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CARTELS IN THE EUROPEAN UNION: PROCEDURAL FAIRNESS FOR DEFENDANTS AND CLAIMANTS

David Anderson
Rachel Cuff

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by

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ESSAYS

CARTELS IN THE EUROPEAN UNION: PROCEDURAL FAIRNESS FOR DEFENDANTS AND CLAIMANTS

David Anderson * *and Rachel Cuff* **

INTRODUCTION

As the level of fines imposed by the European Commission ("Commission") for cartel behavior continues to increase, so does the concern regarding the fairness and stability of the procedures used by the Commission to achieve such penalties. The European Union ("EU") system was developed as an administrative one, without criminal or individual sanctions, but the system has shifted over time. The fines imposed by the Commission have risen to levels that are substantively akin to criminal penalties, and the introduction of criminal sanctions at the EU Member State level, and in other major jurisdictions including the United States and Canada, has had a significant impact on the position of companies investigated in the European Union. There has been a creeping criminalization of antitrust infringement in the European Union,[1] but its system is designed with administrative sanctions in mind, and as a result,

* Partner at Berwin Leighton Paisner LLP, Brussels. The views expressed are those of the authors and do not necessarily represent those of Berwin Leighton Paisner LLP, its partners, or its clients. The authors are grateful for the assistance of Matthew Dunlap in the preparation of this Essay. This Essay was originally presented at the 2010 Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy and a version of the Essay is also published in 2010 FORDHAM COMPETITION L. INST. ch. 10 (Barry Hawk ed., 2010).

** Senior Associate and Principal Knowledge Development Lawyer at Berwin Leighton Paisner LLP, Brussels.

1. Such concerns also arise at the national level, although the focus here remains upon the European Union ("EU"). In the United Kingdom, for example, courts have considered that "[i]nfringement proceedings under the Competition Act 1998 are of a quasi-criminal nature." Crest Nicholson Plc v. Office of Fair Trading, [2009] EWHC (Admin) 1875, [69] (Eng.).

lacks the rigorous procedural safeguards necessary to ensure due process in such a regime.

Significant efforts have been made by the Commission's Directorate General for Competition ("DG Competition") over recent years to render its processes more transparent and subject to more internal scrutiny, including the recent publication of best practice guidelines for antitrust proceedings ("Best Practices") and guidance on procedures of the Hearing Officers in antitrust proceedings,[2] as well as an explanatory note regarding its inspection authorization.[3] Indeed, these latest improvements can be seen as just the most recent part of a longer and very gradual evolution toward better and fairer administration of competition proceedings that dates from the establishment of the Hearing Officer post several decades ago.

However, the EU system remains perforated with points of material procedural unfairness. Although certain issues may not be of significant individual concern, together they serve to sap the effectiveness and fairness of procedures that the Commission has worked hard to establish. Other issues are of more overarching concern and go to the heart and structure of the current anticartel enforcement regime at the EU level.

A further layer has recently added to the debate regarding the underlying fairness of the Commission's antitrust proceedings, which, it has been argued, operate at times in breach of human rights. When the Treaty of Lisbon entered into force on December 1, 2009,[4] it set in motion a process that will lead to the European Union becoming a contracting party to the

2. EUROPEAN COMMISSION DG COMPETITION, BEST PRACTICES ON THE CONDUCT OF PROCEEDINGS CONCERNING ARTICLES 101 AND 102 TFEU (2010) [hereinafter DG COMPETITION], *available at* http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf; EUROPEAN COMMISSION HEARING OFFICE, GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS IN PROCEEDINGS RELATING TO ARTICLES 101 AND 102 TFEU (2010), *available at* http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf.

3. EUROPEAN COMMISSION, EXPLANATORY NOTE TO AN AUTHORISATION TO CONDUCT AN INSPECTION IN EXECUTION OF A COMMISSION DECISION UNDER ARTICLE 20(4) OF COUNCIL REGULATION NO 1/2003 (2008), *available at* http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

4. Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01 [hereinafter TEU post-Lisbon].

European Convention on Human Rights ("ECHR").[5] Accession negotiations have commenced and, once accession is complete, the European Court of Human Rights ("ECtHR") will be able to scrutinize all actions of the Commission (and the other EU institutions) for conformity with the protection of fundamental rights. However, such protection is likely to be increased even before accession takes place, as the EU Charter of Fundamental Rights became binding on EU institutions with the entry into force of the Treaty of Lisbon. These developments will increase the level of external scrutiny of the actions of the Commission and provide another option for potential recourse for individuals and companies.

Discussion of protection of human rights and the importance of procedural equity can swiftly stray into the academic, but such issues and problems are observed by practitioners on a daily basis. A substantial plaintiffs' bar has not yet developed in the European Union, and most antitrust counsel therefore advise both plaintiffs and defendants. This makes them uniquely placed to comment on the challenges for claimants and the dangers for defendants.

For defendants in particular, problematic issues can arise throughout the investigative process, ranging from the "three feet view" of the detail of raids, documents, and interviews up to the "thirty thousand feet view" of the Commission's enforcement structure as a whole.

From a plaintiff's point of view, there are currently too many procedural obstacles for most to consider suing and too few incentives for defendants to consider settling out of court. As a result, few injured companies and consumers threaten to sue or actually sue, and cartelists are never fully held accountable for their overcharges. While the Commission continues to work on reforms to deal with many of these issues, they are currently on hold pending further consultation on collective redress, so the opportunity remains at hand to continue considering ways to improve the private actions system in Europe.

This Essay will explore the issues and concerns from both the defendant and plaintiff angle, and from the micro to the

5. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. The Lisbon Treaty requires that the European Union accede to the ECHR. TEU post-Lisbon, *supra* note 4, art. 6, at 19.

macro level. Above all, it hopes to suggest ways in which the EU systems might be improved to increase fairness and access to justice for both sides. The first three Parts of this Essay consider the issues from the point of view of defendants in cartel investigations. Part I looks at concerns regarding the procedural detail of the investigative process, particularly the increasing impact of human rights arguments. Part II steps back to focus on more overarching concerns, such as the operation of the Commission's leniency and settlement programs, while Part III considers fundamental structural issues, such as the broad role played by the Commission in EU antitrust enforcement. Part IV looks at the debate from the point of view of third-party claimants for damages, assessing the obstacles to effective damages actions in the EU. This Part also discusses the possibilities for synergies between the public and private enforcement regimes and concludes that the Commission would do well to consider the potential benefits of closer cooperation between the two regimes.

I. *THE DEFENDANT'S VIEW FROM THREE FEET*

A. *Raids and Inspections*

In the midst of an unannounced inspection, right at the beginning of the Commission's investigation, certain procedural steps may have an unfair and significant negative impact on a defendant's position moving forward.

1. Authorization of Inspection

In the European Union, inspections and searches can and do take place in individuals' homes and cars as well as on business premises. Despite the exceedingly wide powers of the Commission when conducting such raids, there is no independent check available as to whether the raid should be authorized or how it is conducted. The Commission is able to self-authorize its raids on business premises and, as discussed below, the review of authorizations to raid private premises is restricted.

In practice, the Commission bases the majority of its decisions to commence an investigation and its decisions to

conduct a raid on information submitted to it by an immunity applicant. At this early point in the investigation, such information has not been subjected to any independent verification or corroboration. It has not been supported or challenged by evidence from other parties and can therefore be considered at best one-sided and at worse unreliable, subjective, and potentially just plain wrong. The actual decision authorizing a raid is typically very brief in its scope.

The Commission's discretion to raid a company is very broad. The ultimate decision to raid is not subject to any (known) form of internal independent check or external judicial review prior to the raid and may only be judicially reviewed by the Court of Justice of the European Union after the raid has taken place.[6] There is no clearly identifiable standard or evidential threshold that the Commission must reach before a decision to raid is issued beyond the raid being "necessary," although the decision is limited by very general, yet important, principles of EU law, such as that of proportionality.

The question has been raised as to whether Commission inspections infringe the general right to privacy.[7] Regarding the right to privacy of natural persons (including individuals such as CEOs, other directors, shareholders, and employees), Article 21 of Regulation 1/2003 requires prior authorization to be obtained from a national judicial authority ("NJA") for inspections of "other premises" (i.e., not business premises).[8] However, the role of the NJA in providing such authorization appears to be limited, as it "may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file."[9]

The jurisprudence of the ECtHR has clarified that the right to privacy encompasses the privacy of business premises or offices of legal persons (i.e., companies and other legal entities).[10] However, the protection afforded to legal persons under Regulation 1/2003 is different, as inspections of business

6. In practice, very few companies avail themselves of this rather late and arguably ineffectual remedial path.

7. ECHR, *supra* note 5, art. 8.

8. Council Regulation No. 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty art. 21, 2003 O.J. L 1/1.

9. *Id.*

10. Niemietz v. Germany, 251 Eur. Ct. H.R. 23, 29–32 (1992).

premises do not require prior authorization from an NJA. Again, the only available review is therefore an ex post facto review by the Court of Justice. As ECtHR jurisprudence has extended the right to privacy to business premises,[11] it remains to be seen whether this might pose problems for the authorization and conduct of Commission inspections in the future.

2. Interviews and Explanations

During a surprise inspection, or "dawn raid," and indeed throughout an investigation, individuals may be placed in positions where they risk providing incriminating information about their own involvement in anticompetitive activity. During a dawn raid, for example, the Commission (or national authority) may ask individuals to provide an "explanation" of a document. In the context of the ongoing investigation, companies may take a number of steps that risk or entail self-incrimination by the company or its individual employees, such as (1) making oral statements in the context of a leniency application, which set out a "roadmap" of the involvement of both the company and specific individuals in the cartel; (2) providing evidence in response to a formal request for information from the competition authority; (3) making employees available for interviews (both with external lawyers and with the competition authority, during the dawn raid and later in the procedure); and (4) providing documentary evidence (in the context of either a leniency application or a request for information).

Answering questions and providing information may risk or entail self-incrimination by the company or its individual employees. The ECtHR has described the privilege against self-incrimination as one of the rights that makes up "the very essence of an applicant's defence rights."[12] While this privilege, and the complementary right to remain silent, are textually absent from Article 6 ECHR, the ECtHR considers that these rights are "generally recognised international standards which lie at the heart of the notion of a fair procedure."[13] Privilege against self-incrimination applies to both natural and legal persons.

11. Société Colas Est v. France, 2002-III Eur. Ct. H.R. 148–49.
12. Jalloh v. Germany, 44 Eur. H.R. Rep. 32, 692–93 (2007).
13. J.B. v. Switzerland, 2001-III Eur. Ct. H.R. 450.

The right not to self-incriminate may also be protected under national legislation, such as the UK's Civil Evidence Act 1968,[14] and be further developed by case law. In the United Kingdom, *Crest Nicholson Plc v. Office of Fair Trading* held:

> [F]airness does not countenance a situation where someone who reasonably believes that they are not liable for wrongdoing can be pressured into admitting liability . . . . As a matter of procedural fairness enforcement authorities must not be able to compel admissions by parties so they blindly admit guilt on the basis of a commercial decision.[15]

In the European Union, although the Court of Justice has recognized the privilege against self-incrimination, its jurisprudence is not fully aligned with that of the ECtHR. The Court of Justice has so far extended protection against self-incrimination only to answers that will result in an undertaking or individual directly admitting the existence of an infringement, but it does not consider that such protection applies to pre-existing documents or to answers to factual questions.[16] In the context of an antitrust investigation, this poses significant concerns, as many of the questions asked will be "factual" requests for explanation.

The ECtHR, however, takes a broader view of privilege against self-incrimination, extending it to cover pre-existing documents in certain instances, such as where an individual would be compelled to provide evidence of offences allegedly committed. In addition, the ECtHR has extended the protection to cover answers to questions that are directly *and indirectly* capable of self-incrimination.[17]

14. Civil Evidence Act, 1968, c. 64, § 14 (Eng.).

15. Crest Nicholson Plc v. Office of Fair Trading, [2009] EWHC (Admin) 1875, [69] (Eng.).

16. Orkem v. Commission, Case C-374/87, [1989] E.C.R. I-3283, ¶¶ 34–35. The *Orkem* decision was confirmed in Commission v. SGL Carbon AG, Case C-301/04, [2006] E.C.R. I-5915.

17. Funke v. France, 256 Eur. Ct. H.R. 21–22 (1993) (extending the scope of the privilege against self-incrimination to instances in which authorities compel an applicant to produce real evidence, such as bank statements and checkbooks); Saunders v. United Kingdom, 1996-VI Eur. Ct. H.R. 2065 (noting that the privilege against self-incrimination is not "confined to statements of admission of wrongdoing or to remarks which are directly incriminating," but also extends to "testimony obtained under compulsion which appears on its face to be of a non-incriminating nature—such as exculpatory remarks or mere information on questions of fact—[which] may later be deployed in criminal proceedings in support of the prosecution [sic] case . . . ."); J.B. v.

Competition authorities sometimes appear to give a lower priority to the individual's rights of defense than to their own administrative convenience in obtaining evidence necessary for their case. The overarching problem is frequently that individuals are asked to provide evidence at an early stage in the process (such as during or just after the dawn raid), at which time they have little or no idea of the extent of the case against them and before they have had the opportunity to obtain separate legal advice. The practice of conducting interviews is still relatively new in the Commission's procedure and thus its officials are not practiced in ensuring that the questions they pose are permissible. In practice, individuals tend to respond to questions posed by investigators, whether or not a lawyer is present, and without the procedural safeguards and warnings present in other forms of investigatory interviews.

Further, national criminal investigations often start later than related administrative investigations and such time delays may mean that allegations are not put to individuals when they are in a reasonable position to rebut them without the risk of giving inconsistent answers.

Significant concerns are raised where a company provides a competition authority with evidence that may benefit the position of that company yet be detrimental to the position of individual employees. Questions should be raised as to how the authority intends to use the information that it obtains. In the UK *British Airways* case, for example, information from the immunity applicant was used by the Office of Fair Trading ("OFT") to support its failed prosecutions of British Airways employees.[18]

Companies and their lawyers must recognize and highlight the importance of independent legal advice for relevant individuals, although in practice, companies may wish to select, instruct, and pay for such legal counsel for their employees.

Switzerland, 2001-III Eur. Ct. H.R. 451 (finding a breach of Article 8 where tax authorities compelled the applicant to submit certain documents "which would have provided information as to his income with a view to the assessment of his taxes").

18. Press Release, Office of Fair Trading [OFT], OFT Withdraws Criminal Proceedings against Current and Former BA Executives (May 10, 2010), *available at* http://www.oft.gov.uk/news-and-updates/press/2010/47-10 (Eng.). The hearings were at Southwark Crown Court from April 13, 2010 until May 10, 2010.

Of interest and note is the potential new risk of damages actions being brought by companies against their employees who were involved in anticompetitive behavior. It remains to be seen the extent to which such litigation will be brought, but claims have been brought in the UK courts against the former directors of Safeway in relation to competition infringements committed by Safeway.[19]

3. Legal Privilege

Under EU law, legally privileged documents and information cannot be reviewed or taken as part of an inspection by the Commission. This protection is vital to ensure that companies can obtain legal advice in complete confidence. However, it is established EU law that advice and correspondence from an in-house lawyer is *not* considered privileged. The case of *AM & S Europe Ltd. v. Commission* decided that legal privilege will only be accorded to written communications between a lawyer and client where (1) the correspondence is sent for the purpose of the client's rights of defense in relation to the Commission's investigation; and (2) the correspondence is with an independent *external* lawyer who is qualified to practice in a Member State within the European Economic Area ("EEA").[20] This point was recently reconfirmed by the Court of Justice in *Akzo Nobel Chemicals Ltd. v. Commission*, which held that there is currently no legal privilege in the European Union for in-house lawyers and rejected arguments that the scope of such privilege should be extended.[21]

Many criticisms have already been made regarding the EU's current position on legal privilege and in-house counsel and whether it restricts rights of access to legal representation and the right to a fair trial (as guaranteed by Article 6 of the ECHR).[22] Although the ECtHR has not yet recognized legal privilege for in-house lawyers, it cannot be excluded that this

19. Safeway Stores Ltd. v. Twigger, [2010] EWHC (Comm) 11, [2010] 3 All E.R. 577 (Eng.).

20. AM & S Europe Ltd. v. Commission, Case C-155/79, [1982] E.C.R. 1575, ¶¶ 22–27.

21. Akzo Nobel Chemicals Ltd. v. Commission, Case C-550/07, [2010] E.C.R. I____, ¶¶ 44–49 (delivered Sept. 14, 2010).

22. ECHR, *supra* note 5, art. 6.

could happen in the future,[23] particularly given the ECtHR's view of the ECHR as a "living instrument which must be interpreted in the light of present-day conditions."[24]

B. *Access to the Commission's File*

1. Access to Documentary Evidence

The Commission has taken considerable steps to ensure that it satisfies its obligations to grant parties to investigations appropriate access to the information contained in its investigation file. When the Statement of Objections is issued in cartel cases, parties are provided with a CD-ROM that contains an electronic version of the Commission's file. However, the effectiveness of the "access to file" procedure can be undermined by a number of factors.

Regarding the protection of confidential information, parties are entitled to redact such information to create nonconfidential versions of their submitted evidence, and such nonconfidential versions are included on the CD-ROM. However, the Commission must ensure that it applies its rules in a standardized fashion. The levels of redaction of information requested by some parties may be considered excessive. The problem becomes more apparent later in the investigative process, when the Commission is arguably more willing to accept significant levels of redaction in the interests of finalizing the Statement of Objections and readying the file for review. It is hoped that the Commission considers publishing detailed guidance, including examples, on what information can legitimately be considered confidential in the preparation of nonconfidential versions both of evidence for the Commission's file and of the Commission's final decision.

23. In A.B. v. Netherlands, App. No. 37328/97, 37 Eur. H.R. Rep. 48, 949–50 (2002), the European Court of Human Rights ("ECtHR") found a violation of Article 8 ECHR in regards to interference with an applicant's correspondence because prison guards opened and screened correspondence between the applicant and the applicant's representative during proceedings before ECHR organs. Although the ECtHR recognized that the representative was not authorized to practice law, it extended the scope of Article 8, noting that "neither the Convention nor the Rules of Procedure of the European Commission of Human Rights at the material time required the representatives of applicants to be practising lawyers." *Id.* at 949.

24. Société Colas Est v. France, 2002-III Eur. Ct. H.R. 148.

The Commission's Best Practices contain some guidance on procedures that may be used to alleviate the burden of redacting confidential information, including use of the "negotiated disclosure procedure" and the "data room procedure," which involve granting access to confidential information to a restricted circle.[25] However, relatively limited information is provided regarding these practices. If and as their use increases with time, such guidance should be augmented by the Commission.

Furthermore, in cases conducted under the EU settlement procedure, parties will have only limited access to the Commission's file. Although parties will have agreed to this procedure, it will be important to ensure that they have sufficient access to enable them to exercise their rights of defense. For example, the Commission has indicated that if it receives exculpatory information in responses to the Statement of Objections, it will transmit this information to the relevant company, but parties are likely to desire further confirmation of this.

2. Access to Evidence Provided Orally

In order to circumvent issues regarding disclosure of leniency statements in court litigation (particularly in the United States), the Commission has gone to considerable efforts to enable parties to provide such statements orally and to prevent the creation of discoverable documents. The transcripts of such oral statements are not included on the CD-ROM of the Commission's file and are made accessible only at the Commission's offices. However, the success of this endeavor is in itself creating various problems regarding access to the Commission's file. In any one case, a number of parties will typically provide evidence orally, often on a number of occasions. It takes teams of lawyers days to either transcribe or orally record the transcripts of statements made by leniency applicants.

The Commission could perhaps improve the process for access to oral evidence by establishing a pro forma style to be used by parties when making oral statements, in particular when evidence is provided in tabular format. Further, the necessity of fielding a team of lawyers to review the evidence on the

25. DG COMPETITION, *supra* note 2, ¶ 84.

Commission's premises may favor parties that have hired legal advisors with significant teams.

C. *Oral Hearing and the Role of the Hearing Officer*

The two EU Hearing Officers ("HO") establish a useful safeguard in providing procedural oversight for EU antitrust investigations. The HOs oversee the oral hearing, but also have a role in resolving queries during the course of the investigation in relation to, for example, access to the Commission's file.

However, the role of the HO is predominantly reactive, rather than proactive.[26] Parties may contact the HO with concerns regarding the administration of the case, but the HO will rarely become involved in the management of a case absent a specific concern. The HO's involvement certainly does not fully address the issue of the Commission acting as prosecutor, judge, and jury (discussed further below).

It is submitted that the oral hearing, in its current format, is of limited use to both the parties and the Commission, and ultimately the process as a whole. The hearing provides parties with a useful opportunity for advocacy and a chance to highlight its key arguments to the case team. But in reality it does little more than that. The hearing offers no real opportunity for cross-examination of either the immunity applicant or the Commission's case team. There is no real debate on the merits between the case team and the parties. In practice, the opportunity for parties is limited to the ability to ask a few questions in the hope of inciting a response from the case team. A huge amount of preparation is required of the participants, in terms of both the presentations to be made and in readiness for any questions that Commission representatives may ask. It is submitted that, in practice, participants obtain very little in return, and an opportunity for scrutiny, analysis, and review is missed.

As the oral hearing is held at an advanced stage of the case, the Commission's case team may not be open to hearing new

26. It will be interesting to observe over the coming months whether the appointment of Wouter Wils as a Hearing Officer (along with Michael Albers) will alter this position. Wils has published widely on issues of competition procedure, and the fact that he joins the Hearing Office from the Commission's Legal Service rather than from within DG Competition may be considered to increase levels of independent scrutiny.

arguments from the parties and arguably may have already formed concrete views regarding the involvement of the parties. Regarding attendees other than the case team, such attendance cannot be guaranteed. Certainly the ultimate decision maker, the College of Commissioners, does not attend the oral hearing. Although their availability is inevitably limited, it would be beneficial to ensure the presence of senior members of DG Competition (such as the Director-General or one of his deputies) at the hearing. Such senior officials are removed from the day-to-day running of the investigation and attendance at the hearing would help to guarantee a certain level of involvement and experienced oversight. A move in this direction may create something more akin to an actual hearing where the defendants and prosecutors could have a real debate before a third party, even if, for now, that third party is a senior official.

D. *Clarity of Procedural Steps*

Previously, in cartel cases, the fact that a Statement of Objections had been sent to parties was confirmed by the Commission only if specific questions were asked by the press, and frequently only if one or more parties had publicly confirmed receipt. However, the Commission will now publish information regarding the opening of proceedings, which in cartel cases is at the time of adoption of the Statement of Objections. It appears from recent cases that the Commission will continue its previous practice of keeping any announcement on the subject brief and not identifying any of the entities involved. If this practice continues, then such clarity regarding the procedural status is to be welcomed.

However, additional questions remain regarding the extent to which the Commission will publicize other procedural steps. How will it deal with situations where the case against one or more parties is dropped during the course of the investigation, but continued against others? The Best Practices state that the Commission will not publish this information until the final decision.[27] However, a party dropped from the Commission's investigation may well wish to publicize this fact and to receive public confirmation from the Commission, particularly if there

27. DG COMPETITION, *supra* note 2, ¶ 70.

has been any public speculation regarding its involvement or any impact on its share price.

II. *THE DEFENDANT'S VIEW FROM THREE THOUSAND FEET*

Taking a step back from the specific detail of the raid and the subsequent investigatory procedure, a number of further aspects raise concern, including key elements such as the operation of the Commission's leniency program and the level of sanction imposed.

A. *Leniency*

The benefits to companies of applying to the Commission for leniency from fines are huge. A company in receipt of full immunity can break the law, profit from such illegal activity, cause harm to customers, competitors, and the wider market, and then not be fined for such behavior. To operate such a system was a significant policy decision by the Commission, but it is a model that works and one that is used by antitrust regimes worldwide. Despite the huge benefits, it cannot be denied that the risks for companies are significant, due to their "admission" of participation in illegal activity and the (albeit limited) possibility of having conditional leniency revoked.

It has been argued that there are three cornerstones of an effective leniency program: (1) severe sanctions; (2) perceived high risk of detection; and (3) transparency and predictability to the greatest extent possible.[28] The EU system certainly incorporates the first two elements, but further steps are necessary before it can lay claim to the third. The Commission has taken significant steps, in particular in the revised 2006 version of its Leniency Notice,[29] to clarify its procedures further, but certain elements remain opaque and could benefit from additional predictability. For example, the Commission might consider providing additional guidance on the provision of oral evidence, including the desired format, or further concrete

28. *See* INTERNATIONAL COMPETITION NETWORK [ICN], ANTI-CARTEL ENFORCEMENT MANUAL ch. 2 (2009), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf.

29. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. C 298/17.

examples of evidence that would constitute "significant added value" or cooperation "outside the scope of the Leniency Notice." The recently published Best Practices specifically exclude both the leniency and settlement regimes from their ambit, and it is submitted that this was a missed opportunity to provide important clarification.

Of most use to practitioners, and therefore to companies, would be written guidance that relates only to cartels, collating the useful information that is currently spread between guidance on, for example, leniency, settlements, access to file, and inspections. Procedures in areas such as the provision of oral evidence or access to the Commission's evidential file often change rapidly, and practitioners and companies alike should be kept informed of such developments. Although nothing can replace the knowledge acquired by practitioners through involvement in cartel cases and observing the Commission's practice firsthand, there remains a need for such procedure to be codified to a certain extent to ensure access for all companies and advisors. The Commission has itself admitted that part of the reason for publishing the Best Practices was the differing procedures between units in DG Competition. Given that the cartel units are concentrated within one directorate, their practice presumably remains relatively homogenous, but the improvement of written guidance could only serve to increase levels of consistency. Furthermore, it appears that such guidance exists within DG Competition in the form of an internal handbook providing significant detail on the procedures to be followed in instances including the inadvertent disclosure of confidential information and the conduct of dawn raids.[30] While certain elements have undoubtedly been incorporated into the Best Practices, the majority of such internal guidance has not been rendered transparent.

30. *See* Lewis Crofts, *EC Under Pressure to Disclose Inner Workings of Antitrust Procedures*, MLEX (Feb. 22, 2010), http://www.mlex.com/content.aspx?ID=90393&print=true; Lewis Crofts, *EC Brands Access Request to Internal Antitrust Book "Premature"; Ombudsman Disagrees*, MLEX (June 22, 2010), http://www.mlex.com/content.aspx?ID=103680&print=true.

1. Absence of a "One-Stop-Shop" for Leniency

The ongoing problem of the absence of a "one-stop-shop" for leniency applications has been well documented. The problem will not be considered here in detail, but it remains of concern. Currently, cases may be dealt with by a number of authorities and, although leniency programs worldwide are becoming increasingly standardized, differences in EU national systems remain. For example, immunity for a cartel ringleader is not available in Germany, and a successful leniency application in the UK protects employees from criminal investigation whereas it does not in France.

The absence of a united system for leniency applications may lead to a problem regarding the use of "markers" to secure a place in the leniency queue. For example, if a party puts down a marker for leniency in a national case, this may become irrelevant if the Commission then takes over the case and refuses to honor such a marker. In Germany, for example, a marker is available for leniency applications, while in the European Union it is only available for immunity applicants.

Companies would undoubtedly prefer to see a "one-stop-shop" for leniency within the European Union as mooted by previous Competition Commissioner Neelie Kroes.[31] However, standardization has been much improved through initiatives such as the European Competition Network's ("ECN") model leniency program, which includes the use of summary leniency applications,[32] and the International Competition Network's ("ICN") Anti-Cartel Enforcement Manual,[33] and it is hoped that such harmonization will continue.

2. Concept of "Significant Added Value"

In the European Union, the concept of the "significant added value" contributed by a party's evidence is key, but it can

31. *See* Commission Press Release, SPEECH/05/205 (Apr. 7, 2005); Commission Press Release, SPEECH/06/494 (Sept. 15, 2006).

32. EUROPEAN COMPETITION NETWORK [ECN], ECN MODEL LENIENCY PROGRAMME ¶ 2 (Oct. 2009), *available at* http://ec.europa.eu/competition/ecn/model_leniency_en.pdf; ECN, LIST OF AUTHORITIES ACCEPTING SUMMARY APPLICATIONS AS PROVIDED BY THE ECN MODEL LENIENCY PROGRAMME IN TYPE 1A CASES (2010), *available at* http://ec.europa.eu/competition/ecn/list_of_authorities.pdf.

33. ICN, *supra* note 28.

be difficult for parties to assess exactly what will be required in order to meet this standard. What evidence constitutes "significant added value" remains extremely case specific. In the EU *Gas Insulated Switchgear* case,[34] for example, only the immunity applicant received a reduction in fine, even though leniency applications were made only six days after the dawn raid took place. The Commission considered that none of the evidence provided by the other parties contributed "significant added value" to the evidence already in its possession.[35] Although this is within the letter of the Leniency Notice, the Commission's previous practice made this most unexpected.

The Commission has ceased to hand out fine reductions as easily as it did previously under an earlier version of the Leniency Notice, when simply not contesting the facts as set out in the Statement of Objections often led to a ten percent reduction in fine.[36] But companies do still expect that being one of the first companies to apply for leniency, and bringing in a significant amount of relevant contemporary evidence, will lead to a certain level of reduction. A significant change in this expectation may lead companies to query the wisdom of spending large amounts of time and money on reviewing documents and preparing a leniency application. For companies, applying for leniency is by no means an automatic decision, but a risk-balancing exercise. A leniency application is an admission of guilt, but there is no automatic reduction in fine if evidence provided is not considered to provide added value. Further, as there is no official "marker" system available for leniency (as opposed to immunity) applications, an applicant may find itself bypassed by newer applications in the queue for leniency.

Although a certain level of guidance has been given, both in the Commission's Leniency Notice and through cases in the EU courts, it would be most useful if agencies could provide more evidence on what they are looking for as the case progresses. The same concerns apply to the issue of "continuous cooperation,"

34. Commission Decision No. COMP/F/38899 (*Gas Insulated Switchgear*), 2008 O.J. C 5/7.

35. *Id.*

36. *See* Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 1996 O.J. C 207/04.

where the requirements can vary from case to case and case team to case team.

As a further general comment, it may be argued that the balance has gone too far in protecting the recipient of conditional immunity and that too little is left available to companies that are not "first in" to the Commission. It is accepted that the immunity applicant receives no fine and that its employees are frequently protected from criminal liability. However, various legislative initiatives have suggested according further protection to the immunity applicant. The Commission's White Paper on damages actions suggested that protection from damages actions might be given,[37] although in reality this may be achieved already to a certain extent through agreements between the immunity applicant and class-actions firms whereby the immunity applicant provides the claimant with evidence in return for being excluded from the scope of the damages action. The OFT has also previously suggested that there should be no joint and several liability for immunity recipients.[38] In the United States, damages are de-trebled and there is no several liability for qualifying immunity applicants. Although the burden on immunity applicants is considerable, particularly given the ongoing requirement of complete cooperation, care needs to be taken to ensure that the balance does not tip too far in favor of their protection.

B. *Level of Fines*

Over recent years, levels of Commission fines have risen to heights that few would hesitate to consider astronomical. In 2008, fines totaling €1.38 billion were imposed on companies involved in a car-glass cartel.[39] This was the largest fine in the history of antitrust enforcement worldwide and included an €896 million fine for Saint Gobain—at the time the highest fine ever imposed on one company for cartel infringement. Although fines in other

37. Commission of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 Final (Apr. 2008) [hereinafter White Paper].

38. OFT, DISCUSSION PAPER, PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS ¶¶ 7.17–.18 (Apr. 2007).

39. Commission Decision Summary No. COMP/39125 (*Car Glass*), 2009 O.J. C 173/13.

cases have not quite reached these levels, they remain high. In 2009, for example, a €553 million fine was imposed on each of two companies involved in a cartel in the gas sector.[40]

Of course, the Commission has made a policy decision to pursue high-profile cases and those that have a significant impact on consumers. Not all complaints or leniency applications result in Commission investigations, and not all investigations result in headline-grabbing fines. However, the fact remains that the overall level of fines has risen and is likely to continue to rise. Certainly the EU Commissioners for Competition appear to have no concerns that their fines might be too high. In November 2009, former Commissioner Kroes said, "I have no time for arguments that our fines are too high. Tell that to the businesses and consumers who still suffer at the hands of cartels."[41] Commissioner Almunia stated, "The best recommendation I can give to companies is not to [engage] in anti-competitive practices so that they will not have to care about the fines"[42] and later added, "I have complete confidence in our current system."[43]

Until now, such views appear to have been supported by the EU courts, which have repeatedly confirmed the Commission's significant level of discretion in setting its fines.[44] Although fines are relatively frequently amended on appeal, they have not been reduced by the EU courts simply for being too high. However, there have recently been signs that the judges of the General Court consider that they cannot continue to ignore the ongoing debate regarding the level of Commission fines for antitrust infringements. Judge Nicholas Forwood of the General Court recently commented that "[c]ourts tend to be respectful, they try not to second-guess the regulator. [But] the reality is, . . . many competition cases are now presenting a quasi-penal character."[45]

40. Commission Decision Summary No. COMP/39401 (*E.ON/GDF Collusion*), 2009 O.J. C 248/05.

41. Commission Press Release, SPEECH/09/521 (Nov. 11, 2009).

42. Emily Gray, *DG Comp's New Helmsman*, GLOBAL COMPETITION REV., Mar. 2010, at 6.

43. Commission Press Release, SPEECH/10/233 (May 12, 2010) [hereinafter Almunia Competition Day Speech].

44. *See, e.g.*, Dansk Rørindustri A/S v. Commission, Joined Cases C-189, 202, 205–08, 213/02 P, [2005] E.C.R. I-5425.

45. Ana Rita Rego, *EU Judge Forwood Says Court 'Conscious' Cartel Case-Law Review May Be Due*, MLEX (June 11, 2010), http://www.mlex.com/.aspx?ID=102322&print=true

The comments by Judge Forwood fuel the argument that EU cartel fines have become "criminal charges" in nature under the ECtHR "Engel Criteria."[46] Hypothetically applying the Engel Criteria, practitioners and academics argue that the ECtHR would conclude that cartel fines constitute criminal charges and that alleged cartelists therefore fall under the ambit of Article 6 ECHR. For instance, Wouter Wils, previously a member of the Commission's Legal Service and now a Hearing Officer, has stated, "That the application of these 'Engel criteria' to the European Commission's antitrust fining procedures leads to the conclusion that these procedures are 'criminal' within the autonomous meaning of Article 6 ECHR, is no longer news."[47]

In terms of the legal classification of cartel infringements, the ECtHR has stated on numerous occasions that the domestic classification of an offence is "not decisive."[48] Therefore, the fact that Article 23(5) of Regulation 1/2003 states that a Commission decision to fine an undertaking "shall not be of a criminal law nature" will not be decisive.

Once a fine is determined to be criminal, the full range of the Article 6 ECHR rights are available to defendants. These are commonly referred to collectively as the "rights of defense" or the "right to a fair trial" and include the right to (1) have a fair and public hearing by an independent and impartial tribunal; (2) have publicly announced judgments; (3) be presumed innocent until proved guilty; (4) be informed promptly of the nature and cause of the accusation against oneself; (5) be given adequate time and facilities for the preparation of one's defense; (6) defend oneself in person or through legal assistance of one's own choosing; and (7) examine or have examined witnesses against oneself.

(quoting comments made at the Friends of Europe roundtable event, *New Transatlantic Trends in Competition Policy,* on June 10, 2010).

46. The "Engel Criteria" look at the (1) legal classification of the offense in domestic law; (2) nature of the offense; and (3) nature and degree of severity of the possible penalty. *See, e.g.*, Janosevic v. Sweden, 2002-VII Eur. Ct. H.R. 26 (applying the Engel Criteria to determine whether tax surcharges were criminal in nature).

47. Wouter P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, 33 WORLD COMPETITION LAW & ECON. REV. 5, 13 (2010) (citing EU courts' case law that has recognized the criminal nature of the Commission's competition fines).

48. Paykar Yev Haghtanak Ltd. v. Armenia, App. No. 21638/03 (2007), *available at* http://www.bailii.org/eu/cases/ECHR/2007/1130.html.

In relation to EU cartel proceedings, the criticism has been raised that the right to a hearing by an independent and impartial tribunal is breached, given the breadth of the Commission's role. However, the ECtHR appears to have created an exception to this right, as administrative proceedings are allowed to result in certain fines (such as tax surcharges) "even if they come to large amounts" as long as the administrative decision can be appealed before a judicial body that has "full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision."[49] However, it has to be questioned whether, even if EU cartel fines were to fall into this exception, the right of appeal to the General Court in practice satisfies the requirement of a "full jurisdictional" review, given the Commission's level of discretion in setting fines. Moreover, the ECtHR itself said in the *Jussila* case that "competition law" cases are part of the "gradual broadening of the criminal head [of Article 6] to cases not strictly belonging to the traditional categories of the criminal law."[50]

C. *Parental and Successor Liability*

The issue of parent or successor liability appears to be raised in the majority of cartel cases and it remains an issue of real uncertainty for parties. The Commission has repeatedly confirmed that there is a rebuttable presumption that a parent company has "decisive influence" over its fully owned subsidiary.[51] This position has been strongly criticized for a number of reasons. The rebuttable presumption is, in practice, very difficult to rebut, as companies essentially have to prove a negative. This, and the fact that there is no requirement for the parent company to have acted intentionally or negligently, means that the rebuttable presumption looks more like strict liability. Given that Article 23(2) of Regulation 1/2003 requires that, for fines to be imposed, undertakings must have intentionally or negligently infringed Article 101 (or Article 102),[52] it can be

49. *Janosevic*, 2002-VII Eur. Ct. H.R. 31.

50. Jussila v. Finland, 45 Eur. H.R. Rep. 39, 902–03 (2006).

51. *See, e.g.*, Akzo Nobel v. Commission, Case C-97/08 P, [2009] E.C.R. I-8237, ¶ 60.

52. Council Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1/1.

argued that an entirely "innocent" parent company should not be fined.

Imposing a fine on a parent company inevitably enables the Commission to impose higher fines, as the turnover of the parent company is larger than that of its subsidiary, leading to criticism that the Commission is using this as a vehicle for increasing fining totals.

However, although the Commission's position appears clear, there is in practice considerable inconsistency regarding when the Commission will consider a parent company liable. In a single cartel decision with a number of separate addressees, some parent companies may be held liable while others are not. Practitioners and companies alike have called for the Commission to clarify its position in this area. Although the Commission has publicly indicated that, where it can, it will impose a fine on a parent company, this view is not codified.

In order to clarify the position, the Commission would do well to confirm methods by which a parent company might be able to rebut the presumption of "decisive influence." Further, the Commission needs to clarify when and how leniency applications may be extended to cover parent and successor companies.[53] Given that the number of mergers and acquisitions is set to rise, and that corporate structures are becoming ever-more complicated, the Commission should not hesitate to clarify its views.

Regarding successor liability, the Commission tends to impose fines jointly and severally on entities that may no longer be related but must then divide attribution, causing problems. In practice the fine often ends up being paid by the new owner, although of course companies may have used warranties and other contractual terms to protect their position. Where possible, the Commission should separate out the different financial liabilities as far as it is able.

53. A further issue requiring clarification is that of whether and how leniency applications can be extended to cover joint ventures to which the leniency applicant is party.

D. *Settlements*

After a very slow start, the EU settlement procedure is starting to be used and its benefits are becoming clearer. At its inception, the ten percent reduction in fines was roundly criticized as being too low and an insufficient incentive for parties. However, it appears that participants have found a significant benefit, not so much in the reduction in fine, but in the ability to have a dialogue with the Commission during the case and to discuss (and arguably to influence) the scope of the case. Despite the Commission's protestations that there is no plea-bargaining in the European Union, participants appear to feel that a benefit is derived from taking part in the settlement process.

When introducing the settlement regime, the Commission indicated that it did not expect to apply the settlement process in relation to "hybrid" cases (i.e., cases in which not all parties want to use the process). This caused commentators to raise understandable questions about what would happen if not all parties agreed or if a party changed its mind. However, it seems that the Commission has altered its view, as its second settlement case was a hybrid case in which all but one party settled.[54] However, the Commission's comments at its press briefing on the day the fine was issued appeared to criticize the party that did not proceed with the settlement procedure, saying that the company would have to explain to its shareholders why its fine was higher because it did not cooperate. If the settlement procedure is truly voluntary then parties should not be criticized for choosing not to take part.

The Commission has also made clear that settlement will not be used in cases where there are any questions about liability. In practical terms, this rules out many cases and almost all cases in which the infringing entity has subsequently been sold. This is of particular relevance as cartels are often exposed, at the time of a change in company ownership, to thorough legal and commercial due diligence. However, it remains to be seen whether the Commission is wedded to this view or whether, as with its approach to hybrid cases, its position will alter with time.

54. Commission Decision No. COMP/38866 (*Animal Feed Phosphates*), slip op. (July 20, 2010); Commission Press Release, IP/10/985 (July 20, 2010).

A continuing area of interest is the overlap between the settlement and the leniency programs. The Commission has indicated that the two systems are cumulative and that settlements should not detract from leniency. However, it appears that the Commission presumes the settlement procedure will be exploited mainly by companies that have already applied for leniency. The window for leniency applications closes along with the window for raising interest in exploring settlement. This puts pressure on companies to prepare a leniency application in a very short period, even if they are not interested in settlement. Companies likely would prefer a single system incorporating all elements of leniency, settlements, and fines.

The full interaction between the settlement process and actions for damages remains to be seen. However, the general position is that settled cases will be shorter and not lead to appeals.[55] These may therefore lead to earlier exposure to claims for the parties involved. Conversely, the shorter "settled" decision will provide less evidence for third parties to use in damages actions.

E. *Timing and Delay*

The current length of time that the Commission takes to reach a decision in a cartel case is so significant as to be unfair—both to defendants and to potential plaintiffs (as discussed further below). Even under the settlement procedure, the Commission is only aiming to reach a final decision within two years.

During the period before a final decision is reached, companies must continue to make provision for a possible fine, pay legal advisors, commit company time and resources, and disclose the ongoing investigation to shareholders, insurers, and auditors. Of course, certain companies prefer the wait before the final decision to be as long as possible, so that the fine does not have to be paid immediately, but many would prefer to finalize the case. The Commission appears aware that it needs to reduce

55. Parties to the first settled case, Commission Decision No. COMP/38511 (*DRAM*) (May 19, 2010), have indicated that they will not appeal, but the non-settling party in the Commission's second settled case, *Animal Feed Phosphates*, has appealed. *See* Timab Industries v. Commission, Case T-456/10 (pending case).

the time it takes to reach a final decision, but the Commission must ensure that it takes practical steps to achieve this.

Further, the delay in publishing a public nonconfidential version of the final decision (an issue discussed further below) creates an uneven playing field both for companies and for their legal advisors. Certain elements of the Commission's procedural and decisional practice will alter over time and, absent publication of the decisions, only those involved in the relevant cases will have that information. In relation to the leniency program, for example, significant procedural developments, including the ability to provide corporate statements orally and thereby reduce the risk of disclosure in the US courts, only became widely communicated when the Commission published a revised version of its Leniency Notice in 2006. Disseminating the information more swiftly can only serve to better inform both companies and legal advisors and ensure that future cases can proceed more efficiently. The Commission must help to ensure that companies are able quickly and effectively to obtain information and advice that enables them to assess their position.

F. *Transfer of Information between Competition Authorities*

Given the effort that companies make to ensure that the evidence they provide is not able to be disclosed in other jurisdictions,[56] it is not surprising that the issue of transfer of information between competition authorities raises such concerns for parties. A certain level of comfort and clarification regarding transfer of information between authorities in the ECN is provided to parties through the guidance set out in the Commission Notice on Cooperation within the Network of Competition Authorities.[57] However, information may also be exchanged on a bilateral basis with countries outside the ECN, and the scope for exchanging information (formally and informally) is getting wider as more countries develop competition regimes, engage in information agreements, and join organizations such as the Organisation for Economic Co-operation and Development and the ICN.

56. *See supra* Part I.B.2 (regarding access to orally provided evidence).

57. Commission Notice on Cooperation within the Network of Competition Authorities, 2004 O.J. C 101/43 (*Competition Authorities Cooperation*).

Even if information requests are made to the parties, and not between agencies, they may be based on previous requests made by other competition authorities and may therefore be disproportionately broad. For example, certain significant jurisdictions tend to request all documents that have been produced to other agencies. Companies may be loath to spend significant time and effort satisfying such requests in jurisdictions where their exposure is limited and where such efforts therefore appear disproportionate.

III. *THE DEFENDANT'S VIEW FROM THIRTY THOUSAND FEET*

A. *The Commission as Judge, Jury, Legislator, and Prosecutor*

Commissioner Almunia has indicated that he believes the EU's "administrative system compares positively and favourably with many other systems. Indeed, when the Commission decides to act, this decision is not only extensively reasoned and subject to the Courts' judicial review, it also comes after a process that fully involves the companies concerned."[58] It is true that the current system incorporates a number of checks and balances that seek to ensure the impartiality and justifiability of the Commission's decisions. Such safeguards include (1) the receipt of a fully detailed Statement of Objections and the opportunity to reply in writing; (2) access to the Commission's file; (3) oversight by the Hearing Officer; (4) use of peer review panels; (5) input from members of the Chief Economist team and the Legal Service; (6) review by national competition authorities sitting in the Advisory Committee and by other directorates within the Commission; and (7) approval by the full College of Commissioners.

However, the Commission continues to be criticized for its overarching role as judge, jury, legislator, and prosecutor.[59] The absence of a separation of powers does seem, on the most basic level, to be inconsistent with the rule of law and due process. Furthermore, the arbiters of the final decision, the

58. Commission Press Release, SPEECH/10/81 (Mar. 9, 2010) [hereinafter Almunia Antitrust Speech].

59. Indeed, the Commission may now have a further occasional role as damages complainant. It is currently pursuing a follow-on damages action in the Brussels commercial court in relation to the lifts and escalators cartel.

Commissioners, are political appointees. According to Commissioner Almunia, they "have sworn to be and are genuinely independent of national, political and business interests."[60] However, concerns will always be raised that decisions imposing fines of such magnitude are imposed by a group of fixed-term political appointees.

Criticism of the Commission's broad role is becoming increasingly public. For example, during the investigation that led the Commission to fine Intel €1.06 billion for abuse of a dominant position, Intel made a complaint to the European Ombudsman in which it argued:

> [I]n competition cases, the Commission acts as "the investigator, the jury and the judge" and is subject to judicial review only after it has adopted a decision. In particular, and in contrast to the system in place in some Member States, such as France, where the investigatory and adjudicative functions are split between two agencies, the Commission has the power both to conduct an investigation of the facts and to adopt a decision establishing that an infringement of the competition rules has occurred. In the complainant's view, the extensive nature of the Commission's powers requires that the Commission exercise particular vigilance against any tendency toward bias, lack of objectivity or overzealous prosecution, when performing its investigative and adjudicative functions.[61]

There are of course many other examples in the European Union and around the world of enforcement systems that seek to have separate prosecutorial and sanctioning functions. At one end of the scale are systems such as those in Sweden and the United States, where the agency prosecutes and a court adjudicates, and if the court finds a company guilty, it administers a decision and penalty. Closer to the Commission model, in various EU Member States there are examples of unitary enforcement agencies that maintain a formal or informal separation of powers between investigators and decision makers, such as those in Belgium, France, and Spain.

60. *See* Almunia Antitrust Speech, *supra* note 58.

61. European Ombudsman Decision, Complaint No. 1935/2008/FOR, ¶ 46 (July 14, 2009) (closing his inquiry into complaint 1935/2008/FOR against the European Commission).

There are a number of steps that could be taken toward allaying concerns about due process. One potential solution might be for the Commission to have a purely investigative role and for the decision and fine to be imposed by the General Court. This, after all, is a model used in a number of countries, although there are of course a number of arguments against it. One such argument would be the length of time it would take to receive a final decision, given the need to involve the courts. However, given that almost every cartel decision is currently appealed, the time taken to reach a decision that is less likely to be appealed may be time well spent. Expertise within the General Court could be concentrated within a separate chamber, or even a separate court, dealing with competition cases, and possibly a fast-track procedure could be instituted. A further concern is that such a solution would require serious institutional reform. A less radical solution would be to follow a form of the French model and internally separate the prosecutors from a panel of internal arbiters (such as senior officials), who would then choose whether to prosecute and then present a decision for the Commissioners to adopt or reject. While this model does not completely separate out prosecution and judges into different institutions, it does provide a form of independence of the two functions.

B. *The Impact of the Possibility of Criminal Sanctions and Extradition*

Although criminal sanctions are not available at the EU level, the Commission must ensure that it acknowledges that its administrative sanctions now operate in the wider context of criminal penalties. It cannot afford to have a blanket view that the two are in no way interrelated. The potential risks for individuals have become much greater, especially given the possibility of being extradited to countries such as the United States to stand trial, and this must impact the Commission's decisional procedure. For example, as discussed above, care must be taken to ensure that the position of individuals is protected and that the privilege against self-incrimination is respected.

However, despite the clear need to ensure that the position of individuals is respected and protected, perhaps consideration should be given to introducing individual administrative liability in the European Union. There is an argument to be made that

anticompetitive behavior is, in many cases, the action of specific individuals and that, although corporate responsibility should not be lessened, significant deterrence needs to be targeted at individuals. Of course, there will be cases where anticompetitive behavior is rife within a company, and the ethos of the company condones this. However, in many cases, the infringement stems from a handful (or fewer) of employees acting in clear contradiction of internal company compliance rules. It is submitted that there could be a role for individual sanctions in cases where the actions are those of a rogue employee, as opposed to those cases where anticompetitive behavior is endemic and encouraged.

C. *The Impact of Human Rights Arguments*

As highlighted throughout this discussion, the European Union's forthcoming accession to the ECHR and the binding nature of the EU Charter of Fundamental Rights are likely to alter the antitrust landscape in the EU. It will be possible for companies eventually to challenge Commission procedure at the ECtHR level, adding an additional layer of judicial recourse and a measure of influence and restraint on DG Competition. Even absent such recourse, the increase in awareness among the EU judiciary, legal advisors, and companies themselves will likely mean that issues of human rights are more frequently raised and, above all, better protected.

D. *The Impact of the Increase in Damages Actions*

DG Competition has always maintained that an increase in the number of damages actions will not alter the EU's position toward public anti-cartel enforcement. It considers that the public and private enforcement regimes pursue different policies and priorities, and that the deterrence goals of significant fines do not overlap with the compensatory goals of damages actions. The Commission would therefore not expect to alter its fining policy to reflect an increase in the number of damages actions. However, if the number of damages actions significantly increases, the Commission may need to review its current position. As suggested below, there may be possibilities for

interaction between the two regimes that could usefully be explored.

E. *A Time for Change?*

The issues raised above, particularly that of the Commission's role as judge, jury, legislator, and prosecutor, suggest that the Commission faces a number of questions regarding its current system. The question must be asked whether the Commission will itself instigate internal reform or whether criticism of the current system will increase to a point where such reform is imposed upon it. Currently, no reform appears to be in the offing, and Commissioner Almunia has stated clearly that he has no intention of substantially rethinking the current system: "[T]he merits of our system as such should not be put into question. We will not follow those who ask us radical changes in this field."[62] It therefore appears that critics of the current system will have to play the long game, demonstrating the need for certain limited procedural changes in the short term in the hope that this will lead to more significant developments in the long term. Reform appears probable, with the ECtHR likely leading the way, but it seems that it should not be expected during the five years of Commissioner Almunia's mandate.

IV. *THE VIEW FROM THE OTHER SIDE: DAMAGES CLAIMANTS*

Whatever the level of fines and whatever the financial hardship caused to the infringing companies, Commission fines paid go to the public purse and do nothing to compensate parties harmed by the anticompetitive activity. The Commission has therefore spent several years studying the issue of private actions for antitrust damages and has taken significant steps to craft legislation to encourage such actions. However, recent focus seems to have been on reaching agreement between the EU institutions and between the EU Member States, and this has stalled the Commission's efforts. The focus must also remain on potential claimants; if a damages policy is not sufficiently

62. Commission Press Release, SPEECH/10/305, at 4 (June 10, 2010).

attractive to them and does not remove unmerited procedural shields for defendants, then it will have very limited success.

In the authors' experience, most companies that are harmed, typically by supplier cartels, do not want to go to court. They want to settle out of court as quickly as possible, recover their damages, try to salvage the relationship with their supplier, and continue their business. This is clearly the most efficient and fair outcome in cases where a competition agency has found against a cartel and the facts and liability are not in dispute. However, the procedural obstacles discussed below often dissuade parties with strong claims from bringing cases. The lack of a credible threat of effective and immediate court action unnecessarily deters potential plaintiffs while emboldening cartelists to stall and not settle even in the face of an agency decision against them. Fixing these obstacles is vital to increasing the number of private actions undertaken in Europe. In short, better and fairer procedures are the key to encouraging plaintiffs to seek justice in this area. Former Commissioner Kroes put it well: "Out-of-court settlements can only really work if they are coupled with a realistic chance of effective court action."[63]

A. *Obstacles to Effective Damages Actions and Possible Fixes*

A number of issues that continue to hamper the increase in damages actions are discussed below. There are, however, further barriers that are not considered here, including those of funding such actions and the structure and authorization of class actions.

1. Absence of EU-Wide Legislation

The absence of EU-wide legislation in relation to damages actions has been well documented. The Commission has been keen to pursue development in this area, publishing a White Paper in April 2008 on the issue of damages actions for breach of the EC antitrust rules and proceeding with the preparation of a draft directive.

Commissioner Kroes had hoped to produce legislation in this area before the end of her mandate, but such legislation stalled due to a number of factors, including objections from a number of members of the European Parliament. Although a

63. Commission Press Release, SPEECH/07/698, at 4 (Nov. 9, 2007).

draft directive was in advanced form a year ago,[64] it will certainly not re-emerge until a number of issues have been resolved. The main concerns have revolved around issues of collective redress, and the Commission has agreed that, "[b]efore taking any action, [it] first must agree on common principles that can be applied in various areas, beyond competition."[65] The Commission plans to hold a public consultation in 2011 and, following this, "will take a position on this general framework, which will form the basis of individual legislative proposals, such as the one on antitrust damages actions."[66]

The Commission also intends to explore the options for making use of alternative dispute resolution ("ADR"). Commissioner Dalli (responsible for health and consumer policy) has indicated that he views this as "a key factor for any redress system, and not solely in the context of collective redress."[67] Arbitration and mediation may well be attractive to corporate claimants, given that they are likely to be swifter and less expensive than a court case and have far fewer rules of evidence and discovery. It will be interesting to observe whether DG Competition will advocate the use of ADR systems in relation to antitrust cases.

2. The Availability of the Passing-On Defense

The issue of passing-on, and the availability of a passing-on defense, is key to the success of an efficient damages actions regime. It is submitted that direct purchasers are currently the key players in civil suits and that a focus needs to be placed on incentivizing such potential plaintiffs by putting them in a strong position procedurally.

A focus on the passing-on defense could make it difficult for full compensation (which has clearly been the goal in the European Union) to be achieved. In general terms, the damage suffered by an indirect purchaser is limited, and such a purchaser

64. This draft was widely leaked and informal comments were provided to DG Competition from a number of quarters.

65. Commission Press Release, SPEECH/10/35 (June 10, 2010).

66. *See* Almunia Competition Day Speech, *supra* note 43, at 6.

67. John Dalli, Member of the European Commission, Responsible for Health and Consumer Policy, Address to the European Parliament's IMCO Committee (Apr. 28, 2010), *available at* http://ec.europa.eu/commission_2010-2014/dalli/docs/ep-imco-committee-28042010_en.pdf.

therefore has a proportionately limited incentive to commence litigation. Direct purchasers are currently best placed to bring damages claims in the EU, given that they tend to have more resources and better access to evidence. Furthermore, they are more likely to be able to use the existence of an infringement decision as leverage in any ongoing commercial relationship.

If the passing-on defense is allowed, situations may arise in which both indirect and direct purchasers make a claim, leading to multiple liability and a "race for damages." Where the product is an input (as most cartelized products are) rather than an end product, the situation will only become more complicated.

Certain jurisdictions have already focused on this issue and, in the case of Germany, have tried to strengthen the position of direct purchasers by restricting the availability of the passing-on defense. German antitrust legislation clarifies that damage to a direct purchaser is not automatically excluded due to the resale of the relevant goods,[68] but leaves it to the courts to decide on a case-by-case basis whether the passing-on defense can be invoked. Recent German case law appears to indicate that judges are unwilling to accept the defense easily, stating that "[a]pproving the passing-on defence would be wrong merely on the basis of the requirement emphasised by the [Court of Justice] for the effective enforcement of [EU] law."[69] If other courts in EU Member States, and the Commission itself, were also to endorse such a view, it would significantly facilitate the position of direct purchasers and, it is submitted, enable the number of damages actions brought to increase and the EU damages policy to gain some much needed traction.

3. Discovery Issues

In terms of enabling plaintiffs to bring cases that have a reasonable chance of success, discovery of documents is key. Plaintiffs need to have access to evidence, otherwise they cannot bring cases. The current rules do not facilitate plaintiffs in

68. Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act against Restraints of Competition], July 1, 2005, BGBL. I at 2114, last amended by Gesetz, Nov. 4, 2010, BGBL. I at 1480, § 33(3) (Ger.) ("If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service.").

69. Oberlandesgerichte Karlsruhe [Higher Regional Court of Karlsruhe] June 11, 2010, 6 U 118/05 (Kart.), 2010 (Ger.) (authors' translation).

obtaining documents from third parties and defendants, and consequently they are more likely to try to obtain agency documents. The Commission is clear that the effectiveness of the leniency program must be protected, and specifically that corporate statements should be protected from disclosure:

> Given the inevitable interaction between an increased level of damages claims and the operation of an efficient leniency programme, it appears appropriate to maintain the attractiveness of leniency programmes in Europe, on the one hand, by ensuring an adequate level of protection of leniency applications in a future context of an enhanced level of actions for damages, and, on the other hand, to further reflect on the possibility to further incentivise potential immunity applicants.[70]

The Commission has defended this position in practice, appearing as amicus curiae in US courts to avoid disclosure of leniency applications[71] and refusing requests to grant access to documents from its files.[72]

Although the Commission has taken significant steps to ensure that corporate statements are protected from discovery,[73] such statements are often heavily relied on in EU Statements of Objection (not necessarily with attribution), which are regularly included in US discovery requests and sometimes granted. A company that had not applied for leniency might therefore be in a better position, as less directly attributable information would be contained in the Statement of Objections.

70. Commission of the European Communities, Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 Final, ¶ 286 (Apr. 2008) [hereinafter Commission Staff Working Paper].

71. *See, e.g.*, *In re* Vitamins Antitrust Litigation, No. 99-197, 2002 WL 34499542, at *6 (D.D.C. Dec. 18, 2002) (holding that leniency statements were discoverable); Order on Plaintiffs' Motion to Compel Production of Documents Submitted to Governmental Authorities, *In re* Methionine Antitrust Litigation, MDL No. 00-1311 CRB (JCS) (N.D. Cal. 2001) (holding that leniency statements were not discoverable) (on file with the *Fordham International Law Journal*). It should be noted that this was prior to the possibility of making oral leniency statements in the European Union and therefore substantially circumventing US disclosure issues.

72. *See* EnBW Energie Baden-Württenberg v. Commission, Case T-344/08 (pending case); CDC Hydrogen Peroxide v. Commission, Case T-437/08 (pending case).

73. Submissions made under the EU settlement procedure are being offered the same protections as those granted to leniency applications, and this is welcomed as their disclosure would provide a similar "roadmap" of the EU case.

4. Calculation of Damages

Another bar to the development of effective damages actions has been the issue of the calculation of the damages that should be paid. From a plaintiff's point of view, if it can only hope to reclaim the actual loss that it suffered, then it may consider that it is not worth the effort and potential expense of pursuing a claim. This concern will be especially valid in relation to stand-alone claims where parties cannot rely on a pre-existing decision as proof of the infringement of competition law. In contrast, the US system, for example, considers that treble damages and contingency fees operate to help ensure financial return.

In terms of concrete results for victims of cartel behavior, companies may well use the existence of a pre-existing decision as leverage when renegotiating ongoing business agreements with the infringing company in order to reflect the previous damage suffered. Although this may lead to a certain level of compensation for the customer, it does little to increase deterrence.

A team of external economists has prepared a report for the Commission on the quantification of antitrust damages, with a view to producing nonbinding guidance for national courts,[74] but this does not address the policy issues regarding calculation or passing-on. The Commission has indicated that it is "committed to considering the possibility of suggesting simplified rules of estimation in order to assist the claimant in proving his damage,"[75] and in practice, such flexibility would be welcomed. Such an approach appears to have already been used successfully within the European Union: in Hungary, for example, there is a rebuttable presumption employed in damages actions of a ten percent price increase due to the anticompetitive behavior.[76]

It should be noted that, although the Commission has not so far advocated the use of punitive damages, it has no legal basis

74. ASSIMAKIS KOMNINOS ET AL., OXERA, QUANTIFYING ANTITRUST DAMAGES: TOWARDS NON-BINDING GUIDANCE FOR COURTS 2009, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

75. White Paper, *supra* note 37, at 165, ¶ 200.

76. 2009. a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény módosításáról szóló 2009. évi XIV. törvénnyel (Act XIV of 2009 on the Amendment of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices), art. 14 (Hung.).

to prohibit them, and Member States may provide for them if permitted by their national legislation.

5. Timing and Delay (Again)

As discussed above, the delay before a final decision is reached can be considerable. For companies wishing to carry out a "follow-on" action, such litigation cannot be commenced until there is a final Commission decision on which to base their case. Further, once the final decision has been announced, the delay in publishing a nonconfidential version can be considerable. For example, the Commission's decision in *Chloroprene Rubber* was published on December 5, 2007,[77] and, at the time of this writing, the full nonconfidential version of the decision is not available, some thirty-three months later. Although the length of the delay in this case is unusual, delays in other cases are also serious. For example, the Commission has not yet made available a nonconfidential version of its decision in *Aluminium Fluoride*, which was decided on June 25, 2008.[78]

Such delays have a direct and negative effect on the ability of potential claimants to bring follow-on damages actions in national courts. In particular, given that the Commission's proposed damages legislation has stalled for the time being, such roadblocks to the pursuit of follow-on actions must be removed. The Best Practices state the Commission's aim to publish a full nonconfidential version of the final decision "*as soon as possible*,"[79] and this is certainly an area in which improvement is necessary.

The Commission is taking welcomed steps to speed up the publication of nonconfidential versions of its decisions. The Best Practices state that, should disputes arise regarding the extraction of business secrets, the Commission will publish a version of the decision containing all redactions requested by the parties pending further discussions regarding the disputed parts.[80] Provided that the delay in producing a final nonconfidential version is short, this move is to be welcomed. However, at the time of this writing, no provisional

77. Commission Decision Summary No. COMP/38629 (*Chloroprene Rubber*), 2008 O.J. C 251/7.

78. Commission Decision No. COMP/39180 (*Aluminium Fluoride*) (June 25, 2008).

79. DG COMPETITION, *supra* note 2, ¶ 135 (emphasis added).

80. *Id.*

nonconfidential version has been made available for any of the Commission's six cartel decisions reached so far in 2010.[81]

B. *Public and Private Enforcement: Never the Twain Shall Meet or a New Way Forward?*

That parties harmed by infringements of competition law should be compensated for the damage suffered is a view shared by commentators, competition authorities, and practitioners. However, this view is often expressed subject to the caveat that pursuit of such compensation is only to be encouraged where it does not interfere with the effective pursuit of public enforcement. It is submitted that this should not restrict the Commission from exploring any potential benefits that could be achieved through possible complementary overlaps in the aims and impact of the public and private enforcement regimes.

Certain jurisdictions have already explored ways of creating a relationship between compensation made to third parties and fines imposed by competition authorities. Some have made use of pre-existing systems such as leniency regimes, for example by making compensation a prerequisite for obtaining a reduction in or immunity from fines. Other jurisdictions have made restitution to victims of the cartel a mitigating factor in calculating the fine or have taken account of such compensation when reaching a settlement agreement with the infringing parties. Would any of these approaches be suitable in the European Union?

There has been a significant amount of academic discussion about whether there is an overlap in the objectives of the public and private competition enforcement regimes.[82] There is general

81. Commission Decision No. COMP/39309 (*LCD*) (Dec. 8, 2010); Commission Decision No. COMP/39258 (*Airfreight*) (Nov. 9, 2010); Commission Decision No. COMP/38866 (*Animal Feed Phosphates*) (July 20, 2010); Commission Decision No COMP/38344 (*Prestressing Steel*) (June 30, 2010); Commission Decision No. COMP/39092 (*Bathroom Fittings and Fixtures*) (June 23, 2010); Commission Decision No. COMP/38511 (*DRAM*) (May 19, 2010).

82. *See, e.g.*, Donald I. Baker, *Revisiting History—What Have We Learned about Private Enforcement that We Would Recommend to Others?*, 16 LOY. CONSUMER L. REV. 379 (2004); Assimakis P. Komninos, *Public and Private Antitrust Enforcement in Europe: Complement? Overlap?*, 3 COMPETITION L. REV. 5 (2006); Wouter P.J. Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, 32 WORLD COMPETITION 3 (2009).

(although not necessarily total) agreement that Commission fines are intended to, inter alia, (1) deter anticompetitive behavior; (2) punish anticompetitive behavior; (3) have a moral effect, reinforcing the compliant behavior of other undertakings and individuals; (4) bring infringements to an earlier end; and (5) facilitate corrective justice.

Regarding the objective of encouraging damages actions, the fact that damages are granted at the Member State, rather than the European Union, level means that there are inevitably discrepancies and differences between the regimes about what damages should represent. However, the Commission and the EU courts seem to agree that damages should at least (1) compensate victims of anticompetitive activity; (2) increase levels of deterrence; and (3) strengthen the culture of competition compliance. Whether damages actions serve a punitive function is an issue that varies between Member States, as the availability of punitive/exemplary damages is a matter for national law,[83] and is beyond the scope of this discussion.

There is therefore a certain level of overlap between the aims of the private and public regimes, particularly in relation to deterrence. Are there creative approaches that could be taken by the Commission that would take both regimes into account? If there are benefits that one system could gain without any significant harm to the other, then surely such an avenue should at least be explored.

When setting the level of fine to be paid by an infringing company, the Commission could consider the extent to which it could or should account for compensation made to third parties. The Commission's view has been that this should not occur: "[T]he damages to be awarded should not influence the level of fines imposed by competition authorities in their public enforcement activities, nor under any future framework of enhanced private actions. Public fines and purely compensatory damages serve two distinct objectives that are complementary."[84] This position, however, does not consider the benefits that might be achieved from taking damages into account when setting a fine, such as increased levels of deterrence through increasing

83. Manfredi v. Lloyd Adriatico Assicurazioni, Case C-295/04, [2007] E.C.R. I-6619, ¶¶ 92–93.

84. Commission Staff Working Paper, *supra* note 70, ¶ 61.

the cost of infringing behavior and procedural efficiencies both for the parties and for the competition authorities. There are various ways that such a system might be structured, which are considered below.

1. Compensation as a Mitigating Factor in Fine Calculation

Compensation might be structured as a mitigating factor in fine calculation. This approach would afford the competition authority a degree of flexibility, as it could assess in each case the extent to which compensation made should count as mitigation by considering factors such as the amount of compensation made, the extent to which it was done of the infringing company's own volition (rather than at the insistence of the competition authority), and the parties to whom compensation is made. However, the very flexibility that recommends this system incorporates a significant level of legal uncertainty for parties about whether mitigation would take place in a specific case. In time, naturally, a certain level of decisional practice would build up to provide guidance to parties.

The availability of compensation has been incorporated in official guidance on fining levels as a mitigating factor in several jurisdictions. In the Netherlands, the Fining Code 2007 of the Netherlands Competition Authority ("NMa") incorporates as a mitigating circumstance "that the offender of his own account provided compensation to the injured party/injured parties."[85] The NMa considers that this aspect of its Fining Code enables it to "continue to foster private enforcement."[86]

The European Competition Authorities ("ECA")[87] have agreed on principles for convergence on pecuniary sanctions on undertakings for infringements of antitrust law, which state that "[t]he applicable fine may be reduced if the offender takes active steps to mitigate the adverse consequences of the infringement,

85. Boetecode van de Nederlandse Mededingingsautoriteit [Competition Authority Fining Code], Stcrt. 2007, 196, ¶ 49(c) (Neth.).

86. NEDERLANDSE MEDEDINGINGSAUTORITEIT [NMA] [NETH. COMPETITION AUTH.], RESPONSE OF THE NMA TO THE OFT'S DISCUSSION PAPER ON PRIVATE ENFORCEMENT ¶ 4 (June 22, 2007).

87. Founded in 2001 as a forum for discussion by the competition authorities in the European Economic Area. *See, e.g.*, *International Activities,* NMA, *available at* http://www.nmanet.nl/engels/home/international_activities/index.asp (last visited Jan. 25, 2010).

in particular by providing voluntary, timely and adequate compensation to those who have suffered damage as a result of it."[88] However, these principles are not legally binding on the ECA, and the above recommendation is accompanied by the comment that "[w]here compensation is taken into account as a mitigating circumstance, this reduction should not in any case be such as to undermine the deterrent effect of the fine."[89] It is notable that, in both the Dutch and the ECA systems, the compensation must be made of the infringing company's own volition.

Other jurisdictions have chosen not to incorporate such a principle of compensation into their official guidance, but rather to take such compensation, where made, into account on an ad hoc basis. The Commission itself has already taken such compensation into account in a limited amount of cases in which the parties had made such restitution prior to the Commission making its final infringement decision. In 1998, the Commission granted a reduction of €5 million in the fine imposed on Asea Brown Boveri Ltd. ("ABB") in relation to the *Pre-Insulated Pipe* cartel due to ABB's "payment of substantial compensation" to a competitor harmed by the cartel.[90] However, the terms of the settlement between ABB and its competitor remain confidential, and it is therefore not possible to ascertain the extent to which the reduction in fine reflects the amount of compensation paid.

In only one other case has the Commission taken the payment of such compensation into account when setting the fine. In the 2002 *Nintendo* decision, the fine was reduced by €300,000 due to the offer of "substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of Nintendo Corporation Ltd./Nintendo of Europe GmbH's activities."[91] This reduction in fine was limited in scope, reflecting less than three-tenths of a percent of the basic amount of the fine. Furthermore,

88. EUROPEAN COMPETITION AUTHS., ECA WORKING GROUP ON SANCTIONS, PECUNIARY SANCTIONS IMPOSED ON UNDERTAKINGS FOR INFRINGEMENTS OF ANTITRUST LAW: PRINCIPLES FOR CONVERGENCE ¶ 18 (2008), *available at* http://www.nmanet.nl/images/ECA%20Principles_tcm16-117437.pdf.

89. *Id.*

90. Commission Decision No. 99/60/EC (*Pre-Insulated Pipe*), 1999 O.J. L 24/1, ¶ 172.

91. Commission Decision No. 03/675/EC (*Nintendo*), 2003 O.J. L 255/33, ¶ 440.

Nintendo offered the compensation only at the Commission's instigation rather than entirely of its own volition.

The Commission is under no obligation to take such restitution into account, and requests for it to do so have been rejected on a number of occasions. In its *Graphite Electrodes* decision in 2001, the Commission baldly stated that "the possibility that undertakings may have been required to pay damages in civil actions is of no relevance."[92] It further clarified that "[p]ayments of damages in civil actions which have the objective of compensating for the harm caused by cartels to individual companies or consumers cannot be compared with public law sanctions for illegal behaviour."[93] The Court of First Instance (now the General Court) confirmed the Commission's position on appeal, although the judgment indicates that, for such compensation to be taken into account, it must have been made towards operators on the EEA market in relation to losses suffered on that market rather than on another market.[94]

Although the Commission's decisional practice in this area has been somewhat inconsistent, this does not prevent it from taking such damages payments into consideration in future cases.

2. Compensation as Part of a Settlement Agreement between the Competition Authority and the Infringing Party

Taking compensation into account as a factor in fine calculation, however, is not the only way for the public and private antitrust regimes to intertwine. Compensation could be taken into account as part of a settlement agreement between the competition authority and the infringing party. However, jurisdictions have very different views as to how "settlement" operates, and the one word covers a multitude of different approaches. As discussed above, the Commission views settlement mainly as a tool for obtaining procedural efficiencies once the investigation is over, and during the development of its

92. Commission Decision No. 02/271/EC (*Graphite Electrodes*), 2002 O.J. L 100/1, ¶ 183.

93. *Id.*

94. Tokai Carbon Co. v. Commission, Joined Cases T-236, 239, 244–46, 251–52/01, [2004] E.C.R. II-1200, ¶ 348. However, the court did distinguish its decision from the Commission's conclusion in *Pre-Insulated Pipe*, as the compensatory payments in *Graphite Electrodes* had been made in respect of third parties in the United States and Canada, rather than in the European Union, as was the case in *Pre-Insulated Pipe*. *Id.*

settlement procedure, the Commission highlighted that it was not seeking to replicate the "plea-bargaining" system used in the United States.

The United Kingdom is now making increasing use of negotiated agreements[95] but has only once incorporated consideration of payments made to third parties into its settlement analysis and discussions. The only occasion on which it has done so was in fact the first case in which the OFT negotiated an agreed settlement in an infringement decision procedure. In its decision relating to exchange of information on future fees by certain independent fee-paying schools, published in December 2006, the OFT considered that there were a "number of exceptional features of the case" that justified departure from its penalties guidance, one of which was payment made by the addressees of the OFT's decision designed to benefit the victims of the competition law infringement:

> Secondly, and unusually, the OFT notes that the Participant schools agreed to make an *ex gratia* payment to fund a £3 million educational trust fund for the benefit of pupils who attended the Participant schools during the academic years in respect of which fee information was exchanged, thus indirectly benefiting those whose interests the Act is designed to protect.[96]

This decision may well be considered exceptional and is certainly open to criticism,[97] but it presents an interesting option. Using settlement in this way would again provide a certain level

95. As seen, for example, in cases involving tobacco and the dairy sector.

96. OFT, Exchange of Information on Future Fees by Certain Independent Fee-Paying Schools, Infringement Decision No. CA98/05/2006, ¶ 1427 (Nov. 20, 2006), *available at* http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/schools.pdf.

97. Criticisms include (1) the limited fine of UK£10,000 imposed on each of the implicated schools (except The Royal Hospital School, which is legally protected by Crown immunity); (2) the fact that the educational trust into which the sums were paid was intended to benefit those pupils at the schools at the time of the infringement and therefore not those that suffered financial damage due to the infringement (i.e., for the most part, the parents of those pupils); and (3) the fact that fines for competition infringements are generally intended for the public purse. (In the European Union, fines paid contribute to the Community budget and serve to decrease the payments by Member States. In the United Kingdom, fines paid contribute to the revenues of the state via the consolidated tax fund.) The question could therefore be raised as to whether the OFT was in fact acting *ultra vires* in reducing the fine on the schools due to the *ex gratia* payment.

of flexibility for both the competition authority and the settling parties, as well as some potential protection of confidential information for those parties. However, this very absence of transparency may pose concerns because it could render further follow-on actions more difficult by leading to less information in the final decision, or, if part of the infringement were dropped and not covered in the final agreement, by forcing private parties to litigate certain elements of the infringement as a "stand-alone" action.

3. Compensation as a Requirement for Immunity or Leniency from Fines to Be Granted

Another option for creating a relationship between compensation made to third parties and fines imposed by competition authorities would be to make compensation a requirement for immunity or leniency from fines to be granted under the leniency program. Although this is not strictly a reduction in fine due to compensation paid, the outcome for the leniency applicant would be similar.

A number of jurisdictions have chosen to explore this option. In the United States, the Department of Justice's ("DOJ") corporate leniency policy includes as a condition of leniency that "[w]here possible, the corporation makes restitution to injured parties."[98] In practice, it appears that private litigation is often accepted as a substitute for restitution, and in such cases the DOJ does not actively manage the process of restitution, but instead simply accepts the assurance from the leniency applicant. A document issued by the DOJ in 2008 states that "the applicant must demonstrate to the Division that it has satisfied its obligation to pay restitution before it will be granted final leniency. Restitution is normally resolved through civil actions with private plaintiffs."[99]

Obviously, the system of fines and compensation in the United States differs significantly from that in the European Union. In the United States, it is likely that damages actions will

98. U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY ¶¶ A(5), B(6) (1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf.

99. SCOTT D. HAMMOND & BELINDA A. BARNETT, U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS REGARDING ANTITRUST LENIENCY PROGRAM ¶ 20 (Nov. 19, 2008), *available at* http://www.justice.gov/atr/public/criminal/239583.pdf.

already be underway by the time the DOJ has completed its investigation, whereas this would not necessarily be the same in a Commission investigation.

Although such an approach has not been successful in all jurisdictions,[100] there would seem to be some benefits to incorporating any reductions granted due to restitution made within the auspices of a pre-existing leniency regime. Quite simply, if making compensation available is a pre-condition of being granted leniency from fines, then companies wishing to obtain leniency will have no choice but to make compensation available. Companies that apply for leniency are aware that any grant of leniency brings with it significant obligations of continuous cooperation, and adding restitution to the list of obligations could be viewed as simply another (albeit significant) condition to satisfy. The competition authority will obtain the evidential information and increased cooperation that it can expect from a leniency applicant, and the damaged parties will receive compensation. This would seem to achieve a certain level of efficiency. There may also be practical benefits for the plaintiffs. Under the US system, in order for the immunity applicant to qualify for single, rather than treble damages, it must cooperate with the plaintiffs in their civil actions by providing a full account of the relevant facts and providing reasonable access to documents and witnesses.[101]

Further, it would seem logical to conclude that those companies willing to voluntarily compensate victims are those most likely to have already applied for leniency. Certainly, companies not applying for leniency and planning to appeal any infringement decision against them are unlikely to make compensation voluntarily available as this could be viewed as an admission of its involvement in the cartel. If this assumption is correct, then there would again appear to be a level of efficiency in incorporating restitution within the leniency program. However, the Commission will be concerned to ensure preservation of the key role played by the leniency system, considered to be the linchpin of its anti-cartel enforcement

100. The leniency programs of both Australia and Canada previously included similar conditions, which have since been removed.

101. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213, 118 Stat. 661, 666–67.

regime. If making compensation available becomes a requirement of leniency, it would likely be more difficult for a company to assess the cost-benefit analysis of applying for leniency, but the Commission has made clear that it does not wish companies to be able to conduct too reliable a cost-benefit analysis, as ability to calculate risk in advance will weaken the deterrent element of fines.

In the unlikely case that leniency were to be revoked or fall away for some reason, perhaps the restitution requirement should still remain, and such restitution could then be taken into account as a mitigating factor when calculating the fine, dependent perhaps on the behavior of the party in question and the reason for leniency being revoked.

As mentioned above, there is a question about whether the liability position should be any different for recipients of full immunity from fines. In relation to follow-on damages actions, it has been suggested in the Commission's White Paper on damages actions that immunity recipients should not be considered jointly and severally liable. In the United States, immunity recipients are placed in the privileged position of being exposed in civil actions to only single, rather than treble, damages. The arguments for offering protection from paying compensation are similar to those raised in relation to protecting immunity recipients from damages actions—i.e., that they are likely to be the first to offer such compensation and may therefore end up paying proportionally more than other parties to the cartel. However, this concern may be limited if each infringing party is obliged to compensate only those that it has harmed (rather than all victims of the cartel).

On balance, a system linking damages with leniency may well have advantages and need not necessarily be a permanent fixture. Perhaps such a system might best be used only in the medium term, and could be rethought once an active private plaintiffs' bar is operational in the European Union and a significant number of private actions are being brought in national courts.

V. *MOVING FORWARD: ARE WE ON THE RIGHT PATH?*

Many aspects of the Commission's current anti-cartel enforcement procedure are good. But this does not mean that

they could not be better. Any authority, particularly one that can impose such severe sanctions, should strive to ensure that its procedures are as fair, transparent, and justifiable as possible.

DG Competition has taken, and continues to take, significant steps to ensure that its procedure and process evolve, and it shows an increasing willingness to listen to and take on suggestions from practitioners for improving tweaks to current practice. Such developments are very welcome but do not alleviate concern about resistance to suggestions of more fundamental and structural change. With the increasing protection of fundamental rights as a clear impetus, the Commission has a genuine opportunity to reflect upon its practices and structure and to ensure that it takes strides to make them as fair as possible.

The Commission's reaction to criticism of its systems is often somewhat defensive, referring to the various checks and balances that it has in place. But checks on a flawed system are of limited benefit, more so when they are internal to the system. The level of oversight of the Commission's investigations must be visibly improved: "[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly *be seen* to be done."[102]

Regarding the encouragement of private damages actions, it is sincerely hoped that the Commission's draft directive has only stumbled and not fallen. Harmonizing legislation for plaintiffs needs to facilitate and encourage good settlements, establishing good judicial procedures that enable plaintiffs to bring cases and defendants to know what to expect.

The EU's system of anti-cartel enforcement is respected and emulated around the globe, and the eyes of both mature and developing regimes are on it to see how it will respond to the criticisms levied. But "[h]e has a right to criticize, who has a heart to help,"[103] and it is hoped that some of the thoughts and suggestions provided in this Essay may help contribute to the discussion of how a good system can be made better and more just.

102. R v. Sussex Justices, [1924] 1 K.B. 256, 259 (Lord Hewart C.J.) (Eng.) (emphasis added).

103. Quoting US President Abraham Lincoln. *See* A.N.P. UMMERKUTTY, WORDS OF WISDOM AND QUOTABLE QUOTES 30 (2d ed. 2005).