The Optimal Enforcement of EC Antitrust Law
Essays in Law & Economics

Wouter P.J. Wils
# TABLE OF CONTENTS

ACKNOWLEDGEMENTS v

1. INTRODUCTION 1

1.1. SUBJECT MATTER 1

1.2. METHOD 3

2. EC COMPETITION FINES: TO DETER OR NOT TO DETER 8

2.1. INTRODUCTION 8

2.1.1. The legislative framework 8

2.1.2. Some elementary statistics (1969-1994) 10

2.1.3. The economic approach to law enforcement 12

2.2. FINES VERSUS OTHER METHODS OF LAW ENFORCEMENT 13

2.2.1. Deterrence versus prevention 16

2.2.2. Fines or damages versus imprisonment 16

2.2.3. Public versus private enforcement 18

2.2.4. Compensation 21

2.3. THE CORRECT BASIS FOR ASSESSING FINES 21

2.3.1. Gain-based or harm-based fines 22

2.3.2. Nominal and expected fines and the probability of punishment 24

2.4. THE PRACTICE OF EC COMPETITION FINES (1969-1994) 26

2.4.1. Cases in which no fine is imposed 26

2.4.1.1. Notified agreements 26

2.4.1.2. Leniency 28

2.4.1.3. Absence of negligence or intent 29
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4.2. The Commission's method of calculating fines</td>
<td>31</td>
</tr>
<tr>
<td>2.4.2.1. Description</td>
<td>31</td>
</tr>
<tr>
<td>2.4.2.2. Critical assessment</td>
<td>32</td>
</tr>
<tr>
<td>2.4.3. Other factors taken into account</td>
<td>34</td>
</tr>
<tr>
<td>2.5. DO CURRENT FINES DETER?</td>
<td>37</td>
</tr>
<tr>
<td>2.6. TO DETER OR NOT TO DETER</td>
<td>41</td>
</tr>
<tr>
<td>3. THE COMMISSION NOTICE ON THE NON-IMPOSITION OR REDUCTION OF FINES IN CARTEL CASES</td>
<td>45</td>
</tr>
<tr>
<td>3.1. SUMMARY OF THE COMMISSION NOTICE</td>
<td>45</td>
</tr>
<tr>
<td>3.2. PRECEDENTS IN THE EC AND IN THE US</td>
<td>47</td>
</tr>
<tr>
<td>3.3. LENIENCY AND THE ECONOMICS OF LAW ENFORCEMENT</td>
<td>49</td>
</tr>
<tr>
<td>3.3.1. Deterrence and prevention</td>
<td>49</td>
</tr>
<tr>
<td>3.3.2. Commission fines and other sanctions with deterrent effect</td>
<td>51</td>
</tr>
<tr>
<td>3.3.3. Nominal amount of fines and probability of being detected and fined</td>
<td>52</td>
</tr>
<tr>
<td>3.3.4. The effects of leniency</td>
<td>52</td>
</tr>
<tr>
<td>3.4. THE CONDITIONS FOR LENIENCY REVISITED</td>
<td>53</td>
</tr>
<tr>
<td>3.4.1. The scope of application of the notice</td>
<td>53</td>
</tr>
<tr>
<td>3.4.2. The conditions for first and second degree leniency</td>
<td>55</td>
</tr>
<tr>
<td>3.4.3. Third degree leniency</td>
<td>57</td>
</tr>
<tr>
<td>3.5. LEGAL BASIS, COMPATIBILITY WITH GENERAL PRINCIPLES AND BINDING EFFECT</td>
<td>59</td>
</tr>
<tr>
<td>3.5.1. Regulation No 17 and the Commission's discretionary fining power</td>
<td>59</td>
</tr>
<tr>
<td>3.5.2. Compatibility with the right not to give evidence against oneself and with the right of access to a court</td>
<td>61</td>
</tr>
<tr>
<td>3.5.3. The binding effect of the notice</td>
<td>63</td>
</tr>
<tr>
<td>3.6. HAS THE CARTEL ENFORCEMENT PROBLEM NOW BEEN SOLVED?</td>
<td>65</td>
</tr>
</tbody>
</table>
Table of Contents

4. THE COMMISSION'S NEW METHOD FOR CALCULATING FINES IN ANTITRUST CASES 67

4.1. SUMMARY OF THE COMMISSION NOTICE 67

4.2. THE NEW METHOD COMPARED TO EXISTING LAW AND PREVIOUS PRACTICE 69

4.3. THE ISSUE OF TRANSPARENCY 73

4.4. SOME FURTHER CHARACTERISTICS OF THE NEW METHOD 75

4.4.1. Its effect on the overall level of fines 75

4.4.2. The increased weight attached to duration 75

4.4.3. Benefit derived from the infringement 76

4.4.4. Intent and negligence 77

4.4.5. Cooperation with the Commission and voluntary termination of the infringement 79

4.4.6. Differentiation according to the relative size of the undertakings concerned 80

4.5. CONCLUSION 81

5. NOTIFICATION, CLEARANCE AND EXEMPTION IN EC COMPETITION LAW 82

5.1. INTRODUCTION 82

5.1.1. The enforcement of EC competition law 82

5.1.2. Object of this chapter 86

5.2. THE ECONOMICS OF PRESCREENING 88

5.2.1. In the absence of prescreening: ex post enforcement through deterrence 88

5.2.2. Ex ante enforcement through prescreening as a Substitute to ex post enforcement through deterrence 91

5.2.3. The two alternatives compared 94

5.2.4. Ex ante enforcement through prescreening as a complement to ex post enforcement through deterrence 95

5.3. APPLICATION TO EC COMPETITION LAW ENFORCEMENT 97
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.3.1. Merger control</td>
<td>97</td>
</tr>
<tr>
<td>5.3.2. Articles 81 and 82 EC</td>
<td>99</td>
</tr>
<tr>
<td>6. THE COMMISSION'S PROPOSAL FOR A NEW COUNCIL REGULATION REPLACING</td>
<td>105</td>
</tr>
<tr>
<td>REGULATION REPLACING REGULATION NO 17</td>
<td></td>
</tr>
<tr>
<td>6.1. INTRODUCTION</td>
<td>105</td>
</tr>
<tr>
<td>6.1.1. The provisions of the EC Treaty</td>
<td>105</td>
</tr>
<tr>
<td>6.1.2. Regulation No 17</td>
<td>106</td>
</tr>
<tr>
<td>6.1.3. Main difference between the proposed new regulation and</td>
<td>107</td>
</tr>
<tr>
<td>Regulation No 17</td>
<td></td>
</tr>
<tr>
<td>6.1.4. Fundamental dimensions of law enforcement – outline of this</td>
<td>108</td>
</tr>
<tr>
<td>chapter</td>
<td></td>
</tr>
<tr>
<td>6.2. THE TIMING OF LEGAL INTERVENTION: EX ANTE ENFORCEMENT THROUGH</td>
<td>109</td>
</tr>
<tr>
<td>PRESCREENING OR EX POST ENFORCEMENT THROUGH DETERRENCE?</td>
<td></td>
</tr>
<tr>
<td>6.2.1. The two alternatives and the current Situation</td>
<td>109</td>
</tr>
<tr>
<td>6.2.1.1. Two methods of enforcement</td>
<td>109</td>
</tr>
<tr>
<td>6.2.1.2. The current Situation</td>
<td>110</td>
</tr>
<tr>
<td>6.2.1.2.1. Merger control</td>
<td>110</td>
</tr>
<tr>
<td>6.2.1.2.2. Article 82</td>
<td>110</td>
</tr>
<tr>
<td>6.2.1.2.2. Article 81</td>
<td>111</td>
</tr>
<tr>
<td>6.2.2. Which enforcement method is best suited?</td>
<td>113</td>
</tr>
<tr>
<td>6.2.2.1. Criteria for choosing between the two enforcement methods</td>
<td>113</td>
</tr>
<tr>
<td>6.2.2.2. First factor: credibility of deterrence</td>
<td>114</td>
</tr>
<tr>
<td>6.2.2.2.1. Application to merger control</td>
<td>115</td>
</tr>
<tr>
<td>6.2.2.2.2. Application to Articles 81 and 82</td>
<td>116</td>
</tr>
<tr>
<td>6.2.2.3. Second factor: relative knowledge and predictability of the</td>
<td>116</td>
</tr>
<tr>
<td>Substantive rule</td>
<td></td>
</tr>
<tr>
<td>6.2.2.3.1. Errors</td>
<td>117</td>
</tr>
<tr>
<td>6.2.2.3.1.1. Limited access to information</td>
<td>117</td>
</tr>
<tr>
<td>6.2.2.3.1.2. Neglect</td>
<td>119</td>
</tr>
<tr>
<td>6.2.2.3.2. Uncertainty and risk-bearing cost</td>
<td>119</td>
</tr>
<tr>
<td>6.2.2.3.3. Summing up on the second factor</td>
<td>120</td>
</tr>
<tr>
<td>6.2.2.3.4. Application to merger control</td>
<td>121</td>
</tr>
<tr>
<td>6.2.2.3.5. Application to Articles 81 and 82</td>
<td>121</td>
</tr>
</tbody>
</table>
# Table of Contents

6.4.2. Private enforcement and the role of national courts: what the proposed new regulation will not change, and what it will change 150

6.4.2.1. Impact on private enforcement and on contractual litigation 150

6.4.2.2. Agreements which fulfill the conditions of Article 81(3) will no longer be void 151

6.4.2.3. National courts will be able to apply the four conditions of Article 81(3) themselves 151

6.4.2.4. No declaratory judgments 153

6.4.3. Possible problems with the application of Article 81(3) by national courts 153

6.4.3.1. Complex economic assessments 153

6.4.3.2. Forum Shopping 154

6.4.3.3. Inconsistent judgments 154

6.5. SANCTIONS 156

6.5.1. Fines 157

6.5.1.1. Only pecuniary sanctions imposed on undertakings 157

6.5.1.2. The criminal-law nature of fines 157

6.5.1.3. The maximum amount of fines 159

6.5.1.4. Publication of fining decisions 159

6.5.2. Remedies 159

6.5.2.1. Termination orders 159

6.5.2.2. Consent decisions 160

6.6. CONCLUSION 161

7. THE UNDERTAKING AS SUBJECT OF EC COMPETITION LAW AND THE IMPUTATION OF INFRINGEMENTS TO NATURAL OR LEGAL PERSONS 163

7.1. THE UNDERTAKING AS SUBJECT OF EC COMPETITION LAW 163

7.1.1. Main provisions 163

7.1.2. The two faces of the definition of undertaking 164

7.1.3. Preliminary conclusions and further questions 166

7.1.4. The economic notion of the firm 167
7.1.5. Conclusions flowing from the economic notion of the firm 169
7.1.6. The overall structure and internal consistency of competition law 170
7.1.7. Conclusions flowing from the overall structure and internal consistency of competition law 173
7.1.8. Final conclusions 176

7.2. THE IMPUTATION OF INFRINGEMENTS TO NATURAL OR LEGAL PERSONS 176
7.2.1. Introduction 176
7.2.2. Undertakings coinciding with a Single natural person without employees .. 177
7.2.3. Undertakings consisting of a Single natural person and his employees 178
7.2.4. Undertakings coinciding with a single Company or other legal person 180
7.2.5. Undertakings consisting of a group of companies 182
7.2.6. Succession 184
7.2.7. Conclusions 186

8. DOES THE EFFECTIVE ENFORCEMENT OF ARTICLES 81 AND 82 EC REQUIRE NOT ONLY FINES ON UNDERTAKINGS BUT ALSO INDIVIDUAL PENALTIES, IN PARTICULAR IMPRISONMENT? 188

8.1. INTRODUCTION 188
8.1.1. The current Situation under EC law 188
8.1.2. The Situation in the United States 190
8.1.3. Outline of this chapter 192

8.2. WHO COMMITS ANTITRUST VIOLATIONS, WHY DO THEY DO IT, AND HOW CAN THEIR BEHAVIOUR BE INFLUENCED? 192
8.2.1. Who really commits antitrust violations? 192
8.2.2. Why do they do it? 193
8.2.3. How can their behaviour be influenced? 195

8.3. THE CASE FOR CORPORATE SANCTIONS 196
8.3.1. Exploiting the firm's ability to influence the behaviour of its agents 197
8.3.2. Avoiding perverse incentives 198
8.4. THE CASE AGAINST EXCLUSIVE RELIANCE ON CORPORATE SANCTIONS

8.4.1. The fines needed for effective deterrence are impossibly high

8.4.1.1. What level of fines is required to achieve effective deterrence?

8.4.1.1.1. An estimate of the minimum fine required for effective deterrence

8.4.1.1.2. Comparison with the current level of fines

8.4.1.2. Why can actual fines not be raised to the level required for effective deterrence?

8.4.1.2.1. The fines required for effective deterrence would regularly breach the ceiling laid down in Regulation No. 17

8.4.1.2.2. The fines required for effective deterrence would often exceed the undertakings' ability to pay

8.4.1.2.3. The consequences of inability to pay

8.4.1.2.4. Even below the level of inability to pay, the imposition of high fines is costly

8.4.1.2.5. The fines required for effective deterrence are likely to raise fundamental objections of proportional justice

8.4.2. Corporate sanctions do not always guarantee adequate incentives for responsible individuals within the firm

8.4.2.1. Firms have often only a limited ability to discipline their agents

8.4.2.2. Firms may be management controlled

8.4.2.3. Managers may have left the firm by the time their violation is detected

8.4.3. Consequences and possible Solutions

8.4.3.1. Consequences

8.4.3.2. Possible Solutions

8.4.3.2.1. Keeping a notification system is of no use

8.4.3.2.2. Encouraging private enforcement does not help much

8.4.3.2.3. Increasing the probability of detection cannot solve the problem on its own

8.5. THE CASE FOR COMBINING CORPORATE SANCTIONS WITH INDIVIDUAL PENALTIES

8.5.1. Adding individual penalties could provide the Solution to the problem of corporate sanctions being unable to bring about effective deterrence

8.5.1.1. Adding individual penalties could solve the problems of impossibly high fines
8.5.1.2. Adding individual penalties solves the problems of firms being unable to control their agents 215
8.5.2. Individual penalties ensure necessary resistance to corporate pressure to break the law 215
8.5.3. Individual penalties can strengthen people's moral commitment to the law 216
8.5.4. Individual penalties should only be used in combination with corporate sanctions 217
8.6. THE CASE FOR IMPRISONMENT 218
8.6.1. The fines needed for effective deterrence may again be impossibly high.... 219
8.6.2. The problem of indemnification 220
8.6.3. Imprisonment is a very effective deterrent for antitrust violations 220
8.6.4. Prison sanctions carry a uniquely strong moral message 221
8.6.5. Further arguments in favour of imprisonment 221
8.6.6. No alternative sanctions can replace imprisonment 222
8.6.7. Conclusion 223
8.7. SOME FURTHER ISSUES 225
8.7.1. For which types of violations of Articles 81 and 82 EC should prison sanctions lie? 225
8.7.2. The criminal-law nature of antitrust penalties 226
8.7.2.1. The distinguishing characteristics of criminal law 227
8.7.2.2. Should antitrust penalties be criminal? 228
8.7.2.3. The separate issue of the applicability of the European Convention on Human Rights 229
8.7.3. Some legal and contextual elements supporting the introduction of individual penalties in EC antitrust law 230
8.7.3.1. The OECD Recommendation concerning effective action against hard-core cartels 230
8.7.3.2. The competition laws of the Member States and Norway 231
8.7.3.3. Europe's free ride on American enforcement efforts 232
8.7.4. Some legal and institutional implications of introducing individual penalties in EC antitrust law 232
Table of Contents

8.7.4.1. Would criminal sanctions have to be introduced under the Third Pillar? 232
8.7.4.2. Does the EC Treaty contain an inherent limitation excluding criminal law and criminal sanctions from its scope of application? 233
8.7.4.3. Does the wording of Articles 81 and 82 preclude individual penalties? 233
8.7.4.4. Does the explicit reference to fines in Article 83(2)(a) preclude prison sanctions? 234
8.7.4.5. Could the Commission continue to be both prosecutor and judge? 234
8.7.4.6. Would a Community prison have to be built? 237

9. CONCLUSION 238

9.1. THE TIMING OF LEGAL INTERVENTION: EX ANTE ENFORCEMENT THROUGH PRESCREENING OR EX POST ENFORCEMENT THROUGH DETERRENCE? 239
9.3. THE FORM OF SANCTIONS: FINES ON UNDERTAKINGS, FINES ON INDIVIDUALS OR IMPRISONMENT? 248
9.4. THE PROBLEM OF UNDERDETERRENCE WITH REGARD TO THE MOST SERIOUS ANTITRUST VIOLATIONS 254
9.5. THE HISTORICAL AND CULTURAL DIMENSION 258

REFERENCES 263

TABLE OF CASES 303

SUBJECT INDEX 315