

Any Nearer to Victory in the Fifty Years War?: Assessing the European Commission's Leadership, Weapons and Strategies towards combating Cartels

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All comments are welcome

Abstract

Some fifty years after its creation EU competition policy remains firmly entrenched as one of the most developed examples of supranational governance within the European Union. Although there has been a marked increase in interest among political scientists in competition policy in recent years there are still gaps in terms of overall coverage. One area that has been largely overlooked centres on cartels. Cartel policy has emerged as a highly salient issue and main priority of the Commission's competition policy since the late 1990s. Certainly, the recent restructuring of the EU cartel enforcement regime, the imposition of ever higher fines and a determined EU Competition Commissioner have fuelled growing media attention while new notices and regulations increasingly occupy the interests and minds of practitioners. The European Commission has constantly extended its activities on the competition policy front and its increasingly aggressive strategies to combat cartels provides political scientists with a fascinating case study of governance in action and illustrates the ways – such as leniency programmes, higher fines, enhanced and better equipped resources as well as internal reorganisation in which the European regulator is pursuing such conspiracies. This article traces the evolution and development of EU cartel policy since its inception to its *decussis mirabilis* after 1999 and assesses the Commission's strategies and considers just to what extent the European Commission is winning its war against business cartelisation.

INTRODUCTION: THE BATTLEGROUND

Some fifty years after the signing of the Treaty of Rome there is ample scope to debate the achievements, near misses and failures of the European Union (EU). One aspect is undeniable, namely the priority and centrality of the competition principle throughout the history of the European integration process and its influence on the domestic competition regimes of the EU member states. Although fewer areas of European public policy may seem to have been as widely researched, debated and analysed than European Union (EU) competition policy a degree of caution is immediately required for closer inspection reveals that interest in this particular policy area has stemmed mainly from economics (including Bishop, 1993; Estrin and

Holmes, 1998; Motta, 2004) and law (including Goyder, 2003; Sufrin and Jones, 2008 and Whish, 2003). Most political scientists studying the EU albeit with a handful of exceptions (Cini and McGowan, 2009; McGowan and Wilks, 1995; Doern and Wilks, 1996; Wilks, 1999) have tended to either overlook this field of enquiry or dismiss its relevance altogether. The complexity and seemingly impenetrable labyrinth of legal case law and economic analyses of competition regulation may in part explain this seeming reticence to explore competition but such a situation is simply no longer defensible.

Politics matters in competition regulation and surfaces in relation to institutional design and powers; issues of transparency; degrees of politicisation; discretionary abilities and questions of legitimacy in the decision making process. EU competition policy has long represented one of the few areas where the Commission is not only responsible for direct policy implementation but also possesses wide discretionary powers as both a regulator and an enforcer of policy. Fortunately there are now strong signs that these barriers are finally being broken down as a new generation of researchers (Büthe and Swank, 2007; Damro; 2003; Doleys, 2007; Lehmkuhl, 2008; Leucht; 2008, Seidel, 2007; Warzoulet, 2007, Wigger, 2008) shed greater and welcome light into the origins, institutions and workings of EU competition policy.

Still, from a political science perspective there has been extremely little work done on the two core aspects of anti-trust, namely cartels and monopolies. This article starts to redress this omission by examining cartel policy. Cartels are now universally 'recognised as the 'most aggressive violation of competition law' (OECD, 1998). Cartelbusting has been prioritised as the key element of the Commission's competition policy over the course of the last two decades and particularly under the last three competition Commissioners, Karel van Miert 1993-9), Mario Monti, 1999-2004) and Neelie Kroes, 2004-present).¹ All three have stressed the importance of battling cartels as a means of defending consumers (Kroes, 2008). This article explores the Commission's role and strategies in its pursuit, identification and termination of cartel arrangements.

Cartels represent safe havens for companies to escape and prevent competition and are generally held today to represent the most pernicious form of anti-competitive behaviour. They are normally global in nature and arise when companies participate in 'deliberate, highly organised and covert collaborative' (Harding and Joshua, 2003:1) practices that have been agreed by a number of independent firms from the same or similar sphere of economic activity. Secret horizontal agreements that divide markets, fix prices and prevent newcomers from entering the market embody the classic shape of a collusive agreement. Cartels in the contemporary world are generally recognised as problematic because they have been primarily designed to serve and work in the interests of their members and not the consumer or the overall health of the economy. Kroes (Kroes 2006a) summed this up neatly, 'cartels strike a killer blow at the heart of economic activity. This makes it harder for us to deliver the Lisbon goals of high growth, job creation and innovation'. They work to the detriment of the consumer through the imposition of higher prices.²

¹ Monti described cartels as a 'cancer' on the European economy in the XXXI Report on Competition Policy 2001, European Commission, 2002, p.4

² In its 2005 report on hard core cartels the OECD noted that collusion resulted in significant percentage increase in prices. In Japan it was estimated that cartels raised prices by on average 16.5 percent, in Sweden and Finland by around 20 per cent and in the United States there were examples of price increases of the magnitude of some 60-70 percent.

In the medium to long run cartels will always enjoy higher (illegal profits) than otherwise would be the case in the face of open competition.³ Recourse to cartelization benefits the companies concerned as a means of extracting higher rents from their customers but such covert operations in preventing competition, thereby limit the need for innovation. The profit maximisation incentive ensures that cartels remain very much an endemic reality in the modern world. Concerns have also been raised about the connections between economic power and political power.⁴ Condemnation of cartel agreements has become the norm. In the last decade competition regulators in both the EU and the US have intensified their determination to hunt and break-up as many cartel agreements that can be unearthed as possible. The difficulties of such a task should not be underestimated and the regulators are constantly engaged in battling a seeming propensity on the part of the business world for cartelisation. Indeed, viewed from a longer term perspective this article depicts the Commission's struggle as a series of battles that can be interpreted as an ongoing cartel war.

The paucity of political science literature in this area is unfortunate for the pursuit of cartels opens up a truly fascinating world of 'dawn raids' and intrigue where secretive agreements are concocted in smoke filled rooms, in luxury holiday resorts and have even been subject to covert taping (see Connor, 2001) by the FBI in the USA⁵. In the first half of 2008 alone the European Commission raided the offices of a very prestigious list of companies (such as Unilever, Proctor and Gamble, Lufthansa, and Lloyds Register to name but a few) in their search for cartels (Financial Times, 30-June 2008; Irish Times, 21/06/2008).

EU cartel policy has developed in an incremental fashion and has become over time increasingly proactive and combative. The Commission's current resolve is displayed in a number of strategies and reforms since 2000 that include internal organisational changes within DG Competition, the adoption of new administrative rules under Regulation 1/2003, refinements to the leniency programme, a new and tougher Notice (June 2006) on fining infringements and efforts to foster greater international co-operation as well as a number of more innovative mechanisms and tools such as its 2008 White Paper on Private Actions. The stakes and costs in these cartel wars have been raised. It is not just co-incidence that the highest fines in EU cartel history have all occurred in the last decade, though whether high is high enough remains an issue. The Commission possesses considerable discretion in setting the fines and has opted to shed more transparency on how and why it calculates the actual fine. Fines form a part of a deliberate strategy to deter cartel formation. Yet, no matter how laudable the goal of eradicating cartels may be it remains an onerous task that continually challenges the energies and resources of all anti-trust regulators. How the regulators respond and pursue cartelisation ultimately

³ The economic gains are difficult to quantify and vary from case to case.

⁴ US antitrust has always displayed an aversion towards the concentration of economic power and questioned its actual impact on notions and concepts of democracy if economic power is in the hands of a few powerful players.

⁵ In the Lysine cartel the FBI managed to record a series of meetings attended by executives from the world's five major lysine producers. Lysine itself is an amino acid and is essential for human nutrition and development but cannot be manufactured by the body. For this reason, lysine must be obtained from food. The meetings were all secret and were carefully staged to avoid rousing any suspicion especially as one of their main customers (the poultry industry) was holding a conference in the same town. As the meeting began several jokes were made about who would fill the empty seats as they waited for the other members of the cartel to arrive. Some of the replies states their customers and one even said it was for the FBI. Little did they know as FBI agents posed as hotel employees and recorded everything that took place.

determines the scale, intensity and number of such anti-competitive practices at least in theory. Can they in practice create sufficient deterrents to ever overcome the attraction of cartelisation?⁶

Judging just how successful an enforcement agency the Commission is, depends on a number of factors that include how many cartels it unearths, how many fines it imposes and how many potential arrangements it deters. Although statistics are available for the first two we will never be in a position to provide an answer on the EU rules as a deterrent. It is practically impossible to speak with the firms concerned and thus all reference points relate to cartels that have been unearthed. As onlookers we will simply never be in a position to know enough information about the scale and scope of cartelization or the strategies of the firms involved but we can make general assumptions about the nature and degree of such anti-competitive activities from cartels that have already been detected. That said researchers should also avoid the danger of relying on the Commission's hype in its own assessment of its strategies.

EU cartel policy provides a number of avenues for exploration and this paper focuses specifically on the Commission's role and response over the last five decades to cartelisation. It demonstrates how the Commission has constantly expanded its competences, adapted its approaches and continually sought to refine its strategies to combat cartel proliferation. This paper provides an historical overview of the four phases of EU cartel policy and illustrates how the Commission has steadily become more active through new Notices and Guidelines in its pursuit of cartels. It pays most attention to the most recent phase after 1999 and both identifies and explores how far the latest reforms, administrative developments and internal restructuring have placed the Commission in a position to effectively combat or at least control cartelization.

DECLARING 'WAR' ON THE CARTELS

Cartels have long represented an established aspect of commercial activity. They were particularly pronounced as an essential, accepted and even government orchestrated feature of business activity in German speaking Europe throughout the first half of the twentieth century (Gerber, 1998). Such practices have been traced even as far back as Ancient Egypt (Herlitzka, 1963: 121). Cartels have impacted on the operation of markets and the positions of other actors and traders. Whether such impact might be termed negative or positive is open for debate. Any comparative and historical examination reveals that perceptions (ranging from toleration, agnosticism to outright hostility) have differed from state to state over time (McGowan, forthcoming). The propensity towards cartels today may often be driven as much by cultural norms and historical tradition as much as by economic benefits. Yet, perceptions changed dramatically after 1945 when cartels were generally perceived as undesirable and led to the creation of the first domestic competition regimes firstly in the United Kingdom (1948) and in West Germany (1957).

⁶ In exploring EU cartel policy the academic researcher relies very much for primary material on a number of official publications (such as the Commission's annual competition policy report, DG Competition's Competition Policy Newsletter and information rich web-site as well as Court rulings) and on interviews with officials from DG Competition. Commission information provides statistics on the formal decisions, the number of firms involved in each case, the level of the fines and information on where and to whom leniency notices have been issued. The researcher also needs to be able to digest the existing range of secondary sources that extend across the disciplines of economics, history, law and politics.

The origins of EU cartel policy have to be understood in the context of three factors; the imperative of the drive for the realisation of a single market, the historical context that shaped policy after 1945 and the influence and leading role of the US experience on the European regimes (Leucht, 2008; Schulze and Hoeren, 2000). Cartels were identified as an immediate target from the outset when Article 81 of the European Economic Community (EEC) Treaty specifically prohibited all agreements 'which may affect trade between member states and which have as their object, the prevention, restriction or distortion of competition within the common market'.⁷ In retrospect, the decision by the six founding EEC member states to commit themselves to competition discipline and simultaneously recognise the logic of a supranational dimension is significant given the unfamiliarity for the majority with anti-trust. It is also worth recalling that Member State positions on the competition policy rules certainly varied and there was a tussle between France, the Netherlands and West Germany over both the meaning of competition policy and also differing approaches on policy management.

Nevertheless, political consensus was reached on the inclusion of competition policy in the EEC Treaty (Buch-Hansen, 2008) and further agreement in the Council established DG Competition's legal competence to operate as an autonomous and quasi-judicial policy making institution under Regulation 17/62. It equipped DG Competition with exclusive powers of investigation (including the infamous 'dawn raids') into suspected violations of the EU's competition rules and enabled DG Competition to codify, exempt and impose fines on offending firms. It is important to stress that these fines had an upper threshold of not more than 10% of the company's annual turnover. More significantly in terms of governance, Regulation 17 identified the Commission as the principal actor in the administration and implementation of competition policy decision making and assigned it the roles of judge, jury, and executioner. In hindsight the Member States had created a powerful supranational agent (Seidel, 2007) which has continually advanced its power through the adoption of guidelines and notices and in so doing has altered the terms of the principle/agent relationship (Lehmkuhl, 2008). The decision to initiate an EU competition regime heralded the advance of a Community legal order that would in time ensure strong degrees of convergence on the realisation of a European cartel policy.⁸

Although cartels were identified over fifty years ago by the EEC Treaty as the first and primary target of the EU's competition policy order, the EU cartel regime took time to form and its enforcement until the 1980s has been described as hesitant, patchy and largely ineffectual. It is never always a straightforward task to pinpoint specific chronological turning points or periods in any policy's development, but this article suggests four periods of development for EU cartel policy. In each the position of DG COMP and cartel policy developments can be examined with reference to both the substantive and the procedural regimes. Accounting for internal changes is one aspect of competition policy that is generally well covered (Wilks and McGowan, 1996), whereas there has been considerably less attention paid to the external variables. Any examination into the evolution of EU cartel policy cannot be

⁷ It should be noted that some types of agreement (and this to some extent reflects earlier more sympathetic perceptions) were entitled to exemptions from the EU competition rules where agreements contribute to improving the production or distribution of goods, promote technical and economic progress or ensure that consumers reaped considerable benefits. Prior to 1 May 2004 such exemptions under 81(3) were solely at the Commission's discretion to bestow if an agreement's beneficial effects were judged to outweigh any detrimental impact on competition.

⁸ See point 1, Council Regulation (EC) No 1/2003 on the Implementation of the Rules laid down in Articles 81 and 82 of the Treaty, *Official Journal of the European Communities*, L1/1, 4, 1, 2003.

completely separated from developments at Member State level. This allows recognition of the varieties of capitalism literature (Albert, 1993) which emphasises the spectrum of capitalist models across Europe and the variable impact of competition policy (see Wigger, 2008) on liberal, co-ordinated, state and transitional economies. Policy development must be considered against changes and events in the wider economic and societal spheres. Wigger does this in an innovative manner by adopting a critical economy perspective to the development of EU competition policy in which she traces the impact of Ordo-liberalism, embedded liberalism and neo-liberalism on the evolution of the competition regime and especially on Commission thinking (Wigger and Nölke, 2007). It is not the intention here to retrace this particular wider narrative here, but readers are strongly urged to consult such emerging literature. How far can the Commission really operate a single cartel policy when so many different cartel traditions have prevailed and continue to exist at member state level?

THE EVOLUTION OF EUROPEAN CARTEL POLICY

This article places the first phase of activity to the 1960s and early 1970s. This period was largely exploratory in nature as the Commission sought to bed in, appreciate its powers and gain experience. The second is a continuation of the first but required the Commission to readjust its thinking in the face of the economic downturn and recession that from 1973 until the mid 1980s. The third covers the re-launch of the integration process through the Single European Act of 1987 and specifically the single market project until the end of the 1990s. The final period runs from around 1999 when the first serious discussions about the reform of cartel policy occurred. These debates centred on discussions about modernisation and decentralisation that led to the quiet revolution that is encapsulated by Regulation 1/2003 and reflected a new dynamism within DG Competition to combat cartels more effectively through, for example, the levying of higher fines and a series of policy innovations. Each period is now considered briefly in turn.

The Four Incremental Phases of the Commission's Anti-Cartel Engagement

Period 1: 1962-72, Surveying the Terrain and the 'Phoney War'

(Reg17/62, move to own initiative investigations, first fines)

Commission style: Hesitant, patchy response but growing signs of activity

Period 2: 1973-84, Forays and Stalemate

First use of dawn raids, further cartels discovered, crisis cartels

Commission style: still hesitant and some retrenchment

Period 3: 1985-98, Seizing the Initiative

Fines increasing, Leniency Programme

Commission style: Leadership, comes of age, increasingly active

Period 4: 1999-present, Modernisation and Combat and the Decussis Mirabilis

Reg1/2003, decentralisation, modernisation, revised Guidelines for Setting Fines, New Settlement Procedure, Green and White Papers on Private Actions, Internal reorganisation

Commission style: Pro-active and increasingly innovative

Surveying the Terrain, 1962-72

DG Competition was established in 1960 but only acquired weapons to combat anti-competitive practices in March 1962 once the Council had finally settled upon an agreed administrative *ax ante* (the German preference) model as laid down within Regulation 17/62. This regulation served as DG Competition's procedural bible for over forty years. As a new entity Competition required time to acclimatise itself and its main concern and priority for most of the 1960s centred on forms of vertical integration/relationships rather than on horizontal (price-fixing and market sharing) agreements (Sufirin and Jones, 2008). This situation has two interconnected explanations. On the one hand the Commission was responding to notifications coming before it. In its first five years the Commission received almost 40,000 (Goyder, 2003) notifications which practically pushed it to breaking point and both shifted DG Competition's attention and resources away from cartelpushing. The vast majority of these (some 25,000) were vertical agreements (European Commission, 1980; 15). Many were structured around exclusive dealing arrangements and were usually managed through national trading associations and very much embedded in the national context (Harding and Joshua, 2003; 119). On the other hand and from the Commission's perspective such vertical based agreements seriously affected trade between the member states, created barriers to trade and distorted the realisation of a genuine common market. Thus, DG COMP focused much of its resources on vertical restraints in the distribution and licensing schemes as in *Grundig-Consten* ([1964] CMLR 489 or [1966] ECR 299). This case from September 1964 represented the very first infringement prosecution in the history of EC competition law and accurately displayed the problems of vertical agreements and how they damaged competition within the market.

The case centred on the German company Grundig and its trading relationship with its French distributor Consten where the latter was granted the exclusive right to sell Grundig's products in France (See Goyder, 2003). The Commission rejected the possibility of an exemption whereupon its decision was appealed unsuccessfully from Grundig's perspective to the European Court of Justice. This example of a vertical arrangement represented a familiar, if undesirable, aspect of business activity and the Commission took action against a number of similar styled arrangements in the mid 1960s. By focusing on this type of agreement the Commission faced intense criticism (and especially from US observers) over its priorities and failing to tackle the main horizontal form of anti-competitive activity. Such accusations of policy failure/misdirection compelled the Commission to conceive ways of dealing with the more pressing and contentious issue of cartels as opposed to the more 'mundane' vertical agreements. It was not until the end of the 1960s that the Commission really started to focus on the anti-competitive dangers posed by horizontal cartels and took its first decisions in now infamous *Quinine* (OJ L191, 5.6.69) and *Aniline Dyes* (OJ 195/11, 1969 ECR 619) cases. Cartelpushing had begun though albeit in a cautious fashion with some ECU 500 000 being levied in the *Aniline Dye* case in 1969.

Forays and Stalemate 1973-84

The 1970s began positively for the evolution of the EU as negotiations were successfully concluded on its first enlargement and the subsequent arrival of Denmark, Ireland and the UK as the newest Member States in January 1973. On the competition front the Commission published its first annual competition policy report in 1972 in an effort to inject a degree of greater transparency and provide publicly available information on the cases settled in the previous calendar year. The very first report clearly laid down the objectives which sought to prioritise the 'need to take action with special rigour against restrictions on competition and practices jeopardising the unity of the Common Market, notably sharing markets, allocating customers and collective exclusive dealing arrangements, and preventing agreement which indirectly resulted in concentrating demand on particular producers'. Although written by officials within DG Competition these reports provided useful information and once again demonstrated a growing self-assuredness in making policy decisions. It was going to need it as the competition principle came under attack.

Even as Denmark, Ireland and the UK acceded to the EU the warning sides of economic downturn were already in the air. The collapse of the Bretton Woods system in August 1971 brought to an end the financial order of the convertibility of the US dollar to gold and floating exchange rates and ushered in major changes to the financial landscape. The decision by OPEC in 1973 to raise the price of oil per barrel impacted directly on the economies of the Western world as costs soared, unemployment returned and inflation soared.⁹ If the 1950s and the 1960s had been the time of higher economic growth and greater prosperity the 1970s were hit by recession, doubt and Eurosclerosis. In response Member State governments scrambled to protect their national industries and thereby maintain employment. They did not do this in any co-ordinated or cooperative fashion but sought refuge and protectionism in the erection and maintenance of a range of non tariff barriers that included state subsidies to industry, imposition of quotas, incomes policies and preferential treatment for national companies. Where was competition policy situated in this transformed economy? Was competition the problem or the solution and how would DG Competition respond?

This second phase of cartel policy covers the period from 1973 to 1984 and was set against an unsuitable climate for any persistent offensive action. Overall the entire Commission did not respond very well to the economic downturn (Cini and McGowan, 2009). The Commission maintained its anti-cartel drive and prosecuted a number of important cartels. During this period it demonstrated considerable flexibility and adjusted to meet the changed economic circumstances (Commission, 1977; 9). It was recognised that certain industries were becoming more uncompetitive in the face of cheaper competition from abroad such as shipbuilding while others faced a future of longer term decline such as coal and steel. DG Competition remained wedded to its objectives and emphasised the advantages of the competitive process, but it was the best time to pursue any dogmatic advancement of the competition principle in the face of both external and internal opposition. The former existed in the guise of the Member State governments whereas the internal found voice amongst other DGs, most notably those dealing with industrial policy and regional policy. DG Competition was one voice among many within the Commission and the Competition Commissioner faced 8 colleagues within the College of Commissioners when it came to taking decisions on competition matters. Consequently, DG Competition advanced more slowly than many of its officials would have liked.

⁹ OPEC is the best known international example of a cartel and if it were ever to hold a meeting on US soil, all its participants would be arrested for abuses of anti-trust law.

For these reasons DG Competition opted to maintain a less interventionist stance until economic conditions were more favourably disposed towards competition. In adopting a more light handed approach (Wigger, 2008; 175) the Commission was willing to turn a blind eye to state aid, but also showed its readiness to assist industries in decline and consider measures to alleviate unnecessary rises in unemployment such as the support for structural crisis cartel. These emergency cartels where firms engage in reciprocal reductions in capacity and output were encouraged in the short term in the hope that they would spur recovery and enhance technological development. The Commission has been willing to sacrifice the competition principle to avoid the social costs that industry restructuring left to the market would cause' (Motta, 2007; 14). This softer approach, although infrequent, was evident if the Commission's support of, for example, the sulphuric acid cartel. Few agreements were actually terminated and only a few of the Commission's decisions were appealed to the ECJ (Belgian Wallpaper, Belgian Tobacco). Such crisis cartels were, however, very much envisaged as temporary measures (European Commission, 1977 although in reality many of these cartels lasted until the mid 1980s and led to greater competitiveness. It would be incorrect to label this period of the 1970s and early 1980s as a form of retrenchment in the case of competition policy because DG Competition was making progress, uncovering cartels and even conducted its first 'dawn raids' during this period. The story of EU cartel policy encapsulated an image of incremental growth but as the Commission pushed forward so the determination of the 'enemy' intensified as they tried to cover their tracks.

Seizing the Initiative and Advancing Forward, 1985-99

The momentum within the EU integration project was effectively regained through the appointment of Jacques Delors as President of the European Commission in 1984 and specifically his ability to persuade the then ten Member State governments to endorse the Commission's White Paper on 'Completing the Internal Market' (European Commission, 1985). Concerns about global competitiveness and the growing neo-liberal turn in policy focus came to transform notions about the role of competition in the market and the application and enforcement of antitrust rapidly emerged as a necessary tool in the Commission's strategy to realise the Single European Market. The timing from DG Competition's perspective could not have been more fortuitous and coincided with the arrival of the ultra-liberal and highly competent Leon Brittan as competition Commissioner. Indeed, the changed economic circumstances enabled the Commission to defrost Hallstein's ideas that had been put on ice for some twenty years earlier and to continue the process that the ordo-liberals had commenced (Gehler and von der Groeben, 2002, 53). External developments fused with internal ambitions and together began to transform DG Competition's centrality within the Commission and boosted its reputation. However, the more the single market took shape, the more DG Competition felt itself further constrained because the Council's agreement on European merger control mechanism in 1989 (McGowan and Cini, 1999) and the growing focus on liberalisation was to shift some of its limited and much needed resources away from the issue of cartel-busting.

As DG Competition's fortunes rose in the late 1980s it gradually demonstrated a more assertive nature and placed greater priority on the need to finally combat cartels. This anti-cartel agenda has fuelled the priorities of every Competition Commissioner from Leon Brittan to Neelie Kroes. Beyond the rhetoric the Commission's determination was often thwarted by resistance or lack of interest

in some member states and its own limited powers for manoeuvre. The best weapon at its disposal under Regulation 17 was the power to impose fines on companies who had deliberately opted to breach Article 81. In order to deter cartelisation the Commission first of all recognised the need to impose higher fines and a general upward trajectory can be identified from the mid 1980s onwards. The history of fining cartel infringements reflects growing DG Competition confidence and determination as has the subject of what an optimal fine is!. From the mid-1980s it is possible to detect an upward trend in the severity of fines being imposed (McGowan, 2000). The *Polypropylene* (OJ 1986 L230/1) and *PVC* (OJ 1989 L74/1, 4 CMLR 345) cases in 1986 and 1989 respectively when both were levied fines of ECU 58 million and ECU 23.1 million respectively reflected a stronger Commission determination to tackle cartel activity.

The tougher fining policy brought consequences. One of the most immediate repercussions was a rise in the number of challenges against Commission decisions being brought by the businesses concerned before the European courts. The EU competition regime had provided the Courts as a forum for appeal. The symbiotic relationship between the Commission and the European courts has long represented one of the most crucial dynamics behind individual EU cartel case outcomes. The Commission's credibility has always tested by appeals to the Courts. A degree of relative harmony had existed almost undisturbed between the two supranational institutions in the promotion of integration (from the earliest cases such as *Aniline Dyes*, *European Sugar Cartel* and *Quinine* cases) until the Court of First Instance emerged in 1989 with an altogether more independent and critical approach to the Commission's degree of analysis and argument. Relations between the Commission and the Courts, however, grew fraught during the 1990s when the CFI overturned a number of Commission decisions on the grounds of a supposedly flawed analysis which often rested on the absence of clear proof and documentary evidence that cartels were actually in existence. The *Woodpulp* (OJ L85, 26/03/85) case fully illustrated the tensions and a long drawn out appeal process soured relations between both institutions. It remains the exception rather than the rule.

Cartels deliberately seek to conceal their anti-competitive activities and in order to do so have met outside the EU, opted to conceal and on occasions even not to keep records about the structure of the infringement. It was, of course, not unreasonable for the courts to follow this course of action when they felt that some Commission decisions lacked sufficient evidence. Nevertheless, such pronouncements fuelled frustrations within DG Competition on the back of anger that the competition regulator had always been understaffed. This was a serious, but a fairly accurate assessment of its resources and the personnel shortage effectively restricted its anti-cartel drive. Fines were a means to deter cartels, but their impact as a deterrent has always remained highly dubious and propelled the Commission to consider complementary measures and to design new strategies to combat cartelisation.

The adoption of the EU's first Leniency Notice in 1996 (OJ C207, 18/07/1996) marks the onset of a more proactive Commission response. Although novel as far as European competition experience is concerned the leniency initiative reflected practice that had been established by the Antitrust division of the Department of Justice (DOJ) in the United States in 1979.¹⁰ Both programmes were

¹⁰ The DOJ granted immunity from its criminal sanctions regime. The scheme was thoroughly revised in 1993 and has led to a growing number of firms applying for leniency and providing evidence that have enabled the US competition authorities to unearthed cartels

specifically designed to destabilise cartels which is predicated on inducements and sweeteners in the form of substantially reduced fines and even total immunity from fines if cartel members break cover and inform on their colleagues. This initiative recognised and sought to benefit from the unstable nature of many cartels (and few last more than five years) and sought to exploit it. Complete immunity under the leniency programme was available for the first informant who provided sufficient information for the Commission to launch an inspection of premises and so long as they continued to co-operate throughout the investigation. The Commission wielded considerable discretion throughout and any applications for immunity which were deemed not to have provided sufficient information could be denied. Leniency was a useful innovation in theory, but would it work in practice? As a tool it was a means of deterring cartels but few saw it as a means of preventing cartelisation in the first place and the Commission was effectively compelled to consider a series of complementary measures to enhance both its abilities to focus on more cartels and simultaneously to further dissuade the emergence of such practices. The scene was set for a new heightened period of anti-cartel activity.

Imagination and Design: Launching the Latest Offensives, 1999 – present

In the course of the last decade the Commission's has enhanced its anti-cartel strategy by introducing refinements and making adjustments to the Leniency programme (in 2002 and 2006), bringing in a stricter fining policy (in 2006) and the publishing its Green (European Commission, 2005) and White Papers (European Commission, 2008) on Private Actions as well as processing more decisions (see figure 1). These innovative administrative alterations were fairly easy to introduce as they did not neither require the approval of either the Council or the support of the European Parliament. Undoubtedly, the most significant development in this four phase of activity centres on the overhaul of the operational procedures and mechanics of EU cartel policy that were enshrined in Regulation 1/2003 (and replaced Regulation 17) and came into operation on 1. May 2004. The new regulation facilitates the Commission's determination to modernise, simplify and improve the administrative machinery. It formed the culmination of the Commission's plans that were outlined formally in its 1999 White Paper (European Commission, 1999), to fully modernise cartel policy.

The reform agenda (to replace Regulation 17) had been driven by two factors: firstly, recognition that the existing practices that had been in place for over forty years were becoming ever more problematic and secondly, an expected augmented case load after EU enlargement into Central and Eastern Europe. In short, the reworking was designed to facilitate the Commission's cartel-busting enforcement strategies; to create a more level playing field and ensure a greater degree of consistency and certainty for companies and to reduce the bureaucratic processes. Modernisation and decentralisation were the hallmarks of this reform package and both were presented by the Commission as a means to secure better enforcement through redesigning the rules that applied to the handling of Article 81 and through the creation of a European family of competition regulators that brought together the Commission and the national authorities within the European Competition Network (ECN).

Cartel Cases decided by the European Commission since 1990

PERIOD	NUMBER
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1990-1994	11
1995-1999	10
2000-2004	33
2005-2008	24
TOTAL	78

Source: European Commission website

The former (i.e. pre-2004) system had placed responsibility for enforcing the competition rules on the Commission. This may have made sense, but the requirement that all agreements that potentially violated article 81 had to be notified to the Commission and especially if an exemption was sought, proved largely unsatisfactory and practically unworkable from an efficiency perspective. It had effectively pushed DG Competition from the start into a largely reactive mode, and one that had diverted the competition directorate's staff away from cartel busting towards often routine but numerous notifications from companies who wished to ensure that their specific agreements did not contravene the provisions of Article 81. In effect, DG Competition had found itself swamped from the very outset under a sea of notifications. The creation of block exemptions for certain sectors, *de minimis* thresholds (that have been regularly revised) and the issuing of comfort letters (as an interim measure that allowed companies to operate safe in the knowledge that they would be exempted from any future negative Commission decision) certainly played a considerable role in easing the caseload but it did not eradicate the problem entirely and the Commission was never able to digest its workload. Dealing with notifications meant that there was less time to pursue its own proactive investigations. Indeed, EU enlargement to 27 may not have meant paralysis but it certainly threatened to severely undermine the workings of the EU competition regime. In short, the centralised system established by Regulation 17 hampered the application of Community rules by the courts and competition authorities of the member states, and the system ...prevents the Commission from concentrating its resources on curbing the most serious infringements.¹¹

Regulation 1/2003 makes significant strides in the evolution of DG Competition's cartel wars. In the first instance the system of notifications has been abolished and now follows the American *ex post* model. Firms are now fully expected to know the rules of the game and what practices are permissible and which are not allowed. This alteration enables DG Competition's staff to allocate much more of their time tackling real anti-competitive practices. One of the most creative features of the new regulation envisaged the decentralisation of enforcement by allowing the national competition authorities and courts to be able directly to apply articles 81 (and 82) to any agreement that affected intra-state trade. In all areas where there existed a cross-national effect that EC law will apply. This affirmation of a system of parallel competences and the creation of a flexible mechanism for case allocation between the national and supranational levels) is a radical innovation. Put another way the regulation effectively means that the status and authority of the national competition bodies have been transformed into cartel-like agencies of the European Commission.

¹¹ See point 3, See point 1, Council Regulation (EC) No 1/2003 on the Implementation of the Rules laid down in Articles 81 and 82 of the Treaty

Some have interpreted this reform package as an adept masterstroke on the part of the Commission to anchor its pre-eminent position (Wilks, 2005) *vis á vis* the national authorities while others have been more critical and argue that the alterations threaten a complete Balkanisation of competition policy enforcement (Joshua, 2001). It is still too early to provide an accurate assessment of the reform but the Commission is already conducting a survey of Regulation 1/2003 in practice which remained open for public comment until the end of September 2008. The results are awaited with interest.

Reform, it must be emphasised was far from being automatic or a foregone conclusion. Discussions and deliberations within the Council had revealed a number of detractors, and particularly in Germany, where repeated concerns were raised by the German Federal Cartel Office (BKartA) about what it deemed to constitute the inherent weaknesses of the new regime. These have centred primarily on the degree to which EU decisions were subject to the infusion of politicking in the College of Commissioners. Although the BKartA vocally resisted changes and tried to ensure that Article 81 should serve as a minimum standard with national competition law being allowed to offer stricter formulations it was unable to muster a blocking minority in Council and the proposals passed. Identifying this major reform as modernisation, although certainly undeniable, provides, however, only a partial explanation. The other avenue for exploration must focus on what represents the Europeanization (read policy convergence) of cartel policy. For others, the final version of Regulation created the 'French' administrative model of cartel policy!

Cartelbusting has never been quite as straightforward as the handling of potential mergers. Over the years firms engaged in such practices have become increasingly adept at concealing their moves. For example, experience has shown that there are numerous cases where business records have been stored at the home of directors or other employees and to aid the cartelbusters the new regulation grants the European Commission the power for the first time to interview individuals or representatives from an undertaking (Article 19), enables the Commission not only to search business premises where serious violations are suspected (Article 20), but also under Article 21 equips the cartel busters with the power to search domestic premises (home raids).¹² Complaints from third parties and former cartel members represent a fundamental means of detecting infringements and from the Commission's perspective it remains essential to establish a clear and efficient procedure for handling complain procedures. Moreover, the Commission has been given the ability to conduct its own enquiry into a particular sector of the economy is again reinforced and in both theory and practice from now on should be much easier to conduct than in the past when the Commission was overloaded with notifications. This step is already producing positive results and enabled, for example, the Commission to launch a full enquiry and information gathering exercise into the state of competition in the pharmaceutical sector for those medicines related to human consumption in January 2008 (IP/08/49).

EU cartel policy moved centre stage after 2004 and attention is focusing more than ever on the identification, targeting and pursuit of cartels. Kroes has pledged to 'be steadfast in applying zero tolerance to those who operate cartels to the disadvantage of customers... I have made it crystal clear that the fight against cartels will be one of my top priorities... I intend to walk the walk as well as talk the talk'

¹² See point 26, Council Regulation (EC) No 1/2003 on the Implementation of the Rules laid down in Articles 81 and 82 of the Treaty.

(Kroes, 2006b). There is, of course, nothing particularly new in rhetoric behind this anti-cartel drive. The rhetoric is good, but is the Commission delivering?

ASSESSING THE IMPACT OF THE ANTI-CARTEL STRATEGY

DG Competition is certainly trying to deliver in terms of policy and organisational changes. Throughout the history of EU restrictive practices and cartel policy it is clear that DG Competition's activities have been hampered by too many potential cases coming before it and insufficient staff numbers to deal adequately (in terms of speedy decision making) with all these cases. DG Competition and external commentators had long voiced their concern (and correctly) over insufficient staffing levels and a backlog arose which restricted DG Competition's pursuit of cartel agreements. Aware of this reality and the prevalence of cartels the Commission has long sought a means to prioritise its fight against such overt anti-competitive practices. This objective has been brought closer with an increase in staff levels. A number of recent rises in overall personnel numbers to some 750 by the end of 2006 (as compared to 411 in 1992) (Cini and McGowan, 2009:53) is expected to allow the competition regulator to handle more cases. An augmented pool of staff may work but DG Competition will still be hard pressed, however, as overall numbers are still fairly modest. Indeed, some 357 officials deal with anti-trust, mergers and liberalisation as well as cartels. The welcome additional staff numbers have enabled a degree of strategic organisational restructuring and the creation of a new dedicated (and 60 strong) Cartels Directorate. It is a welcome development but in reality more staff is required. The number of decisions in cartel cases is somewhat low (as figures 1 and 2 illustrate) and is due to resource constraints and arguably a degree of inefficiency within DG Competition where there is considerable staff rotation and the involvement of too many staff with pending cases and cases before the Courts. The decision making process remains too slow. Even without taking on any new cases it is generally assumed that DG Competition would require several years to clear the existing backlog. Not surprisingly the Commission has continued to seek further deterrents and means to both break-up cartels and to deter them in the first place.

Figure 2
Commission Cartel decisions and annual fines since 2003

Year	No. of Cartels detected	Total Fines
2003	5	404.8 m
2004	6	390.2 m
2005	5	683 m
2006	7	1,846 m
2007	8	3,338 m
2008	7	2,271
2009 (to March)	1 ¹³	132
Total	39	9, 065 m

¹³ Marine Hoses became the first cartel decision of 2009 (IP/09/137) when 6 companies were handed a finer of €131 million.

Source: DG Competition website http://ec.europa.eu/competitionand_sourced_on_11. March 2009

Source: European Commission

One of the most visible developments over the last decade has the Commission's determination to move towards harsher penalties and the imposition of meaningful fines. The seventeen highest fines in the history of EU cartel policy were all levied after 2000 and nine of these have occurred after 2005 (see figure 3). The Car Glass¹⁴ and the Lifts and Escalators cartels embody the two largest fines to date in the history of EU cartelpushing. These fines may illustrate an upward trajectory but there have always been questions over whether such administrative fines impact sufficiently on the companies to hurt them or deter them from further activity (see figure 4)? How high is high enough has been an issue that has divided commentators?¹⁵ There is general agreement that deterrence requires a heavy financial sanction but the fines imposed by the Commission may simply fail to outweigh the illegal profits that have been earned. For many commentators (Buiccirossi and Spagnolo, 2006, Motta, 2007) fines have traditionally been set at too low a level and have argued that any real deterrent needs to greatly exceed the original 10 per cent threshold established under Regulation 17. Few fines have come anywhere close!¹⁶

¹⁴ The Commission's decision to levy fines of over €1.383 896 000 on the members of the Car Glass cartel (IP/08/1685) marks yet another milestone in the history of EU cartelpushing for two reasons. This fine, which was based on the 2006 guidelines (IP/06/857), represents the highest ever levy for an infringement of Article 81 and secondly, represents the highest ever fine against an individual company (Saint Gobain) in its role as a repeat offender (see figure 7.5). The cartel had been in operation from 1998 to 2003 and had actively sought to restrict competition by fixing process and allocating markets. Car glass itself is used in a variety of ways by the car industry in the manufacture of windscreens, wing mirrors, windows and sun-rooves. The cartel bore the familiar characteristics. Meetings had been arranged to take place in airports and hotels in different European cities where confidential information was exchanged by the parties concerned. Neelie Kroes was scathing in her comments about the objectives of this cartel and argued that these companies had cheated the car industry and car buyers for five years in a market which was estimated to be worth two billion euros in the last year of the cartel. Given the size of the market and its affects the Commission regarded this cartel as a 'very serious infringement' of the antitrust rules and was extremely critical of the activities of the cartel members who comprised Asahi, Pilkington, Saint-Gobain and Soliver. Together the four offenders controlled more than 90 per cent of the EU market (including the EEA) for branded replacement glass for car. The case was also interesting in its own right as an 'own initiative' case to which DG Competition had been alerted to by an unknown third part and suggests that the recent reforms are bearing fruit. Asahi was granted a 50 per cent reduction in its fine as it supplied information under the Leniency Notice.

¹⁵ See OECD, Report on Hard Core Cartels, 2002.

¹⁶ In Elevators and Escalators ThyssenKrupp's consolidated sales, according to its annual report, amounted to roughly €47,100 million for 2005/2006. It had increased its total turnover by €4,198 million. The fines imposed by the Commission was €480 million and represented less than 10 per cent of the previous year's turnover.

The EU's Cartel Wars: The Seventeen Largest Fines in EU Antitrust History, 1969-present¹⁷

Case Name and Economic Sector	Year fine imposed	Number of Cartel Members	Amount of Fine (euro)
Car Glass	2008	4	1,383.8 million
Lift and Escalators i	2007	5	992.3 million
Vitamins	2001	4	855 million (on appeal reduced to 790.5 million)
Gas Insulated Switchgear i	2007	11	750.7 million
Candle Waxes i	2008	10	676.0 million
Synthetic Rubber i	2006	6	519 million
Flat Glass i	2007	4	486.9 million
Plasterboard i	2002	-	458.5 million
Hydrogen peroxide i	2006	9	388.1 million
Methacrylates (Acrylic Glass)	2006	5	344.5 million
Hard Haperdashery/Zip Fasteners i	2007	7	328.6 million
Copper Fittings Producers i	2006	11	314.7 million
Carbonless Paper	2001	6	313.6 million
Plastic Industrial Bags i	2005	16	290.7 million
Dutch Brewers ^c	2007	4	273.7 million
Bitumen Netherlands i	2006	14	266.6 million
Chloroprene Rubber i	2007	6	247.6 million

i) appeal lodged before the CFI

ii) Following judgment of the CFI

Source: European Commission website at

http://ec.europa.eu/competition/cartels/overview/faqs_en.html on 12. March 2009

The Commission recognised such criticisms and finally introduced a new, and the strictest yet, framework notice for the setting of fines in 2006 and one that significantly raises the bar when imposing fines (IP/06/857, OJ C 210). It sees a possible 10 fold increase in the level of fine that can be imposed and an even higher penalty for repeat offenders.¹⁸ The Commission is making its intention robustly clear

¹⁷ There were of course a number of smaller cases during this period. It is not the intention to list all here but they included amongst others, decisions against: FETTCSA (€6.9 million in 2000); Amino Acids (€109 million in 2000); Soda-Ash (€33 million in 2000); SAS/Maersk Air (€52.5 million in 2001); Sodium Gluconate (€57.7 million in 2001); Belgian Brewers (€91 million in 2001); Luxembourg Brewers (€448,000 in 2001); Citric Acid (€135.22 million in 2001); German Banks (€100.8 million in 2001); Austrian Banks (€124.46 million in 2002); Dutch Industrial Gases €25 million in 2002); Sothebys/Christies (€20.4 million in 2002); Food Favour Enhancers (€20.56 million in 2002) and Concrete Reinforcing Bars (€85 million in 2002).

¹⁸ The actual level of fine is calculated to reflect both the length and seriousness of a particular infringement and also to punish those habitual offenders. New draft guidelines were published in June

and by stiffening the deterrent is hoping to encourage more whistleblowers. The new fining arrangements mark a major step forward and it is increasingly difficult to make a case for higher fines without seriously entailing some degree of social costs for the companies concerned. Fining arrangements may represent a useful means to deter existing cartels but how far do they prevent the formation of new cartels? Under existing arrangements managers and chief executives rarely lose their jobs for cartel activity. The move towards the introduction of criminal sanctions (as in the USA and in some EU member states) which includes real and personal risk (prison sentences) to such executives may arguably provide greater results. The issue of criminal sanctions would certainly prove controversial in terms of wider discussions about EU competences under the current Pillar 1, but such sanctions already apply in many member states (though they are rarely used). Creeping steps towards some form of 'harmonised criminal sanctions' (Daly, 2007:315) for cartel offences in the EU are probably much closer than many commentators realise though there is scope to debate the origins and promoters of such developments.

For the moment, pecuniary sanctions remain the Commission's best weapon and they impact in another way as evidence illustrates that markets do react rather badly to Commission investigations of cartel activity (as made public in dawn raids), infringement decisions and negative court judgements (Langer and Motta, 2006). In the short term a firm's value actually falls. How far and how damaging such falls may be is open to further question. Positively, however, the fines impact on European consumers in two ways. The first outcome is relatively straightforward and relates to the benefits to consumers from a system of genuine competition (better quality products at lower prices) but the second is equally significant and relates directly to this attempt to mainstream competition policy because these fines are paid directly to the EU and enter the miscellaneous category of the EU budget.

This fourth period of activity also saw an overhauling of the Leniency initiative in 2002 (OJ C45, 19/02/02). Leniency had promised to relieve DG Competition's resources and to provide hard evidence to present to the courts, but it had not proved as successful as imagined. There was one major distinction between the EU and the US leniency schemes. Whereas leniency was automatic under the US regime it was at the Commission's discretion to give and by how much under the EU system. In its scheme the Commission had devised several categories to reflect the level of reduction in the fine depending on the material and evidence supplied by the firm in question. This proved problematic as it left business unsure about the advantages of pursuing the leniency route and prompted major reform in 2002 to provide immediate immunity.

Whereas experience of the first Leniency programme had displayed considerable reluctance towards this Commission initiative (Reynolds and Anderson, 2006) the policy is now proving very effective and most cartels that are now being discovered and unravelled by the Commission following the receipt of insider evidence. Indeed, whereas the Commission received 80 applications (both for total immunity and a reduction in fines) in the period from 1996 to 2002 it is interesting to note post the 2002 Notice the rise in such requests. In the period from February 2002

2006 (to update the 1998 Notice) and approved in the autumn of 2006 and present a revised and tougher framework for the setting of fines. Under the new rules companies will be fined a so-called 'entry fee' automatically and this will amount to somewhere in the region of 15-25% of their specific annual turnover from the infringement in question while repeat offenders can expect even tougher example of how fines are set.

until the end of December 2006 104 applications were made. 56 of these were granted partial or complete immunity. The reworked 2002 Leniency Programme has 'been an extremely effective device in uncovering cartels and in facilitating the Commission's task to prosecute the companies involved in such cartels' (Motta, 2007:18). The fact that more and more companies are approaching the Commission for leniency is a sure sign of the programme's impact (see Geradin and Henry, 2005) and success and has been enthusiastically welcomed by the Commission. However, two points should be made. Firstly, the Leniency Programme has not really reduced the length of time needed by DG Competition to handle the case and secondly, the competition regulator can still not deal with all cases brought before it on account of limited resources and prefers to focus on major international cartels.

The publication of the most recent Leniency Notice in December 2006 (OJ C 298, 8/12/2008; de Broca, 2006) has reinforced the fundamental shift in business' approaches to, and growing acceptance of the leniency initiative. This revised Notice represents a significant step to both detect and terminate hard core cartel activity. Hard core infringements (that divide markets, fix prices and/or apply conditions of sale) are deemed under Article 81 to constitute infringements even where in theory they might be able, but in practice cannot make a case for efficiency benefits. Interestingly, in agreements where there are no specific hardcore clauses can still fall foul of the EU rules if they have the effect of restricting actual competition.

The 2006 Notice clarifies for companies the information the Commission requires for an undertaking to benefit from immunity as well as providing greater guidance on how to obtain a reduction in fines. According to the Commission the leniency programme continues to play a crucial role in DG Competition's detection efforts and continues to entice more 'whistle blowers' to come forward. However, it has been suggested that most of the cartels detected through the leniency programmes would probably have broken up within a couple of years in any case (Lowe, 2007). Such often economic assessments should not be allowed to detract from serious nature of cartels. The fortunes for the companies who have opted to cooperate have been mixed. In the very first decision stemming from the 2002 Notice in *Raw Tobacco Italy* the original whistleblower's hope of conditional immunity was dashed when it was discovered that it (Deltafina) had actually pre-alerted its competitors/cartel members of the pending Commission investigation. Nevertheless, Deltafina was deemed to have provided sufficient information and warranted a 50 per cent reduction.

In *Bitumen* (2006) British Petroleum came forward as a whistle blower and was granted immunity from a Commission fine for clear cartel activity among oil producers. In this case the highest individual fine fell on Shell (€80 million) and provided further evidence of the Commission's determination to punish such habitual cartel offenders (given Shell's earlier involvement in the *PVS* and *Polypropelene* cases) more severely. In *Chloroprene Rubber* (IP-07/1855) Bayer's decision to play whistle blower and inform the Commission of a price fixing and market rigging cartel in the production of rubber ensured that the company received complete immunity from the overall fine while its former partners (including ENI and Tosoh) were punished for cartel activity that has lasted from 1993-2002.

As already pointed out (Motta, 2008; 211) the Leniency initiative has not reduced the overall length of investigation time. Most cases still take some three years on average and pushed the Commission to consider the adoption of a settlement procedures scheme which encapsulated a form of plea bargaining as already exists in the United States. The settlement procedure for cartels was

introduced in June 2008 (IP/08/1056) and enables the Commission to settle cartel cases through a more simplified procedure. Basically this scheme operates when firms who have been alerted to the DG Competition's file and evidence, agree to plead guilty to their (the company's) participation in the specific infringement of Article 81. In return the Commission can reduce the fine that it would have imposed by some 10 per cent. The attraction of this course of action is a speedier response and a freeing up of resources and makes it more unlikely that the company will appeal to the Courts. This process should save time and manpower. The process is entirely voluntary and where no settlement is reached the usual procedure will apply.

In the meantime another Commission initiative centres on the introduction of a direct actions scheme whereby both companies and consumers could seek private damages from cartel activity. According to Kroes, 'businesses and consumers in Europe lose billions of euros each and every year as a result of companies breaking EU antitrust rules. These people have a right to compensation through an effective system that complements public enforcement, whilst avoiding excessive burdens and abuses'.¹⁹ Direct actions have been rare in EU competition law and in many of the member state jurisdictions but they hold considerable potential for the competition regulator. The Commission's Green Paper and a Staff Working Paper on Damages Actions for Breach of the EC Antitrust rules was published in December 2005. Its purpose (see Pheasant, 2006) was to launch a debate from stakeholders and to set out a number of possible options to facilitate private damages actions where loss has been suffered as a result of a deliberate infringement of the competition rules.²⁰ The responses from the public discussion fed directly into the Commission's White Paper on Damages in April 2008 which was once up again up for discussion until mid July 2008. If civil actions come into play in cartel-busting it will provide another potential deterrent because if successful, any private claim for damages would come on top of the fines already imposed by the Commission. Some commentators are more sceptical and believe the impact will be less than imagined as few individuals will have the means to bring cases (see Walsh, 2008). The practice itself, however, marks a new shift in direction and one that again derives largely from US experiences and private litigation. The beauty of this approach from the Commission's perspective is the fact that it is completely resource free and is being strongly encouraged. In short, the White Paper embodies an ingenious move and, if approved by the Council, potentially represents another landmark in development of EC competition policy.

AN ANTI-TRUST ENFORCEMENT COALITION

The decentralisation of antitrust enforcement and the involvement of the national competition authorities in decision making proved relatively unproblematic as all the EU states had either voluntarily aligned their national policy with Article 81 (as in the EU15) or had done so as part of the conditionality arrangements for the states that

¹⁹ See the Commission's competition web site at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html> which was accessed on 11. August 2008.

²⁰ The public consultation on this Green Article was open until 21st April 2006. The Commission received substantial comments from business and law firms across Europe and beyond and has put all submissions on its website at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html

acceded to the EU after April 2004. The convergence process reflected the reality that much cartel activity was increasingly cross-border and thus, propelled inter-agency dialogue. The convergence process with the European Union model and particularly from both those states with the most experience with anti-cartel legislation that dates back to the late 1940s (in the UK case) and 1957 (in the German context) typifies the pull of the integration logic and notions of Europeanization. The decentralisation process had enabled the construction of an anti-cartel coalition that was centred on the European Competition Network (ECN).

The ECN promises an ever closer relationship between the Commission and the national competition authorities. The ECN centres on which provides for a greater degree of both horizontal and vertical exchanges of information, consultation and interaction between all the members over policy in general and specifically over individual competition cases and has led to a number of joint statements. It can be read as an ingenious mechanism to foster and develop a competition culture across EU space and supersedes earlier forms of interaction which Gerber (Gerber, 2002) labelled both the 'foundational model' and the 'solar model'. In operation it is hoped that the ECN will potentially strengthen information symmetry and reduce conflict. It will certainly strengthen the 'federal' relationship.

Developments in European cartel governance in both the form of policy convergence and the new 'European family of competition authorities' (Lehmkuhl, 2008: 151) have been truly remarkable. Given that some states in Western Europe did not even possess a competition law in 1990 let alone the non-existence of the competition principle in the newest EU Member States that had once belonged to the Soviet block, the emergence of competition governance is somewhat revolutionary. We should neither readily dismiss the different philosophies, approaches and national provisions that had existed and shaped cartel policy even in the states with competition laws in Western Europe nor the lack of contact between the EU rules and the national systems (Riley, 2003). Can these different experiences prevent the arrival of a single European cartel policy?

According to the Commission, however, the ECN is already proving effective as a forum for consultation and information exchange. So far, disputes have not occurred. Indeed, one of the first positive outcomes of such dialogue centres on the readiness of national competition authorities to alert the Commission and other ECN members about potential cartel infringements and thereafter to embark on joint co-operation in the very early stages of the investigations. Others (Riley, 2003 and Wilks, 2007) remain to be fully convinced and hold that the ultimate success of the ECN will depend on the powers of enforcement and the reality that some of the national authorities (e.g. the British, French and German) are unquestionably more significant players within the ECN in terms of budget and case-load than many of the others.

Others have wondered whether the EU modernisation plan was 'deeply flawed' (Joshua, 2001). Federalising competition policy with a system of federal courts was a radical idea but doubts were raised about the challenge that the fragmentation of enforcement poses for legal predictability and consistency in a multi-level governance system like the EU and especially in Central and Eastern Europe. It is one thing to enact competition legislation and another to implement it. In order to prevent any inconsistency in approach the Commission has moved to finance training programmes to the value of €600,000 to train and retrain national judges about the latest developments in competition law. Considerable co-operation

within the EU seems to be becoming a reality but time will tell how secure and pronounced this actually is.

Since the late 1990s fewer Commission decisions have been overturned by the Courts as the Commission started to receive much more substantive evidence and proof through the Leniency programme. However, although the Courts have not rejected any of the more recent Commission decisions they have usually opted to slightly lower many of the actual Commission fines (Motta, 2008). Recourse to the courts makes sense for firms who hope at least for a reduction in the size of the overall fines. Between 1999 and 2006 fines were appealed in 33 out of 39 instances. Some 13 were reduced. In order for cartel policy to be effective there needs to be a general consensus on the part of both the Commission and the Courts over facts and stances. Constant friction and disagreements would seriously undermine policy effectiveness. Both have come to realise this. In 2005, for example, the European courts reviewed eight cartel decisions (some four in 2004) and significantly, backed the Commission's stance in each case. The Commission has also taken to welcoming Court judgements as in CFI's ruling on Plasterboard when Commission's initial fines were reduced from €478 million to €458 million/ (MEMO/08/489 Date: 08/07/2008). Advances are being made in the Commission's war against cartels but let's be clear. Even with the recent increases in staffing levels it is clear that DG Competition is still under-resourced and this is particularly true for the fight against cartels. This explains why the Commission continually seeks new mechanisms and means to aid its activities.

Figure 7.5

The Ten largest Fines imposed by the Commission on Individual Companies for Cartel Membership

Company	Fine (euros)	Year
Saint Gobain	896000 000	2008 (Car Glass)
ThyssenKrupp	479 669 850	2007 (Lifts and Escalators)
Hoffmann-La Roche	462 000 000	2001 (Vitamins)
Siemens	396 562 500	2007 (Gas Insulated Gear)
Pilkington	370 000 000	2008 (Car Glass)
Sasol Limited	318 200 000	2008 (Candle Wax)
ENI SpA	272 250 000	2006 Synthetic Rubber
Lafarge SA	249 600 000	2002 (Plasterboard)
BASF AG	236 845 000	2001 (Vitamins)
Otis	224 932 950	2007 (Lifts and Escalators)

Source: *European Commission website at http://ec.europa.eu/competition/cartels/overview/faqs_en.html on 12. March 2009*

CONCLUSIONS

EU cartel policy provides for a fascinating study of supranational enforcement activity and one where once the Commission had accrued its powers, developed its arguments and bolstered its position as a puissant and determined regulator. The Commission consistently displayed both imagination and drive in its efforts to combat cartels

through initiatives such as the decentralisation of its remit, the leniency notices, the imposition of higher fines, moves towards direct actions and is firmly located as the focal point of anti-trust activity within the ECN. Having been empowered by the Member States the Commission has been able to graft on new notices and guidelines itself to make cartel policy more efficient. Building in mechanisms (such as the ECN) as a means of securing greater co-operation and consistency with the national competition authorities is one such route that hopes to enhance detection and foster a common competition culture. Time will tell how effective this will be but it appears for some to be working well already (ABA, 2005).

Judging just how successful European cartel policy actually is remains an arduous task for we only get to learn about the cartels that have been unearthed. Just how many unknown agreements proliferate through the entire global economy? Are the cartel authorities really making an impact on attitudes? Officials are prepared to state that they are probably discovering only the tip of the iceberg and that the challenge confronting all cartel-busting regulators is immense. According to Phillip Lowe (Lowe 2007), DG Competition's Director General the Commission will only uncover about 10 per cent of cartel activity. This demonstrates the difficulty in diminishing the propensity that exists among many businesses towards cartelisation and the negative aspects that arise from this activity. Ultimately, cartels as an element of the business world in all probability will never be vanquished. The regulator's task is an immense one and each must create the best possible conditions that deter cartelisation. It is fair to say that the Commission is making progress. Detection is getting easier but finding the right deterrent remains somewhat elusive.

From a positive perspective DG Competition has correctly opted to prioritise its cartel-busting activities and its record over the last twenty years is pretty impressive. Horizontal price fixing and market sharing agreements have been attacked robustly. An analysis of the Commission's cartel decisions (see its website for official figures) reveals how the number of cartel agreements being uncovered has risen steadily since the late 1980s. This has corresponded with a dramatic rise in the level of fines that have been imposed by the Commission on cartels since the mid 1990s. The publication of the fining notices (1998 and 2006) and the Leniency Programme seem to have made a positive impact as far as dissolving cartels is concerned. There are still issues and problems to be addressed.

In this the under-resourced Commission has shown degrees of flair and imagination in the recent past. As DG Competition's resolve intensifies so it appears does the determination of cartels not to be caught. Indeed, cartels are becoming ever more sophisticated and better equipped to evade the cartel hunters. It is clear that DG Competition has used its authority and powers to create norm interpreting administrative rules which take the form of guidelines, communications, notices and letters (see Hofmann, 2006). It was handed weapons to secure its objectives but also devised and upgraded its own means to tackle cartels. It has developed and deployed simultaneously both carrot and stick approaches to deter cartelisation. The new fining arrangements should prove invaluable upgrade and will neither lead to bankruptcies nor higher prices for consumers as is so often claimed (see Motta, 2008). Indeed, the Commission should publicise more widely to a general audience how its anti-cartel strategies benefits consumers directly (the benefits of greater competition) and indirectly (fines are paid into the EU budget). Ultimately the fact that cartels still exist strongly suggest that fines at current levels do not act as sufficient deterrents but can they go much higher and further? Whatever sanctions prevail must achieve 'genuine dissuasive effect' (Van den Bergh and Camesasca, 2006, 312). Moves towards

the criminalisation of cartel activity, and some member states including the UK now allow for such sanctions, may yet provide the better, and even the best, deterrent (Wils, 2008) but it requires similar sanctions across all EU Member States and raises questions about the nature and powers of the EU. It will be interesting to see how far the UK experience of criminal sanctions in practice will inform discussions within the EU and provide political leadership to spearhead this initiative. The issue of criminal sanctions for cartel offences is expected to emerge as a 'hot' topic for debate and seems inevitable in the medium term.

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