# The EU Competition Law Fining System: A Reassessment

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13 November 2013

UCL Conference -- New Challenges in EU Competition Law and Enforcement

# Sanctions are central to the EU Competition law regime

- Sanctions should be part of all legal regimes and this is also true for Competition law

- Because of the severe harm that can be created by Competition law infringements, sanctions for such infringements must be sufficiently strict to ensure deterrence

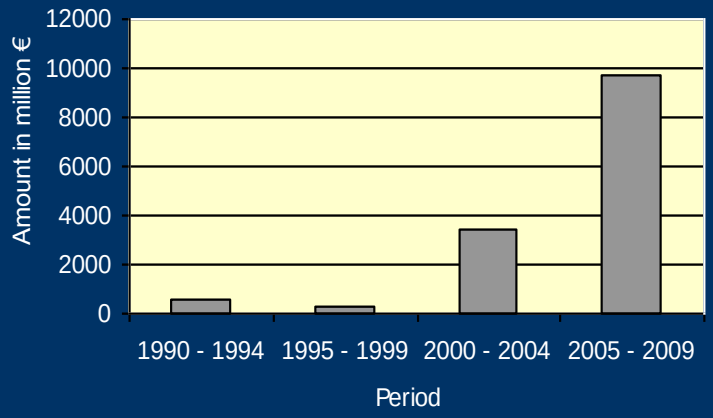
- BUT is the imposition of increasingly high corporate fines the most effective way to improve compliance with EU competition law?

Proposals made in the paper seek to improve the efficiency and fairness of the sanctions imposed in case of infringement, and ensure that they are made at the least cost to society

# The evolution of competition fines imposed by the Commission

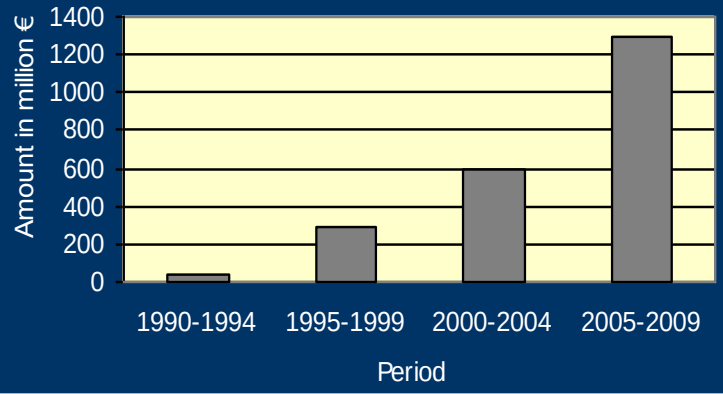
## Fines imposed by the Commission (1990 – 2009)

- **CARTELS**




| Period | Amount in million € | No of cases |
|---|---|---|
| 1990 - 1994 | 539.69 | 11 |
| 1995 - 1999 | 292.84 | 10 |
| 2000 - 2004 | 3462.66 | 30 |
| 2005-2009 | 9736.24 | 33 |

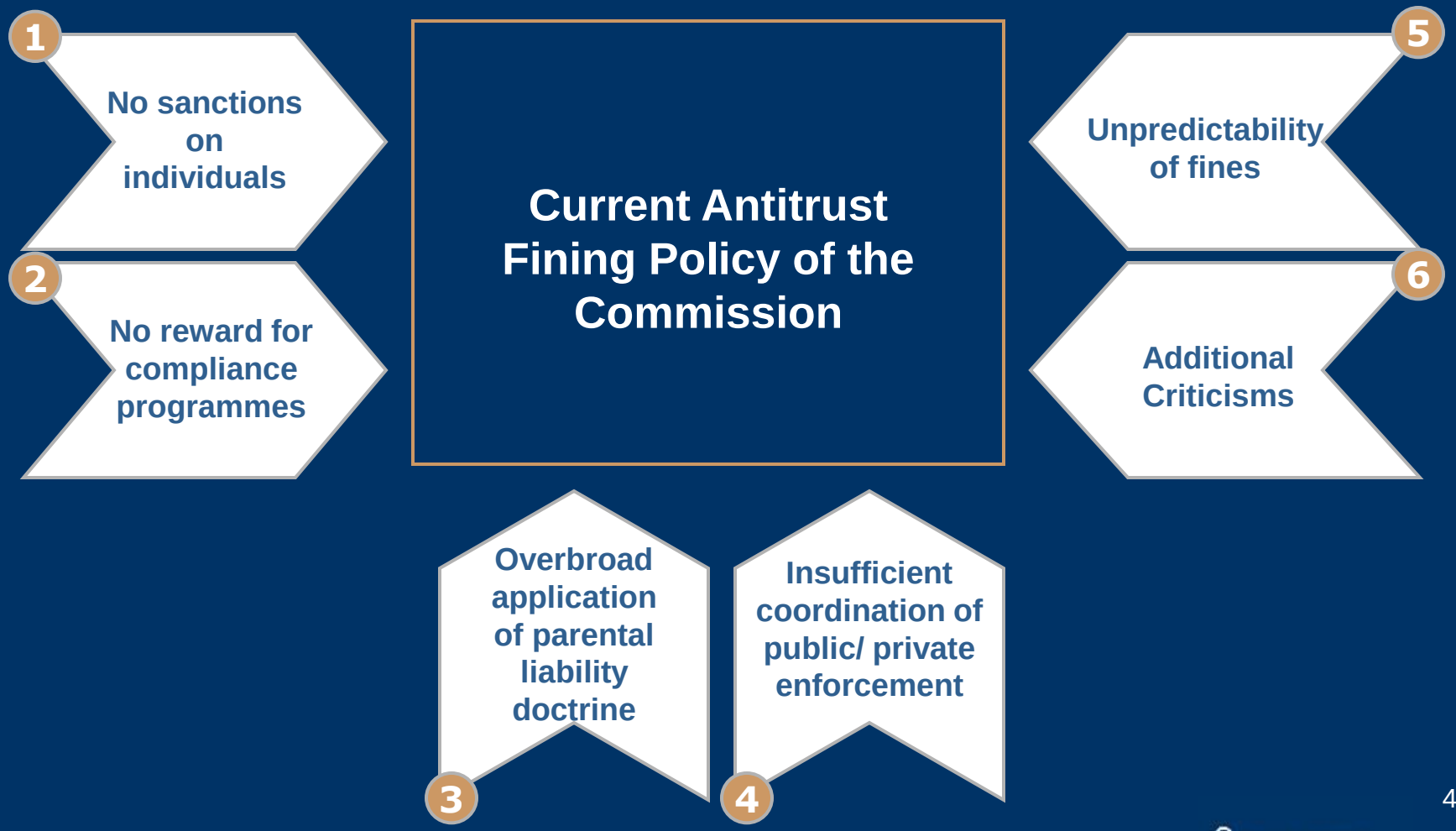
- **102 TFEU INFRINGEMENTS**




| Period | Amount in million € | No of cases |
|---|---|---|
| 1990-1994 | 38.85 | 5 |
| 1995-1999 | 294.60 | 5 |
| 2000-2004 | 599.61 | 9 |
| 2005-2009 | 1295.9 | 4 |

- Steep increase in the amount of fines imposed for cartels in years 1990-2009
- Case-specific factors must be taken into account
- These factors alone do not suffice to explain the significant increase in antitrust fines at EU level

# Main criticisms against the current fining policy of the Commission



# 1 The effectiveness of the EU antitrust fining system suffers from its exclusive focus on undertakings (1)

**CORPORATE FINES**

| | |
|---|---|
| **Necessary** | Corporate fines are necessary, as otherwise corporations would do little to prevent infringements by their employees |
| **Insufficient** | However, they are also insufficient because the ability of firms to prevent or deter their employees from committing infringements may be limited |
| **Not always Effective** | There is no evidence that the increasingly stringent fines have an impact on the number of infringements. For instance, there is a high level of recidivism in cartel cases |

# 1 The effectiveness of the EU antitrust fining system suffers from its exclusive focus on undertakings (2)

**COMBINATION OF CORPORATE FINES WITH SANCTIONS TO INDIVIDUALS**

- Effective deterrence requires a combination of corporate sanctions and individual penalties:
  - Sanctions that directly hurt employees are likely to make them more hesitant to breach competition rules
  - The risks of such sanctions may also lead employees to reject orders to engage in anti-competitive behaviour coming from their superiors and even encourage them to blow the whistle
- Sanctions on employees could include imprisonment, director disqualifications, personal fines, etc.

**EFFECTIVE DETERRENCE**

# 1 Sanctions on individuals in EU (Competition) law?

## FINES TO INDIVIDUALS

- There is no legal obstacle in primary EU law to the introduction of fines against individuals, as long as they do not have a criminal law nature (see Article 103 TFEU)

- But this would require a modification of Regulation 1/2003, as the latter only provides for sanctions against "undertakings and associations of undertakings"

## CRIMINAL SANCTIONS TO INDIVIDUALS

- Imprisonment and other criminal sanctions cannot be introduced at the EU level under TFEU

- Article 83(2) TFEU, which confers the power to the EU to adopt substantive criminal law measures, requires the use of Directives. This seems to exclude the possibility of criminalizing competition law at the EU level

- However, through a Directive, the EU could require Member States to adopt criminal penalties at the national level to sanction individuals who have breached Articles 101/102 TFEU

# 2 Reward the implementation of Compliance Programmes

## Reward of "Robust" Compliance Programmes

- A Compliance Programme qualifies as "robust", when the undertaking makes significant effort to align with competition rules. The Programme should include training, monitoring and sanctioning mechanisms

- Even if one or several employees decide to breach EU Competition law rules, the undertaking should be rewarded for putting in place such a Programme, especially given the difficulties of detecting at corporate level the unlawful behaviour of individuals

## Lessons from the decisional practice of NCAs

- In a new Communication on fines from May 2011, the French Competition Authority (NCA) encourages the adoption of compliance programmes

- In October 2011, the French Competition Authority also initiated a consultation process, whereby all stakeholders were invited to submit comments

# 3 The scope of the parental liability doctrine is too broad

- When a parent company is found to exert "decisive influence" over the conduct of its subsidiary, it can be made jointly and severally liable for the fines imposed on that subsidiary

- Parental liability can significantly increase the level of the fines (as the 10% cap applies to the turnover of the parent company and there is an increased risk of recidivism)

**Compliance Programmes**

- Parent companies that have not participated in the infringement should only be held liable if they fail to monitor the compliance of their subsidiaries with competition law by implementing a robust compliance programme

**No direct involvement**

- At least, the fact that the parent company is not directly involved in the infringement should be taken into account either to reduce the gravity percentage or as a mitigating circumstance

# 4 Uncoordinated accumulation of public and private enforcement

## The Importance of Private Enforcement

- Until recently, the accumulation of liabilities was not a major issue because private enforcement was minimal in Europe
- However, this can change, given the recent tendency of reinforcement of private enforcement. The possible introduction of collective redress is also part of this trend
- With the rise of private enforcement, the total amount of fines and compensation for which infringers could be liable might reach disproportionate levels

## Coordinating accumulation

- It has become important for the EU to address the interaction of public and private liabilities
- The paper makes several proposals to address this problem

# 5 The EU antitrust fining system's insufficient predictability

## UNCERTAINTY IN THE EU ANTITRUST FINING SYSTEM

- In the 2006 Fining Guidelines (para 37)
- Because of the EU substantive rules (not true for infringement by "object", but for infringement by "effects")
- Due to the decentralisation of EU Competition law enforcement
- Given the lack of transparency surrounding fine reductions granted in case of "inability to pay" or other financial constraints

## STUDY

- The paper makes **several proposals** to address this problem of uncertainty

# 6 Additional deficiencies in the EU antitrust fining system

| | |
|---|---|
| **Effects?** | The effects of the infringement should be taken into account in the assessment of the fine |
| **10% Ceiling** | The 10% ceiling for EU sanctions should be defined in a more elaborate manner |
| **Recidivism** | The conditions for recidivism should be clarified |
| **Negligence/ Intent** | Negligence and intent should be distinguished more clearly |
| **Human Rights** | The EU antitrust fining system should respect the human rights guarantees of ECHR |

# Conclusions

The main proposals made in the Discussion Paper

- Introduce individual sanctions
- Reward the implementation of “robust” compliance programmes
- Mitigate the liability of parent companies that have not participated in the infringement and/or have implemented robust compliance programmes
- “Regulate” the interaction between public and private liabilities
- Increase predictability in the EU fine setting procedure
- Address specific discrepancies of the EU fine setting procedure