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Enforcement by the EU Commission

Substantive Issues

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A Swiss Challenge to EU Cartel Fining Policies



Five Flaws of EU Cartel Fining Policies

1. “Agency Problem”: **Ignored**
2. Deterrence: **Misunderstood**
3. “Fault” Principle: **Disregarded**
4. Limited Liability Principle: **Undercut**
5. Fine Calculation: **Arbitrary**

1. “Agency Problem”: *Ignored*

- EU cartel fines: “**shareholder pay**”-rule
- **Large corporations**: “agency problem” pervasive
- Countermeasure: **Corporate Governance**
- Key: Best Practices **Compliance**
- Fines: **Incentives** for compliance

2. Deterrence: *Misunderstood*

- EU: company as **blackbox**
- **No differentiation** perpetrators/shareholders
- First best deterrence: **Sanctions individuals**
- Company fines: **Compliance defense**
- EU: “**Shareholders shot**, no matter what”

3. “Fault” Principle: *Disregarded*

- Art. 23 Reg. 1/2003: **intent** or **negligence**
- **Top-Management involved** in cartel activity: intent
- **Top-Management not involved**: negligence?
- **Compliance efforts**: fine reduction
- **“Best Practice Compliance”**: no fine!?

4. Limited Liability Principle: *Undercut*

- EU: parent liability if “**control**”
- Limited liability: **risk protection** shareholders
- Parent acted wrongfully: “**piercing the corporate veil**”
- Parent obligation: **compliance?**
- Compliance defense: **mandatory**

5. Fine Calculation: *Arbitrary*

- Cf. EU fining policy **flaws** 1-4
- **Sales** instead of cartel rents/damages
- Dysfunctional “**recidivism**”-multiplier
- Insufficient **checks & balances**:
 - Art. 23 Reg. 1/2003 **unspecific**
 - passive **courts**
 - lack of **due process**
- **Radical reforms urgent!**

Swiss Chocolate as Compensation...



Annex 1: Food for Thought from Switzerland Proposal for Amendment of Art. 23 Reg. 1/2003

In consideration of the above identified need for amendments, Art. 23 Reg. 1/2003 could be amended as follows:

(...) The Commission may by decision impose fines on undertakings and associations of undertakings between EUR 1,000 and EUR [xxx] million where, intentionally or negligently, Article 81 or 82 of the Treaty are infringed.

(...) Undertaking in the meaning of this provision shall be the legal subject to which the infringement may be attributed. An attribution to a legal person shall occur only subject to the condition that one or several members of the legal representative body negligently or intentionally have participated in the infringement or have omitted supervisory measures. The negligent participation in the infringement by omission of supervisory measures requires that not all necessary measures for avoiding competition law infringements (compliance) have been taken. A compliance measure meets the required scope only where it provides for adequate means of training, supervision, and sanctions of the employees.

(...) Where the infringement is very serious the Commission may impose fines of up to EUR [xxx] million. A very serious infringement shall be deemed to occur where the undertaking or the association of undertakings

- 1. has participated for more than [xxx] years actively and continuously in horizontal restrictions;*
- 2. has been the ringleader of the cartel;*
- 3. has forced or instigated others to participate in the infringement;*
- 4. [xxx].*

(...) Where the infringement is less serious the Commission may impose fines that shall not exceed EUR 1 million. A less serious infringement shall be deemed to occur where the undertaking or the association of undertakings has participated in the infringement involuntarily or for a short period only or where the infringement has occurred despite compliance efforts. Where the illegality of the conduct has not been identifiable for the undertaking or the association of undertakings due to the lack of settled case law or a clear practice of the Commission the Commission shall refrain from imposing a fine.

Annex 1: Food for Thought from Switzerland

Proposal for Amendment of Art. 23 Reg. 1/2003 cont.

(...) In setting the amount of the fine, the Commission shall weigh the advantageous factors against the disadvantageous factors in the decision for each undertaking or association of undertakings. In particular, the Commission shall have regard of the following criteria:

- 1. the nature of the infringement as a horizontal or vertical competition law infringement;*
- 2. the size of the part of the Common Market affected by the infringement geographic- and product-wise;*
- 3. the actual effects of the infringement on the Common Market;*
- 4. the intensity of the participation of the undertaking or the association of undertakings;*
- 5. the benefits gained by the infringement and the damage suffered by the consumers;*
- 6. the duration of the infringement and the cessation of the infringement prior to the intervention of the Commission;*
- 7. the turnover and market share of the undertaking or the association of undertakings;*
- 8. the level of the guilt;*
- 9. [xxx].*

(...) In no case, the fine for each of the undertakings participating in the infringement shall exceed 10% of its total turnover in the preceding business year or shall not be unreasonable for other reasons.

(...) Where the undertaking or the association of undertakings submits evidence fostering the detection and sanctioning of an infringement, the Commission shall grant full immunity or reduce the fine. The details shall be governed by a Commission regulation.

Annex 2: Food for Thought from Switzerland Optimal Company Fines¹

$$Fine = \frac{CoC - CaC}{LD} + \left(\frac{CoC - CaC}{CoC} \times \frac{lCP}{LD} \right) - pCC$$

- CoC = Cost of optimal compliance
- CaC = Cost of actual compliance
- LD = Likelihood of discovery
- lCP = likely cartel profits
- pCC = probable civil claims

¹ Hofstetter Karl/Ludescher Melanie, Der Konzern als Adressat von Bussen im EU-Kartellrecht, in: Festschrift Roland von Büren, Helbing & Lichtenhahn, Basel 2009, 835 ff.