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GROUP 3

ENFORCEMENT BY THE COMMISSION

The decisional and enforcement structure in antitrust
Cases and the Commission's fining system

- Our Group dealt with “*Enforcement by the Commission*” → very broad subject
- We limited ourselves to 2 points of particular interest when dealing with enforcement by the Commission under Regulation 1/2003:
 - (1) The decisional and enforcement structure in antitrust cases
 - (2) The Commission’s fining system
- I will deal with point (1) and Prof Hofstetter with point (2)

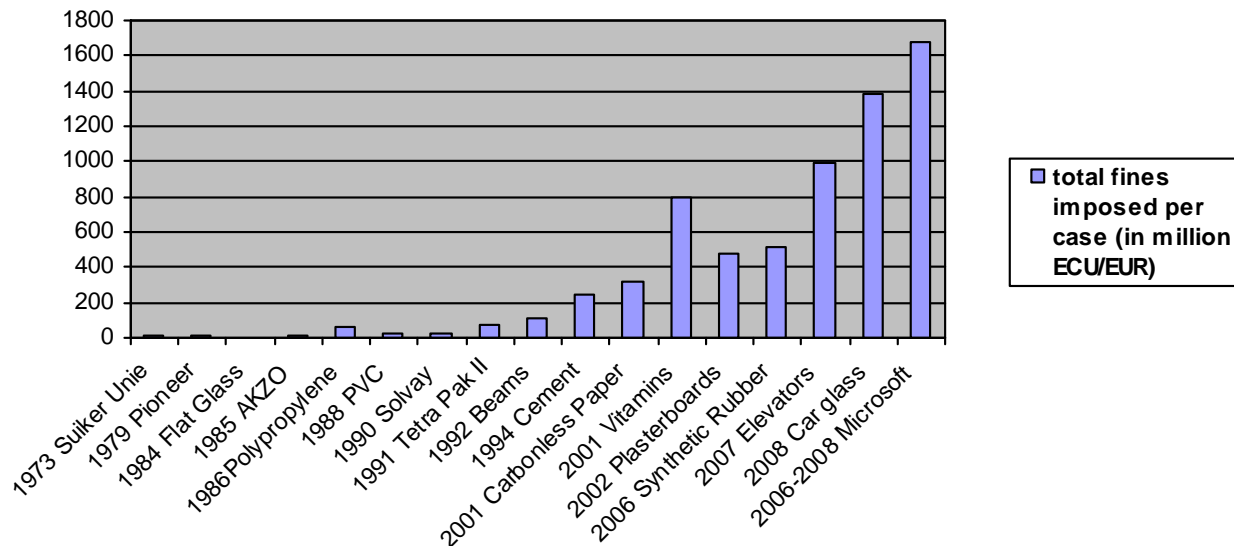
Decisional & enforcement structure: Key conclusions

- Nature of EC competition law has fundamentally changed;
- Current system no longer compatible with right to a fair trial (Art. 6 ECHR);
- Proposals for change.

Conclusion n° 1

Nature of EC competition law has changed

- Massive increase in penalties



- increased rhetoric emphasis on deterrence
- change in presentation of infringements (vocabulary of theft, recidivism, etc)
- change in public perception

Consequences of change: “criminalisation”

- EC competition law now undoubtedly “criminal” within the meaning of Art. 6 ECHR;
- Conclusion supported by ECtHR and even Commission officials;
- Requirement to respect guarantees related to criminal charges under Art. 6 ECHR.

Conclusion n° 2

Current system incompatible with Art. 6 ECHR

- ECHR case law requires that criminal charges be heard at first instance by an independent tribunal.

→ THE CURRENT SYSTEM DOES NOT RESPECT THIS REQUIREMENT

Conclusion n° 2

Current system incompatible with Art. 6 ECHR

- Only exceptions are for minor offences (e.g. road traffic violations) and so do not apply;
- Even if exceptions were to apply, ECHR case law requires subsequent full judicial review (i.e. *ab initio* review of facts and law) by an independent tribunal.

→ THE CURRENT SYSTEM DOES NOT RESPECT THIS REQUIREMENT EITHER

Consequences of incompatibility with ECHR: Change the system

- Current system where Commission cumulates role of investigation, prosecutor and judicator must change; OR as a minimum
- ECJ must be given powers of full judicial review (i.e. *ab initio* review of all facts and law without deference to a wide margin of discretion of the Commission)

Conclusion n° 3

Proposal for change (1)

- a) Creation of an independent European Competition Agency;
- b) Give Community courts “full jurisdictional control” over Commission decisions;
- c) Grant decision making power to the Community courts directly (or a judicial panel thereof).

Conclusion n° 3

Proposal for change (2)

- All 3 options controversial BUT
- All arguably compatible with Treaty:
 - delegation of Commission decisional power could be achieved by legislation;
 - transfer of power to Community courts could be done on basis of Art. 83 EC.

Less ambitious reforms

Would not solve incompatibility with ECHR but would improve current situation:

- To formalise and improve of the working of peer review panels;
- To increase the role of the Hearing Officer;
- To increase and formalise the role of the Legal Service and of the Chief Economist;
- To introduce various more limited reforms so as to increase respects for the rights of defence.

Conclusion

System created in 1962 is not adapted anymore to the current situation

This system creates problems both in practice and in law

Wide perception in industry and legal practice that the days have come for a more fundamental overhaul of the current system

Contrary to conventional wisdom, even fundamental reforms are entirely conceivable without changing the Treaty

→ Time for a “Regulation 2 “ after “Regulation 1” !