, fairness, constitutionality and have adverse economic effects.

⁹ Little or no disincentive exists for employees not to comply with anti-cartel law which is further exacerbated by the fact that companies are unable to adequately control the behaviour of their employees (Wils, 2006: 267).

¹⁰ C100-03/80 *SA Musique Diffusion française and others v Commission of the European Communities* [1983] ECRv 1825.

¹¹ From 1995-2004 of 16 cartels with 217 participating undertakings 153 appealed to the CFI and 47 subsequently appealed to European Court of Justice (Harding and Gibbs, 2005: 364-65).

element of the fine is the deterrent part (Möschel, 2011). The deterrent effect is the reason behind the increase of the fines and it has been asserted that the fines will be further increased until cartels cease to exist (Kroes, 2009).¹² It is easy to imply that the calculations are not primarily based on considerations of compensation but of deterrence and can only be explained in terms of sanction (Möschel, 2011).

‘If the legal sanction imposed for breaching a rule has the principal objective of deterring future violations, where the violation of that norm is generally perceived as inherently “bad” or contrary to the common values shared in a democratic society, and where the norm is generally addressed to an undefined group of persons, a “criminal charge” under Article 6 ECHR would be involved’ (Forrester, 2009: 827).

The above quote paraphrases the *Engel* criteria¹³, by which the European Court of Human Rights (ECtHR) has decided the type of a charge. The designation as administrative in legal instruments is not decisive in itself, but the nature of the offence and the nature and severity of the sanction are.

The importance of the severity of the fine, in regards to the nature of it, was stressed in a recent case of *Dubus v France*¹⁴ by the ECtHR. The Court stated that as the fine was so severe as to affect the credit of the company, involving undeniable consequences on the undertakings capital, the fine was a criminal charge for the purpose of Article 6(1) ECHR. The Court further added that the nature of the punishment depends on the size of the *potential* fine, not on the size of the fine imposed (Forrester, 2009).

Based on the *Engel* criteria and supported by the *Dubus* judgement, it seems difficult to claim that the Commission’s sanctions are not of a criminal law nature (Forrester, 2009).¹⁵ Article 101 TFEU on the prohibition of cartels applies generally all over the Community with a general objective of maintaining a competitive market. And as described above the fines carry a deterrent effect and are very severe and undeniably affect the credit of the company, which can be reflected from the number of inability-to-pay applications (Veljanovski, 2010).¹⁶

2.2.2 Compliance with Article 6 ECHR

Article 6(1) ECHR sets out that ‘everyone is entitled to a fair and public hearing’ before ‘an independent and impartial tribunal established by law’ to determine the civil rights or obligations or a criminal charge. However, for the purpose of efficiency and flexibility the ECtHR has created an exception allowing minor and disciplinary offences to be heard at first instance without the need of fulfilling the Article 6 ECHR requirements, provided that the decision can be challenged before a judicial body which has full jurisdiction and provides full guarantees of Article 6(1) ECHR.¹⁷ The current competition law enforcement procedures satisfy this condition as participants of a cartel that have been found guilty by the Commission, can lodge an appeal before the European General Court which offers full guarantees of the ECHR and will comprehensively review the decision. However, the reasoning for the exception, allowing minor offences to be dealt by a non-Article 6 ECHR compliant body, is to leave flexibility to the states not to burden their courts with the prosecution and adjudication when dealing with a ‘great

¹² ‘Fines were not deterrent in previous decades. Just think about that for a moment... year after year we would catch a cartel and impose a fine that would have little or no effect on a company’s incentives. What is the point of that? Now, taking better account of the economic impacts of abuses and cartels, we fine in order to deter, linking the fine to the relevant sales of the infringing company. If we catch recidivists – the French glass company Saint-Gobain is a good example – the fine increases are severe. So, in adopting a clear policy basis for deterrent fines and a focus on the most serious infringements of course the fines have increased!’ (Kroes, 2009).

¹³ *Engel and Others v Netherlands* (1976) 1 EHRR 647.

¹⁴ *Dubus SA v France* App no 5242/04 (ECtHR, June 11 2009).

¹⁵ ‘[T]he notion that the Commission’s fines are administrative and not criminal in nature, set forth in Regulation 1/2003, sits uncomfortably with the notion of a criminal charge as defined by the European Court of Human Rights, which depends to a large extent on the nature of the offence and the nature and severity of the penalty’ (Forrester, 2009: 826).

¹⁶ Between 2008 and 2010 46 inability-to-pay applications were submitted. Inability-to-pay was granted in 13 instances (Veljanovski, 2010: 18).

¹⁷ *Le Compte, Van Leuven and De Meyere v Belgium* App no 6878/75; 7238/75 (ECtHR, 23 June 1981) [51]

number of minor offences', such as traffic offences or tax surcharges.¹⁸ It would seem difficult to fit the anti-cartel enforcement under the exception as the Commission decides no more than eight cartel cases per year with a surfeit of around 60 cases (Riley, 2010).

On the other hand, in a more recent case of *Jussila v Finland* the Court stressed that the determination of a 'criminal charge' by the *Engel* criteria has resulted in the 'gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law... [like] [t]ax surcharges [which] differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency.'¹⁹ Based on the judgement it appears that two types of cases exist; cases involving the hard core criminal law to which the Article 6(1) ECHR applies in its entirety, and other non-traditional criminal cases to which the criminal-head guarantees of Article 6 ECHR will not necessarily apply with their full stringency (Wils, 2010; Agerbeek, 2010). Riley accepts that the Court judgement seems to permit criminal penalties to be imposed at first instance by an administrative or non-judicial body, but claims that based on the judgement it cannot be concluded that the Commission's procedures are compatible with Article 6 ECHR (Riley, 2010). He believes that because of Commission's extensive and detailed procedures prior to adjudication it is far more similar to the substantive role of the General Court, which has to comply with Article 6(1) ECHR, than the adjudication of a tax surcharge or traffic offence (Riley, 2010). As no criteria was provided to determine whether a case is subject to hard core criminal law Felix Agerbeek presumes the decisive factors of the test to resemble the *Engle* criteria or at least will be founded on the same underlying logic (Agerbeek, 2010). In the views of the current writer, this would bring us right back to the same conclusion made before the *Jussila* judgement, especially because of the severity of the fines imposed by the Commission.²⁰

2.03 Fines and Inability to Pay

Under the 2006 Guidelines the fines for cartel infringements have increased immensely. In the period of 1990-1994 11 cases were decided with the fines totalling to more than €344 million giving the average fine per cartel case of €31 million, whereas in 2005-2009 33 cases were decided with the fines totalling to more than €8.93 billion with an average fine of €270 million per cartel case.²¹ Based on these calculations the fines have increased nine times since the first half of the 1990s. With fines more than a billion euros, the Commission's anti-cartel practice has understandably caught attention from the media as well as the academics, business people (shareholders, executives etc) and lawyers who criticise the situation.

It is feared that the heavy fines imposed by the Commission might result in companies increasing their product prices to recover the cost of the fine or possibly not being able to pay at all and going bankrupt (Motta, 2008). For survival an undertaking might need to downsize or close its operations and dispose some assets. It could also affect the companies' ability to borrow money, due to the great loss of financial assets, and invest in future profitable projects. All the above would have an adverse effect to

¹⁸ *Öztürk v Germany* (1984) 6 EHRR 409 [56]: 'Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6'.

¹⁹ *Jussila v Finland* (2007) 45 EHRR 39 (emphasis added).

²⁰ One should not forget that the upper limit of the fine has stayed the same since 1962 and in the case of *Dubus* (n13) it was stated that it is the potential fine that is of importance for the determination of the nature of the fine, not the actual fine imposed. From that point of view the current writer believes there to be no change in the severity of the anti-cartel fines since 1962. This further presents the uncertainty surrounding the issue.

²¹ Commission, 'Cartel Statistics' (Last update 2 April 2014). <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 30 August 2013; I do understand that the amount of the fine per cartel depends on the number of participants fined. The statistics provide us with a number of decisions made by the Commission which can give us an approximate idea of the number of undertakings being fined. In the period of 1990-1994 and 2005-2009 the numbers of decisions made by the Commission are 185 and 205 decisions, respectively. However, as these numbers also include the immunity applicants who were not fined and in cases where the decision was imposed on a group consisting of more than one legal entity the group has been counted as one, for calculating the average fine per undertaking based on the number of decisions made would not provide a commendable result.

the general economy and would not pursue the overall goal of the competition law to maximise welfare.

In this section I will assess the Commission enforcement policy's effectiveness towards the achievement of the primary goal of welfare maximisation by analysing the possible effect of the Commission imposed cartel fines and thereafter examining if the increase of fines has been enough to deter price-fixing.

2.3.1 Recovery of Fines through Increased Prices

In regards to the fear that undertakings will recover the fines through higher prices, it conflicts with the standard economic logic whereby fixed sunk costs, of which the paid fines would form part of, will not alter the optimal price decisions, which are based on the marginal cost and profitability. Motta exemplifies this point as follows (Motta, 2008). Let us imagine that company X sells a product Z and faces three possible customers A, B and C, each of whom can pay £1, £2 and £3, respectively, for the product Z. For the sake of argument the price has to be the same for all customers and the marginal costs for producing Z are zero. If X decides to price the product Z £3, only C will be able to buy the product and X will make a profit of £3. With a price of £1, all three customers will be able to purchase, giving X a profit of £3. The optimal choice would be a price of £2 as in this case B and C both will purchase the product and X would make a profit of £4. The optimal choice does not depend on whether the undertaking has millions of pounds in cash or no cash at all. Therefore, the price of the product will not depend on the size of the imposed fine; rather the price is set by following standard economic reasoning.

The above argument can be further supported by the fact that if a cartel is discovered through a leniency program, then there exists an asymmetry in the financial circumstances of the different members of the cartel. The 'whistle-blower' will not be fined and thus has no reason to increase the product price. This will restrain the competitors from increasing the price. Even if none of the participants is granted immunity and are all charged, the Commission's decision has broken up the cartel and the firms cannot rely on their price increase being followed by other producers anymore. Although, at first the explicit collusion may be replaced by tacit collusion, but once a demand or supply shock affects the industry the lack of co-ordination will disrupt the remaining collusion and drive the prices to a competitive level (Motta, 2008).

In addition, from an empirical point, a study has revealed that the announcement of a dawn raid, an infringement decision and a court judgement supporting the decision affect the undertakings market value negatively by 2%, 3.3% and 1.4%, respectively (Langus and Motta, 2007; Langus et al, 2010).²² As can be seen, the court judgement confirming the decision affects the value of the shares the least. From this fact one can imply that the fine itself has the least negative effect on share value. The most of the decline of the share value seems to stem from the market's prediction for the loss of future profits as the company will not be able to continue selling the product for the same price, not even taking into consideration a price increase (Motta, 2008).

2.3.2 Inability to Pay Resulting in Bankruptcy

Another fear concerning the heavy fines is that it might force firms to go bankrupt. Instead of enhancing competition, for being the purpose of antitrust law, it would have an opposite effect. With fewer competitors the market structure is more concentrated leading to less competition and higher prices. It would be a loss to the general economy and society. However, the EU competition commissioner Joaquin Almunia submits that no company will be fined more than they could pay, which

²² Under the more recent draft paper of 18 May 2010, the study reveals the market valuation drop for a dawn raid being between 1.9% and 4.8%, for Commission's infringement decision 3.6%. A Court judgement upholding the decision affects the market valuation of the firm between -0.51 and +0.43 (Langus et al, 2010: 15).

is in all cases automatically safeguarded by the 10% annual global turnover limit (Gray, 2010).²³ Should the limit be reached the fine will be reduced to a certain level before any lenience discounts get applied?²⁴

In addition, a second safeguard exists giving the Commission discretion to reduce the fine if the company can objectively prove its inability to pay the fine.²⁵ Almunia has assured that every inability-to-pay application from a company facing difficulties will be carefully assessed as the DG Competition's policy is to 'ensure that no company goes bankrupt because of a fine imposed by the commission' (Gray, 2010: 3). For the inability-to-pay claim to be accepted the company needs to present 'objective evidence' that the fine would 'irretrievably jeopardise the company's economic viability and cause its assets to lose all their value.'²⁶ It is interesting to note that a participant in the *Calcium Carbide* cartel²⁷, a chemical company *Novacke Chemicke Zavody*, filed an inability-to-pay application, after being imposed a fine of €19.6 million, which was rejected by the Commission. Shortly after the rejection, on the 7 October 2009, the company declared bankruptcy (Forrester et al, 2010). However, the success rate of inability-to-pay claims has now risen from 1 out of 5 claims (20% of all applications being successful) in 2008 to 9 out of 32 claims (28%) in 2010 (Veljanovski, 2010a).

Nevertheless, the true reason behind a firm's bankruptcy after receiving a fine for infringing the anti-cartel law may not be the high fine. It may well happen that the company after being caught is just too inefficient to cope with the conditions of a competitive market. Inefficiency also reflects from the fact that an undertaking is in financial difficulties despite having made excessive profits through cartel overcharges (Riley, 2010).²⁸ A disappearance of an undertaking that is too inefficient for a competitive market upholds the operation of a healthy market structure where the most efficient survive. It gives the companies a reason to invest and improve their products which benefits the society in general and consumers in particular. Protection of inefficient undertakings should not make part of an effective competition law enforcement policy.

Indeed, once the cartel has been disrupted and one or more companies have left the market, the relevant market would be more concentrated, however, it is very unlikely that the prices would be higher than the cartel prices previously (Motta, 2008).²⁹ In regards to concentration, first, the decrease of the number of firms in one industry might increase competition in another industry because of *ex-ante* deterrence effect generated by the fines (Buccirossi et al, 2009) and second, the bankruptcy would create an opportunity for new comers to buy the assets of the firm and compete on the market (Buccirossi et al, 2009).

2.3.3 Still too Low to Deter Price-fixing

Motta has carried out a simulation exercise to determine the level of fines which would cover the damage done to the consumers as well as include a deterrent effect against the formation of cartels. In brief terms he described the model to assume 'that firms set prices by adding a mark-up over marginal

²³ The 10% cap was introduced already in 1962 by the first implementing Regulation for competition enforcement (Regulation No 17). As the cap has stayed constant, from that perspective the possible level of fine itself has not increased (Gray, 2010: 4).

²⁴ It has been questioned whether the current 10% safeguard should be increased in the light of the increased fines under 2006 Guidelines. Research reveals that out of the 70 cartel participants fined between 2007-2009, slightly less than 9% had their fines reduced by the 10% safeguard. Under the 1998 Guidelines, slightly more than 9% of the 254 cartelists reached the limit. Therefore the safeguard limit has not been used more frequently under the 2006 Guidelines and there seems to be no need for the 10% cap to be increased (Connor, 2011).

²⁵ 2006 Guidelines paragraph 35 allows the Commission to take account of a company's inability-to-pay a fine.

²⁶ 2006 Guidelines paragraph 35.

²⁷ (Case COMP/39.396) Commission Decision 2009/301/EC [2009] OJ C301/18.

²⁸ Riley (2010: 206), nonetheless, claims that at the current bad economic conditions undertakings that are unable to pay the fine are often not failing companies but companies that operate in failing economic conditions.

²⁹ Motta (2008: 217), also brings a good example in regards to the feared price increase that even if a monopoly situation should arise because of the exit of the rivals and the cartel had been pricing optimally, then the monopoly price would be identical to the previous cartel price.

costs, and that when prices increase (because of the cartel), the demand will decrease according to a simple constant elasticity function.’ The gain from the cartel will depend on the increase of the prices as well as the loss of demand due to the price increase. Motta used parameters such as the competitive mark-up, price overcharge, demand elasticity and the probability for the cartel to be discovered. With the parameters being 50%, 15%, 0.6 and 15%, respectively, the simulation exercise suggests that to deter the formation of cartels the minimum fine should be 68% per year of the undertaking’s relevant market turnover. However, computing in accordance to the 2006 Guidelines, excluding the aggravating or mitigating factors, revealed a fine of 35% per year. It implies that the current level of fines is still too low to deter price-fixing. Nevertheless, as the parameters in the simulation exercise were based on examples and guesswork Motta admits that the results do not provide an optimal level of fine and as the aggravating factors under the 2006 Guidelines could multiply the fine several times, he submits that the current fines based on the 2006 Guidelines are ‘not of a significantly different order of magnitude than the optimal fines one could compute by conducting a simple simulation exercise’ (Motta, 2008: 213-15).

Cento Veljanovski believes that the ‘European Commission’s fines significantly under-deter price-fixing’ and that instead of the €3 billion collected in fines (calculated under the 1998 Guidelines) from the studied 24 cartels over €50 billion in fines should have been imposed to deter price-fixers (Veljanovski, 2007). His calculations were based on ‘an annual average overcharge of 20 percent, [assuming] that annual sales are constant at the end-period annual sales as reported in the European Commission’s decision, [...] losses attract compound interest at 4 percent,’ (Veljanovski, 2007: 79) and a conviction rate of one out of three cartels being successfully prosecuted. Even with a 10 percent overcharge the fines would have needed to be several times greater in order to achieve the deterrent purpose. Taking into account that the average fine per cartel (before leniency) has increased from €218 million (Veljanovski, 2010b)³⁰ under the 1998 Guidelines to €393 million (Veljanovski, 2010a)³¹ under the 2006 Guidelines (after leniency from €139 million to €323 million, respectively) the fines are continually far from the results proposed by Veljanovski. The difference stems from the calculation of the deterrence which he believes should be based on the *expected fine* principle. According to this a fine of €100 millions with a probability of prosecution being one out of three (33%) the *expected fine* is 33% of €100 millions, thus €33 millions. For an effective deterrence against cartels to exist the *expected fine* should equal the aggregate consumer loss. If the harm suffered is €100 millions, then with a probability rating of 33% the fine should be €330 million (Veljanovski, 2007).³² Despite his findings Veljanovski does acknowledge that the effectiveness of high fines depends on the undertakings ability to pay, for if the fines are too high for the undertakings to cope with it would not just result in bankruptcy but also fail to deter price-fixing (Veljanovski, 2007).³³

The suggestion for higher fines based on the simulation exercises is further supported by the number of repeat offenders. Out of 74 cartel cases where the Commission applied the 1998 Guidelines until the end of 2006, 17 cases involved a discovery of repeated violation by at least one undertaking, totalling in 28 repeat offending (Hodges, 2011). I am convinced that the current level of fines is continually too low to deter price-fixing.

3.0 Possible Solutions and Alternative Approaches

In this part of the article, I will bring out some possible solutions and alternative approaches to tackle the issues raised in part 2 to make the Commission’s enforcement practice against the formation of

³⁰ In calculating the average, the fines imposed after 2006 but still under the 1998 Guidelines have also been taken into account (Veljanovski, 2010b: 4).

³¹ In calculating the average only published decision have been taken into account, that is 13 decision until the end of 2010. By the end of 2010 the Commission had imposed fines on 22 cartels with an aggregate fine of €7.6 billion (Veljanovski, 2010a: 4-5).

³² In reality, however, it ‘is widely asserted within the competition world that only between 10% and 20% of cartels are detected in Europe’, which would increase the fine significantly based on the *expected fine* principle (Hodges, 2011: 270).

³³ Wils claims that fines would need to be above 150% of the companies annual turnover of the relevant product market in order to deter price-fixing (Wils, 2006).

cartels more effective. The claimed belief of increased effectiveness of the proposed measures stems from survey results. A survey committed by Beckenstein and Gabel, questioning US practitioners over the period of late 1950s to late 70s revealed the most powerful deterrence instruments to be the imprisonment and private damages actions (Beckenstein and Gabel, 1986). Feinberg's survey in the early 1980s exploring the effects of EU competition law policy on horizontal effects gathering the opinions of law practitioners in Brussels revealed a belief that high fines, private damage suits and individual sanctions would promote compliance (Feinberg, 1985). A recent survey by Deloitte in 2007 in the United Kingdom placed private enforcement, faster proceedings and criminal proceedings respectively on the 2nd, 3rd and 4th place in the 'increasing the deterrence the most in UK' ranking. The most effective in improving the deterrence was held by the respondents to be public awareness of the law (Deloitte, 2007).

3.01 Procedure

Although the uniqueness of the Commissions competition law procedure has been criticised since 1970s (Forrester, 2009),³⁴ Forrester finds there to be three reasons why the issue is becoming increasingly urgent these days (Forrester, 2009). First, as the enforcement of competition law has become more efficient, especially due to the Leniency Program but also because of the increase of human as well as financial resources, the number of cartels investigated and fined has tripled,³⁵ with the number of dissatisfied parties and their lawyers having the experience of protecting themselves in Brussels growing. Since the 2006 Guidelines the level of fines have multiplied and already passed a billion euro mark per cartel case with the highest cartel fine per undertaking standing at 896 million euros.³⁶ Understandably, this creates anger among the parties found guilty and raises an appropriate question if the procedures are apt for generating such responsibilities. Second, reflecting from the success of the Commission in regards to the competition law enforcement the Commission's practices need to be adequate and robust and able to convince the interested parties of its incapability of being politically influenced. The current processes fail to qualitatively meet the importance and prestige of the Commission in the competition law field (Forrester, 2009). Third, since the Lisbon Treaty the EU has acceded to the ECHR³⁷ and thus the Courts cannot diverge from the application of the ECHR by claiming that it does not from part of Community law.³⁸ The Commission's decision-making procedures have fundamentally stayed the same since their adoption in 1962 and are unable to satisfy the responsibilities placed on the Commission by the EC Treaty as amended. Forrester submits that 'the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR' (Forrester, 2009: 821).

In brief, the issue with the Commission's practice lies in the fact that the Commission acts as an investigator, prosecutor and adjudicator which possibly conflicts with Article 6 of ECHR right to a fair trial.³⁹ There is no public hearing before an independent person or body that would decide the guilt or innocence, as required under Article 6(1) ECHR, leaving the accused in an unfair state.⁴⁰

³⁴ In 1970 a German lawyer Alfred Gleiss complained about the Commission acting as a judge and a jury in setting a fine against his klient (Forrester, 2009: 819).

³⁵ According to the Commission's 'Cartel Statistics' the number of cartel cases investigated and fined has increased from 11 decisions in 1990-1994 to 33 in 2005-2009.

³⁶ *Car glass case* (COMP/39.125) Decision 2009/173/EC [2008] OJ C173/13, fine totalling 1.383 billion euros, with the record cartel fine per undertaking set on Saint Gobain totalling 896 million euros.

³⁷ Article 6(2) TFEU, 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

³⁸ *Mannesmannröhren-Werke AG v Commission* (Case T-112/98) [2001] 5 CMLR 1 [59], 'it must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law (*Mayr-Melnhof v Commission* (Case T-374/94) [1998] ECR II-1715, paragraph 311)'

³⁹ See section Procedure and ECHR, covering also the question whether the competition law sanctions are criminal in nature.

⁴⁰ Under the current procedures the hearing gives an opportunity to the accused undertaking to convince the case team that they have mistaken, but in no instance does it create a moment of comparison of the case of the defence and the case of the Commission or an opportunity for an independent third party to decide the guilt or innocence.

3.1.1 Separation of Powers

The incompatibility with ECHR could be solved by separating the Commission's powers of investigation and prosecution from decision-making. This could be achieved by creating a new judicial panel of the General Court to make final decisions on the substantive infringement or/and the amount of the fine in cartel cases. The Commission would keep its duties of investigation and drafting the statement of objections, but it would be for the judicial panel to hear and evaluate the Commission's and the undertakings' arguments before reaching a decision whether an offence has been committed under Article 101 TFEU and imposing a fine. The allocation of decision-making to the judicial panel would guarantee that proceedings are truly fair and objective. It would make the competition law enforcement more effective as the procedures faced by the Commission would be shorter, ending with the statement of objections, and the likelihood of an appeal would be lesser as it would be easier for the undertakings to accept decisions made by an independent court. Such an institutional change would need to be introduced via a formal legislative act, as opposed to case law. It is claimed that Article 103(2)(d) TFEU provides a potential legal basis for the passing of the Commission's decision-making powers in competition law cases to the Community courts (Andreangeli et al, 2009). Nevertheless, this radical approach is unlikely to be accepted due to the principle of "institutional balance", which strictly limits the institution's sub-delegations of its own power,⁴¹ and the principle of attribution of powers laid down in Article 7 of the Treaty on European Union (TEU), which read in conjunction prohibits the institutions' from unconditionally assigning their powers to other institutions or bodies (Forrester, 2009).⁴²

3.1.2 An Alternative Option

This proposed alternative approach would not solve the procedural inconsistencies with the ECHR yet still improve the current enforcement system. Forrester finds the 'real source of sharpness of the sentiment of unfairness' to lie in the absence of a hearing by an independent and impartial party of the 'factual and legal merits of the accusations levelled by case teams in DG Competition against the accused company' (Forrester, 2009: 841). The issue could be made less objectionable if the draft decision, which is later sent to the College of Commissioners, would be based on a debate between the Commission's case team and the accused company held before a neutral and impartial person or body. The case team would need to convince the impartial party of the existence of a solid case, who would compose the draft decision based on his findings, and thereby it would separate the case team's functions as investigator-prosecutor from decision-maker (Andreangeli, 2009).⁴³

It is perfectly understandable that diligent and honest officials who have been working on a case for a number of years and are eventually relatively close to the end of the saga will be reluctant to be convinced that they have mistaken in their statement of objections. It would seem that the prosecutorial bias could be avoided by entrusting the drafting of the decision in the hands of a person or group of persons who have not been involved in the preparation of the case (Forrester, 2009). The position could be occupied by members of the judiciary, independent academics, practitioners of law or hearing officers. Despite that the latter already carry out an assessment on the substance of the case, as their interim report is not made public it would have no formal influence on the decision, they would still be very suitable candidates because of their experience. Should the individuals sit in a tribunal of

⁴¹ Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.

⁴² C-301/02 *Tralli v European Central Bank* [2005] ECR I-4071 [43], in a relatively recent case the Court held that only 'clearly defined executive powers' may be delegated by an institution; there are other possible solutions that require a fundamental institutional change: a) the creation of an entirely independent agency that would take over the Commission's prosecutorial, decision-making or both powers, or b) giving the Courts power of full jurisdictional review. As both of those approaches would require great institutional changes with relatively low potential of being adopted in the near future, I will not elaborate on them in detail, for more see Andreangeli (2009).

⁴³ Analogous result would be achieved by separating the functions within the DG Competition itself as it used to be during the early days of DG IV when the investigation and adjudication functions were enforced by two different directorates of the DG Competition (Andreangeli, 2009).

three, Forrester suggests that one of the persons could be a representative of the Commission whereas should it be just a single person it would be more convincing not to be a member of the DG Competition but an individual with experience in competition cases attached to the Commission President or Secretary General (Forrester, 2009).

From the practical side, should the hearing officer or tribunal find the accusations not convincing they so will conclude and the case would go no further on those grounds. Whilst should the officer or tribunal be satisfied with the accusation they will conclude that in a reasoned text which will be presented to the College of Commissioners for making the final decision. As the decision is still made by the College of Commissioners the implications of Commission's power delegation would be avoided, as the reasoned text from the officer or tribunal would be treated as including factual conclusion, but not as a Commission's decision. Furthermore, the College would not have the right to amend the factual findings but can call for reconsiderations of the findings in a way of draft decision by the hearing officer of tribunal. Forrester asserts that although the decisions would still formally be taken by the Commission and the outcomes of the cases would probably not differ from the current ones, the decisions would be, and appear to be, more judicial and less political, thus enhancing the credibility of the decisions (Forrester, 2009).

Forrester adds that for further trustworthiness and compliance with the Article 6 ECHR, the Commission hearing procedure should be made public.⁴⁴ The presence of third parties at the hearing would require more solid standards of evidence and a stricter way of scrutiny allowing the evidence as well as the statements of the Commission's witnesses to be challenged by the defendant company. Forrester maintains that the Regulation 1/2003 should be altered as hearing needs to become an obligatory part of the procedures and not left optional to the parties (Forrester, 2009).

3.1.3 Increasing the powers of Hearing Officer

Another way to improve the efficiency as well as credibility of the current enforcement system could be by increasing the role played by the Hearing Officer. Instead of just concentrating on the procedural matters, the Hearing Officer could also assess if the decisions taken have sufficient evidential base (Andreageli, 2009); the Hearing Officer could resolve the issues linked to the protection of legal privilege in the course of 'dawn raid' (Andreageli, 2009); by making the Hearing Officers interim reports available to the parties it would increase transparency (House of Lords European Union Select Committee, 2009); and, finally, to increase the Hearing Officers credibility he could be made completely independent from the Commission just like the Advocate General at the European Court of Justice or less ambitiously, but still increasing independence, attach him to the President of the Commission (Andreageli, 2009).

3.02 Individual Sanctions

It has been suggested that individual sanctions should be considered in cartel cases because a corporate fine alone is insufficient to deter anticompetitive conduct (Calvino, 2006) and to reflect the seriousness and the 'damage to the European competitiveness' (Riley, 2010).⁴⁵ There are a number of reasons why individual sanctions appear effective and should be desired.

First, many have argued that Commission's fines for anti-cartel infringements would need to be several times bigger for the fines to carry a deterrent effect (Veljanovski, 2007; Motta, 2008; Wils, 2006).⁴⁶ Increasing the fines to the proposed level to deter price-fixing is, however, impossible due to the fines

⁴⁴ Article 6(1) ECHR, 'everybody is entitled to a fair and public hearing (...)'.

⁴⁵ For the imposition of individual sanctions to be possible the European Regulation 1/2003 would need to be revised as currently the instrument allows fines only against undertakings. Conceptually an individual could be fined as an 'undertaking qua undertakings', however, Riley has not been able to find a case where an individual has been charged in such a way (Riley, 2010: 205).

⁴⁶ See section *Still too low to deter price-fixing* above.

being limited to 10% of global annual turnover of the undertaking. Also, in many instances, such high fines would exceed the companies' ability to pay and forcing undertakings into bankruptcy would entail undesirable social costs.

Second, in price-fixing cases employees have a self-interest/motivation through individual bonuses to see bigger sales and better financial results creating a temptation to secretly form a cartel primarily because a corporate fine imposed by the Commission lacks a deterrent effect on the director or other employees who might have been involved. The board of the company may be totally unaware of such unlawful conduct taking place. Detecting a cartel agreement might appear to be as difficult to the board of the company as it is for the Commission, even if the former operate a surveillance system to secure compliance.

Third, individual sanctions could also give rise to an EU individual leniency notice being introduced. On the one hand, with the fear of individual punishments the executives and possibly the senior employees would have an increased incentive to confess to the Commission and claim the immunity against possible sanctions. On the other hand, it would increase the threat of being caught for all the members of the cartel and pressure them to be the first to file a leniency application. This would strongly support the corporate leniency procedure.

The different possible individual sanctions can be divided into two groups, civil and criminal penalties, and are set out below, with the most engaging, imprisonment, being left last.

3.2.1 Civil Penalties

3.2.1.1 Individual Fine

One possible solution would be to impose an individual fine. Riley suggests that this could be 'capped to a multiple of gross annual benefits of the suspect individual' (Riley, 2010: 205). The downside of this sanction is that the payment of the fine could easily be reimbursed by the company to the individual thereby removing the deterrent effect of the penalty (Buccirossi et al, 2009). Riley has proposed that in such circumstances further measures should be taken by the Commission, for instance, a doubling-up of the fine (Riley, 2010). It is unclear how exactly the Commission is supposed to find out and I believe that investigating the matter would be an inefficient use of resources as there are no guarantees that the doubled-up fine will not be remunerated again by the undertaking. The undertaking and individual could take the 'remuneration affairs' as far as an offshore bank account if required. By the words of a senior executive, 'as long as you are only talking about money, the company can at the end of the day take care of me' (Baker, 2001: 705; Wils, 2006: n148).⁴⁷

3.2.1.2 Director Disqualification Order

Director disqualification order could also be a successful remedy in a fight against cartels. It is an order prohibiting the director of a firm found guilty from holding a position as a director anywhere within the European Union for a specific length of time depending on the seriousness of the offence. The effect of the sanction could be further enhanced by broadening its application also to senior employees of the company, as it would restrict their future prospect.

A director disqualification order is clearly more effective than a mere individual fine, in the sense that the individual might not feel fully satisfied over the financial remuneration offered by the undertaking, should that be the case, because of the stigma of the sanction and the inability to take part in management. Nevertheless, taking into account that the Commission only investigates the major

⁴⁷ The statement continues '... - but once you begin talking about taking away my liberty, there is nothing that the company can do for me' (Baker, 2001: 705). The ineffectiveness of an individual fine and the believed effectiveness of imprisonment can be inferred from the statement.

international actors which understandably are led by wise and experienced directors it would not be surprising to see the disqualified employee blithely starting to enjoy the already late retirement, while also being compensated for the loss by the undertaking (Wils, 2006).

3.2.1.3 Expulsion Order

Riley proposes a sanction of ‘expulsion of aliens from EU territory’. It is a prohibition from entering the EU for a certain period of years. As the EU is the largest single market in the world it is vital for the executives of international undertakings to be able to travel to the EU. Such a penalty would make it difficult to carry out their duties as an executive and would also harm their reputation (Riley, 2010). However, this could only be applicable to individuals who are not nationals of any Member State of the European Union.

3.2.2 Criminal Penalties

3.2.2.1 Imprisonment

Criminal penalties bear a very strong deterrent as it changes the risks of infringing for the employees completely. By the words of Arthur Liman, ‘to the businessmen [...] prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations’ (Liman, 1977: 630-31). A criminal penalty could not be reimbursed by the undertaking as an individual fine could be and it is unlikely that the incentives, like bonuses and promotions of the company, are big enough to outweigh the risk of being placed behind the bars for years. Besides the deterrent effect, a criminal punishment also carries a strong moral message to the individuals who are spontaneously law-abiding, due to normative commitments, reinforcing their moral values (Tyler, 1990).

For the creation of a competition law criminal penalties system legislation needs to be passed creating a criminal offence and an European Criminal Court would need to be founded.⁴⁸ A Treaty amendment would be required to criminalize the competition law enforcement at the EU Institution level (Hakopian, 2010). Furthermore, to ensure the effectiveness in the enforcement of the criminal penalties, Wils brings out that there needs to be strong public and political consensus that cartels deserve punishment, so that there could exist judges and juries ready to convict, and there must be a dedicated investigator and prosecutor granted with sufficient powers of investigation (Wils, 2006; Lowe, 2009).⁴⁹

Despite being an attractive solution for increasing the effectiveness of the enforcement of cartel infringements it seems unlikely that the Member States would be ready to support the creation of criminal penalties on the EU level, in the foreseeable future. As the previous Director General of the Competition DG Philip Lowe pointed out that the creation of criminal penalties would require a complete overhaul of the Commission’s procedures and investigative powers and a foundation of an European criminal court and questioned if the added deterrence would justify such major changes (Lowe, 2009).

A more realistic alternative would be by way of a Community Directive which would oblige the Member States to implement criminal penalties into their national legislation against individuals who perpetrate a serious competition law infringement (Hakopian, 2010; Forrester, 2009; Hodges, 2011).⁵⁰ Article 83(2)

⁴⁸ Creation of the European Criminal Court would require the separation of the Commission’s investigative and decision making powers.

⁴⁹ This should avoid non-enforcement of the criminal penalties in practice, as happened in Austria resulting in decriminalization of the competition law (Lowe, 2009: n13).

⁵⁰ This has been done in regards to environmental offences under the Directive 2008/99 of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28 (Hakopian, 2010). Criminal penalties for competition law offences exist in: United Kingdom, Ireland, France, Germany, Estonia, Hungary, Cyprus, Malta, Poland (Hodges, 2011).

TFEU, as long as the conditions are fulfilled, could be used for creating harmonised criminal competition law enforcement in the Member States.

4.0 Conclusion

Over the recent years the Commission has shown great success in prosecuting cartel offences. More importantly, the Commission has shown continuous effort in increasing the effectiveness of the enforcement policy. It has introduced a settlement procedure which will shorten the length of time of procedures, for allowing freed resources to be used more efficiently. Furthermore, the Commission has proposed a Directive on antitrust damages actions which has been adopted by the European Parliament and now sent to the European Council of Ministers for final approval.⁵¹ The purpose is to introduce an effective redress mechanism so that victims of the EU antitrust infringements could be compensated for the harm suffered. Statistics show that private procedure is regarded as one of the most effective deterrence (Beckenstein and Gabel, 1986; Feinberg, 1985; Deloitte, 2007). Besides the deterrence effect it would also enable corrective justice and would balance the market through the compensations claims. As private parties could stand out for the protection of their interests the amount of litigation would rise, increasing the probabilities of being prosecuted. Furthermore, private parties' who have been directly in contact with the supposed cartel participant tend to have valuable knowledge about the latter, for the knowledge without an efficient private enforcement system could go to waste due to the limited resources of the public enforcement. The initiative shown by the Commission to increase effectiveness of the competition law policy is great, nevertheless, in this article I have presented a number of other drawbacks of the current policy.

In this article I have argued that the current enforcement aiming at only undertakings is not sufficient and individuals who are behind the making of the decisions should also be targeted, especially because even if the undertaking itself does not support concerted practices the individuals can have their own incentives for the violation and it is very difficult for the undertakings to control and detect their employees actions. This is not to say that in cases where the employees have created a cartel without the knowledge of the board those companies should not be held liable, because in any case the company has benefited from the cartel. However, individual sanctions which would approach the individuals behind the anticompetitive decisions and provide an incentive for them to be law-abiding, should be introduced. This could be achieved through individual fines, director disqualification order, expulsion order or imprisonment.

Article 23(5) of Regulation 1/2003 declares that the fines imposed by the Commission for antitrust violations are not 'of a criminal law nature'. However, when looking at the weight of the fines it is difficult to be convinced of their claimed administrative nature. Based on the ECtHR case law, namely the *Engel* criteria and the supporting *Dubus* judgement, it seems difficult to claim that the Commission's sanctions are not of a criminal law nature. This raises the question for the applicability of the Article 6(1) ECHR conditions in its entirety to the competition law enforcement procedures.

Statistics has shown that due to procedural concerns many decisions are being appealed by the firms found guilty for infringing competition law, which requires Commission resources to be dealt with. As presented in this article there is no one answer whether the Article 6(1) ECHR should apply in its entirety to the competition law enforcement procedures of the Commission or can the road of non-compliance be followed. It is possible that instead of an overarching decision applying to all potential cartel cases, in regards to compliance or non-compliance, another criteria taking into account the specifics of a case and leaving room for discretion will be formed. However, until there is no clear decision an appeal of the Commission's decision is more likely and through that the effectiveness of the

⁵¹ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+Vo//EN>> accessed on 09.06.2014.

enforcement of anti-cartel law will suffer as resources could not be directed to the investigation of new cartels. As solutions that involve fundamental institutional changes are unlikely to be achieved in the near future, it would be reasonable to approach for solutions that are less ambitious but still would improve the current enforcement system in regards to the procedural issues. Adopting an alternative solution as proposed in this article would require increased resources to be allocated to the hearing officer or tribunal, changes to be made to the Regulation 1/2003 as well as it would lengthen the hearing in time, nevertheless with the increased legitimacy, credibility and acceptability of the enforcement system along with the lesser inconsistencies with ECHR and reasons for lodging an appeal, the cost would be justified.

In this article it is also argued that the current fines for cartel infringements are not that high as to harm the market or welfare of society. It is unlikely that undertakings will try to recover their fine through higher prices and should the undertaking face genuine difficulties with paying back the fine an inability-to-pay claim can be lodged. Nevertheless, the creation of an environment where bankruptcy is excluded should not be aspired as it would undermine the whole enforcement policy by creating incentives for undertakings to issue more debt in order to reduce their apparent ability to pay. In any case bankruptcy should not be seen as inherently bad but as creating new opportunities. In addition, because of the number of repeat offenders it would seem unreasonable to cut the fines but to rather increase them, while keeping in mind that too high fines would jeopardise the firm's financial stability and run against the goal of welfare maximisation (Buccirossi, 2009). Furthermore, as stressed by the EU competition commissioner Joaquin Almunia, high fines are a pre-requisite for an effective operation of the leniency program, which is a fundamental part in the current Commission's success story in detecting cartels (Gray, 2010).

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