Fines under article 102 of the Treaty on the Functioning of the European Union

Frances Dethmers
Counsel at Clifford Chance LLP, Brussels

Heleen Engelen[*]
Lawyer at Clifford Chance LLP, Brussels

Abuse of dominant position; Competition policy; Competition procedure; EU law; Fines; Legal certainty; Presumption of innocence; Right to fair trial; Rule of reason

Introduction

The European Commission ("Commission") recently imposed a record fine of €1.06 billion on Intel for having abused its dominant position by employing conditional rebates and so-called "naked restrictions".[1] This was despite the adoption by the Commission of a more effects-based approach under art.102 of the Treaty on the Functioning of the European Union ("TFEU") as set forth in its Guidance Paper on Exclusionary Abuse ("Guidance Paper").[2] These two acts clearly send conflicting messages to both practitioners and businesses. On the one hand, the Commission punishes a dominant company with extremely high fines for a type of behaviour that cannot and should not be qualified as illegal per se; on the other, it officially distances itself from a per se illegality approach under art.102 TFEU. In practical terms, it means that the proposed rule of reason, where a case-by-case analysis is required to assess whether a certain type of behaviour is anti-competitive without there being off-setting efficiencies, is of limited value. In the current climate of exorbitant and spiralling fines, can a company ever be sufficiently confident that its behaviour does not amount to an abuse when there exists a risk, even if only small, of such high fines? In other words, is the effect of the Intel Decision to reduce the proposed approach in the Guidance Paper to a "dead letter", from its inception? Although the Commission claims to provide sensible and predictable rules,[3] it is impossible to properly determine, with the proposed economic analysis, whether any behaviour is legal. With such legal uncertainty and the risk of high fines, it is likely that companies will continue to apply a more conservative approach when dealing with abuse of dominance issues.

Besides this policy observation, it is questionable from a legal perspective whether a rule of reason can be reconciled with penalties of a "criminal" nature. We intend to address this question in this article. In so doing, we will first provide a brief overview of the Commission's decisional practice on fines under art.102 TFEU. At face value, it seems that the setting of fines by the Commission is highly discretionary, and that parties only have limited possibility to change the level of fines imposed or to feed into the process of their determination. Subsequently, we will analyse the rule of reason introduced in the Guidance Paper, and examine whether this new policy will or should affect the level of fines imposed by the Commission. In so doing, we will discuss the principles of *nulla poena sine culpa* and *nulla poena sine lege certa* which are, in our view, of relevance to this question.

Fines under art.102 of the Treaty on the Functioning of the European Union

Introduction

The Commission has the power:

> "[T]o impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty."[4]

The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 ("Guidelines") set out the Commission's policy on the structure of fines for antitrust violations.[5] The Commission will use a two-step methodology when setting the fine.

First, the Commission will determine a basic amount. This amount will be set by reference to the value of sales to which the infringement relates in the relevant geographic area and by reference to the gravity of the

[*] We express gratitude to our colleague Ninette Dodoo and to Daniel Gore from RBB Economics, who have contributed to this article. The views expressed in this article are those of the authors and do not purport to be the views of Clifford Chance LLP.

[1] Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990—Intel) [2009] OJ C227/07 (hereafter, the "Intel Decision").

[2] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

[3] As previous Competition Commissioner Neelie Kroes explained in a speech to the Fordham Corporate Law Institute in New York on September 13, 2005, the Commission's aim in adopting the effects-based approach laid out in its Guidance Paper was to identify: "[S]ensible 'rules' that would enable us to reach preliminary conclusions about when conduct may exclude competition, yet at the same time allow companies to know when they are on safe ground. Such an approach would have the advantage of being based on solid economic thinking while at the same time giving clear indications to companies and maintaining workable enforcement rules." (Speech/05/537, available at *http://ec.europa.eu/competition/antitrust/art82/index.html* [Accessed on May 18, 2010], where it is referred to by the Commission as providing the rationale for the new approach.)

[4] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2 para.1.

[5] These Guidelines replace the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty [1998] OJ C9/3. Under these Guidelines, the same principles are applied. However, in assessing the gravity of the infringement, infringements are put into one of the following categories: minor infringements, serious infringements and very serious infringements; each category having corresponding "likely fines".

infringement. This amount will then be multiplied by the number of years of participation in the infringement in order to reflect the duration of the infringement.

Secondly, the Commission will adjust the basic amount upwards or downwards to take into account aggravating or mitigating circumstances. If, for instance, the undertaking concerned proves that the infringement has been committed as a result of negligence rather than intention, the basic amount will be reduced.[6] The Commission may also increase the fine to ensure that it will have a sufficient deterrent effect.

The Commission cannot impose a fine which exceeds 10 per cent of the defendant's total turnover in the preceding business year.

We will analyse below how the Commission applies this methodology in practice.

Overview of cases since 1998

In the table below we have summarised art.102 TFEU decisions since 1998.[7] As can be seen from this overview, there is often very little substance as to the determination of the fines. We have only included factors that were explicitly identified by the Commission in these decisions; we have therefore not speculated as to what other factors could have explained the level of fines.

Table 1: Overview of art.102 TFEU cases since 1998

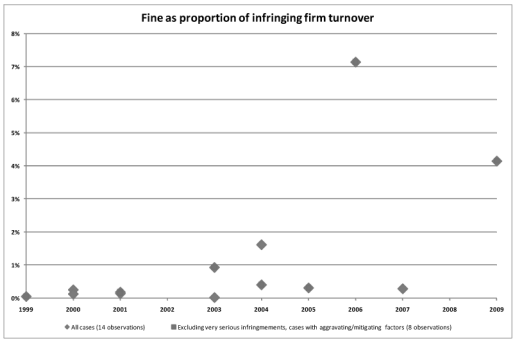
Parties	**Date**	**Geographical scope[8]**	**Starting amount ('000,000)**	**Addition**	**Final amount ('000,000)**
AAMS	June 17, 1998	Italy	ECU 3	100% increase due to the long duration, i.e. 13 years	ECU 6
TACA	September 16, 1998	Catchment areas of the ports in Northern Europe	ECU 220	25% increase due to the duration, i.e. 2 to 3 years	ECU 273[9]
Virgin—British Airways	July 14, 1999	United Kingdom	€4	70% increase due to the long duration, i.e. 7 years	€6.8
Soda ash—Solvay	December 13, 2000	Community without UK and Ireland	NA[10]	NA	€20
Soda ash—ICI	December 13, 2000	United Kingdom	NA	NA	€10
Deutsche Post AG	March 20, 2001	Germany	€12	70% increase due to the duration for the period between 1974 and 1997 and 30% increase for the period between November 1997 and October 2000	€24
Michelin	June 20, 2001	France	€8	90% increase due to the duration, i.e. 9 years and 50% increase for aggravating circumstances[11]	€19.76
De Post/La Poste	December 5, 2001	Belgium	€2	25% increase due to the medium duration, i.e. 32 months	€2.5
Deutsche Telekom AG	May 21, 2003	Germany	€10	40% increase due to the long duration, i.e. > 5 years and 10% reduction for mitigating circumstances	€12.6
Wanadoo Interactive	July 16, 2003	France	€9	15% increase due to the medium duration, i.e. 19.5 months	€10.35
Microsoft	March 24, 2004	EEA	€165.7	In order to ensure a sufficient deterrent effect, the initial amount was adjusted upwards by a factor of 2 and 50% increase due to the long duration, i.e. 5 years and 5 months	€497
Compagnie Maritime Belge	April 30, 2004	Liner services between Northern European Ports and Zaire	€3	20% or 15% increase due to the medium duration of the infringements, i.e. on average 2 years and reduction of the basic amount by EUR 50,000 due to the duration of the proceedings	€3.4

[6] See Guidelines, para.29: "The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as: … where the undertaking provides evidence that the infringement has been committed as a result of negligence."
[7] We have not covered art.9 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 cases.
[8] Geographical scope refers to the markets in which the abuse allegedly took place.
[9] Total fine imposed on the members of the TACA.
[10] NA stands for "not available".
[11] Michelin was previously fined for a similar abuse of its dominant position.

Parties	Date	Geographical scope[8]	Starting amount ('000,000)	Addition	Final amount ('000,000)
Astra Zeneca	June 15, 2005	Belgium, Denmark, Germany, the Netherlands, Norway, Sweden, UK	€40	Increase due to the duration of the infringements[12]	€60
Prokent-Tomra	March 29, 2006	Austria, Germany, the Netherlands, Norway, Sweden	€16	50% increase due to the long duration, i.e. 5 years	€24
Wanadoo Espana v Telefónica	July 4, 2007	Spain	€90	In order to ensure a sufficient deterrent effect, the initial amount was adjusted upwards by a factor of 1.25; 50% increase due to the long duration, i.e. 5 years and 4 months and 10% reduction due to mitigating circumstances	€151.9
Intel	May 13, 2009	EEA[13]	NA	The starting amount was multiplied by 5.55 to take account of its duration, i.e. 5 years and 3 months	€1,060

Higher fines and policy discretion to set the appropriate level of fines to deter abusive behaviour

We have summarised in the chart below the level of fines. The blue markers show the final fines imposed in 14 of the 16 cases summarised in the preceding table, expressed as a proportion of the turnover of the infringing firm (the necessary turnover data are not available for the *AAMS* and *TACA* cases). The red markers seek to control for case-specific factors by focusing on eight of those cases that were not considered to be "very serious" in nature or of "extreme gravity", and that were not subject to aggravating or mitigating circumstances.



Fine as proportion of infringing firm turnover

While the importance of the specific circumstances affecting each case should not be overlooked, there is obviously a trend towards higher fines under art.102 over time. Prior to 2004, no fine exceeded 1 per cent of turnover, whereas there has subsequently been three instances of fines above this level, the maximum being 7 per cent of turnover in the case of *Prokent Tomra*.[14] A similar trend can also be seen in relation to art.101 TFEU offences where the Commission has also considerably increased fines in order to achieve a greater deterrent effect. The Commission's unfettered discretion to increase fines for policy reasons, shown in an increase in the basic amount of the fine, has been condoned by the EU courts in several judgments, not only in respect of cartels under art.101 TFEU:

> "Furthermore, according to the case-law, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy … The proper application of the Community competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy."[15]

This policy discretion also explains why fines can be substantially different in identical cases. In the *Michelin* case, the defendant argued that the fine was disproportionate and discriminatory; the Commission had previously imposed a much lower fine for an identical infringement committed by a dominant undertaking with a much higher turnover (British Airways). Both the Court and the Commission dismissed this argument: even if

[8] Geographical scope refers to the markets in which the abuse allegedly took place.
[12] First infringement: seven years; second infringement: two years: 10% for each full year of the infringements, 5% for any remaining period of six months or more but less than a year. 5% increase for years for the period before 1998 and 2.5% for any remaining period of six months or more but less than one year.
[13] The Commission clarifies in para.1784 of the Intel Decision [2009] OJ C227/07 that: "[I]t has been demonstrated in this Decision that Intel's exclusionary strategy against AMD was worldwide in scope. For the purposes of establishing the gravity of the infringement, this means that the whole EEA was covered by the unlawful conduct."
[14] Decision relating to relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement (COMP/E-1/38.113 – Prokent-Tomra) [2008] OJ C219.
[15] Judgment of the Court of First Instance of March 20, 2002 in *LR AF 1998 A/S (formerly Løgstør Rør A/S) v Commission of the European Communities* (T-23/99) [2002] E.C.R. II-1705; [2002] 5 C.M.L.R. 10 at [237]. See also judgment of the Court of First Instance of October 21, 1997 in *Deutsche Bahn AG v Commission of the European Communities* (T-229/94) [1997] E.C.R. II-1689; [1998] 4 C.M.L.R. 220 at [127]: "[I]t should be pointed out that fines constitute an instrument of the Commission's competition policy and that that institution must therefore be allowed a margin of discretion when fixing their amount in order that it may direct the conduct of undertakings towards compliance with the competition rules."

cases are identical and decided within only few years of each other, the Commission's policy may dictate higher fines.[16]

All abuses are qualified as serious or very serious infringements with little variation in fines

Although the Commission defends its fines by relying on the nature of the infringement and its impact as well as the size of the relevant markets and undertakings concerned, no attempt is made by the Commission or the courts to identify objective factors which would justify the starting level of the fines. The Commission rarely addresses these factors in its decisions. All abuses have invariably been qualified as either "serious" or "very serious", as shown in the table below, and no distinction in the level of fines is therefore discernible, i.e. any abuse warrants the same treatment and is considered serious or very serious.

Table 2: Qualification of the abuses

Decision	**Abuse**	**Qualification of the abuse**
AAMS	Compulsory distribution contracts allowing AAMS to control and veto the competitive initiatives of the foreign firms in order to protect its own sales and abusive unilateral practices with regard to imported cigarettes	Serious infringement
TACA	Abuse of collective dominant position by: (i) placing restrictions on the availability and contents of service contracts; and (ii) by altering the competitive structure of the market so as to reinforce the dominant position of the TACA	(i) Serious infringement (ii) Very serious infringement
Virgin—British Airways	Exclusionary rebate schemes	Serious abuse
Soda ash—Solvay	Exclusionary rebates and fidelity rebates	Infringements of extreme gravity
Soda ash—ICI	Tying of customers to ICI by means of a number of devices which all served the same exclusionary purpose: "top-slice" rebates, exclusive requirements clauses and making other financial benefits dependent on the customer taking its total requirements from ICI	Infringements of particular gravity
Deutsche Post AG	Fidelity rebates and predatory pricing	Serious infringement
Michelin	Application of loyalty-inducing rebates to dealers in new replacement tyres and re-treated tyres for trucks and buses in France	Serious infringement
De Post/La Poste	Tying practices	Serious infringement
Deutsche Telekom AG	Imposition of unfair prices in the form of a margin squeeze to the detriment of DT's competitors	Serious infringement from 1998–2001/minor infringement from 2002–2003
Wanadoo Interactive	Predatory pricing	Serious infringement
Microsoft	Refusal of supplying interoperability information and implementation of tying practices	Very serious infringements
Compagnie Maritime Belge	Abuse of joint dominant position by: (i) participating in the implementation of a co-operation agreement with Ogefrem; (ii) modifying its freight rates in order to offer rates the same as or less than those of the principal independent competitor; and (iii) by establishing 100% loyalty arrangements	Serious infringements
Astra Zeneca	Misleading representations before patent offices requesting for the surrender of market authorisations for Losec capsules, combined with the withdrawal from the market of Losec capsules and launch of the Losec MUPS tablets	Serious infringements
Prokent-Tomra	Implementation of an exclusionary strategy in the national reserve vending machine markets involving exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes	Serious infringement
Wanadoo Espana v Telefónica	Margin squeeze	Very serious infringement
Intel	Fidelity rebates and payments to prevent sales of specific rival products (the so-called "naked restrictions")	NA

[16] Decision relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO—Michelin) [2002] OJ L143/1; judgment of the Court of First Instance of September 30, 2003 in *Manufacture Française des Pneumatiques Michelin v Commission of the European Communities* (T-203/01) [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18. The CFI referred to two differences (Michelin held a stronger position and there were more incidences of abuse), however, neither difference was needed to justify the higher fine. See also the *Manufacture Française des Pneumatiques Michelin v Commission* at [254]: "Secondly, it is in any event permissible for the Commission to increase the level of fines in order to reinforce their deterrent effect."

The effects of the abuse have little influence on the level of fines

Similarly, it is clear from the case law that the negative effects of the abuse, i.e. the resulting damage to competition, are less relevant than the factors relating to the object of the behaviour in question:

> "It is also clear from settled case law that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects."[17]

Typically, the impact of the infringement cannot be estimated with any certainty or it is simply not even necessary to demonstrate such impact, as the behaviour is presumed to restrict competition. See, e.g. the *Wanadoo* case:

> "Wanadoo Interactive's share of the market in high-speed Internet access for residential customers grew from [40–50]% to [70–80]% during the period in question. One competitor was eliminated, the market shares of several competitors fell very steeply, and those of the other surviving competitors grew very slowly or stagnated at an insignificant level. Although it is not proven that the developments observed on the market can be ascribed exclusively to Wanadoo's Interactive's behaviour, the latter's predatory pricing policy has undoubtedly had adverse repercussions on competition."[18]

If there is any discussion, it is on general market conditions rather than the specifics of the alleged effects of the abuse: for instance, the Commission has referred to the nascent state of the market on a number of occasions or the difficulties in entering certain markets.

The ability to set one fine for multiple abuses provides further flexibility. See for instance, the Commission's recent decision in *Tomra*[19]:

> "The Commission is entitled to impose a single fine for a multiplicity of infringements without being required to state specifically how it took into account each of the abusive components objected to for the purposes of setting the fine."[20]

See also *TetraPak v Commission*, where, the Court noted that a breakdown is, in particular, impossible where all the infringements are part of a coherent overall strategy.[21] It is not clear whether a breakdown would therefore be required if the infringements can be distinguished. In recent judgments, no reference is made to this point.

Limited scope for mitigating circumstances

Companies can of course dispute the duration of the infringement and the possible aggravating and mitigating factors taken into account by the Commission when determining the fine. But if the starting point for the fine's calculation is solely within the discretion of the Commission, such arguments are unlikely to reduce the fines substantially. Moreover, these arguments have rarely succeeded. Since 1998, the Commission only accepted the presence of mitigating circumstances in three cases, namely, *Michelin*, *Deutsche Telekom AG*, and *Wanadoo Espana v Telefónica*:

- **Michelin:**

  Michelin amended its commercial policy to bring an end to the infringement even before the Commission sent the Statement of Objections, which justified a reduction of 20 per cent in the basic amount of the fine;

- **Deutsche Telekom AG:**

  The Commission applied a 10 per cent reduction from the basic amount, as the retail and wholesale charges in question had been subject to sector-specific regulations at the national level since 1988; and

- **Wanadoo Espana v Telefónica:**

  Telefónica argued that the novelty of the case should be taken into account when determining the amount of its fine. Whilst the Commission did not accept this argument, it did apply a 10 per cent reduction from the basic amount as the infringement resulted from negligence rather than a deliberate act.

Furthermore, no equivalent of the leniency policy exists under art.102 TFEU. This means that companies cannot obtain reductions in fines through co-operation. Likewise, the recently introduced settlement procedure does not apply under art.102 TFEU. Consequently, there is no incentive for companies to seek the Commission's guidance or to assist the Commission when it investigates

[17] See for instance *Manufacture Française des Pneumatiques Michelin v Commission* [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18 at [259] and Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/A.37507/F3—AstraZeneca) [2006] OJ L332/24 para.914. The same principle is applied under art.101 TFEU; the courts have indicated that: "[T]he effect which an agreement or concerted practice may have had on normal competition is not a conclusive criterion in assessing the proper amount of the fine. As the Commission has correctly pointed out, factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects, particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing." See for instance judgment of the Court of First Instance of March 11, 1999 in *Thyssen Stahl AG v Commission of the European Communities* (T-141/94) [1999] E.C.R. II-347; [1999] 4 C.M.L.R. 810 at [636].

[18] Decision relating to a proceeding under Article 82 of the EC Treaty (COMP/38.233—Wanadoo Interactive) para.400.

[19] See also Decision of relating to a proceeding under Article 82 of the EC Treaty (COMP/C-3/37.792—Microsoft) and the Intel Decision [2009] OJ C227/07.

[20] Decision relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement (COMP/E-1/38.113—Prokent Tomra) [2008] OJ C219/11 para.415.

[21] Judgment of the Court of First Instance (Second Chamber) of October 6, 1994 in *Tetra Pak International SA v Commission of the European Communities* (T-83/91) [1994] E.C.R. II-755; [1997] 4 C.M.L.R. 726 at [236].

a potential abuse. There is perhaps an informal "settlement" policy but companies cannot derive any legal certainty from it; they would take a huge risk when volunteering potential abuse cases to the Commission. There are several commitment decisions under art.9(1) of Regulation 1/2003 but as indicated in the Regulation, "commitment decisions are not appropriate in cases where the Commission intends to impose a fine".[22] It should also be noted that most commitment decisions have concerned exclusivity arrangements, especially in the energy sector.[23]

Appeals generally do not succeed in reducing fines

As such, the setting of fines seems almost entirely discretionary and there is very limited reliable precedent or policy. The courts do not appear to impose any constraint on the Commission's discretion. There have only been three appeals where the General Court ("GC")[24] has reduced the level of fines and one appeal where the GC has annulled the fine imposed by the Commission (in other words, except for four cases, the courts have not overturned art.102 TFEU cases since 1998).[25] This is in contrast to art.101 TFEU cases, where the courts seem more rigorous with regard to the computation of fines by the Commission and consequently reduce the fines imposed by the Commission on a regular basis.[26]

Table 3: Overview of appeals

Decision	Appeal	Result
AAMS	GC November 22, 2001	No change in fine
TACA	*GC September 30, 2003*	*Annulment of fine*[27]
Virgin—British Airways	GC December 17, 2003	No change in fine
Soda ash—Solvay	*GC December 17, 2009*	*Reduction of fine*[28]
Soda ash—ICI	*GC June 25, 2010*	*Reduction of fine*[29]
Deutsche Post AG	No appeal was lodged	—
Michelin	GC September 30, 2003	No change in fine
De Post/La Poste	No appeal was lodged	—
Deutsche Telekom AG	GC April 10, 2008	No change in fine
Wanadoo Interactive	GC January 30, 2007	No change in fine
Microsoft	GC September 17, 2007	No change in fine
Compagnie Maritime belge	GC July 1, 2008	No change in fine
Astra Zeneca	*GC July 1, 2010*	*Reduction of fine*[30]
Prokent-Tomra	GC September 9, 2010	No change in fine
Wanadoo Espana v Telefónica	Action brought to the GC on September 10 and October 31, 2007	No judgment yet
Intel	Action brought to the GC on July 22, 2009	No judgment yet

Abuses that do not warrant fines: novel abuses and exclusivity agreements

On the one hand, the Commission has the seemingly unreviewable discretion to set fines at whatever amount it deems appropriate; on the other hand, there have been several cases where no fine was imposed when a company was found to have abused its dominance or where the level of the fine was so low that it was only symbolic in nature. [31]

With the exception of the *Van den Bergh Foods* case, the Commission imposed no fine—or only a symbolic fine—in cases where it was not sufficiently clear to the undertaking concerned, in light of the existing case law at the time of the infringement, that the behaviour in question would constitute an infringement of EU competition law. Confusingly, both the Commission and the Courts have dismissed the argument that a fine should be reduced as the finding was novel or unprecedented in several other cases. In *Deutsche Bahn*, the GC held that:

[22] See Regulation 1/2003 recital 13.
[23] See for instance the Decision relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/B-1/37966—Distrigaz); Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.316—Gaz de France); Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.386—Long-term contracts France).
[24] Following the entry into force of the Treaty of Lisbon the Court of First Instance has been renamed the General Court.
[25] This record is also strikingly different from that under merger control where the courts have overturned several high profile cases. This lack of judicial intervention to date also means that the Commission will have difficulties changing its policy in accordance with its Guidance Paper; they may receive little support from the courts.
[26] See, e.g. C. Veljanovski, "Penalties for Price Fixers: An analysis of Fines Imposed on 39 Cartels by the EU Commission" (2006) E.C.L.R. 512: "Fines were appealed in 33 out of 39 cartels by one or more firms. Decisions in 12 appeals were pending (as at June 2006). Of the 21 decided appeals, five were dismissed …, in three fines were not adjusted … and fines reduced in 13 appeals by between 2 per cent (Belgian Brewers) to the annulment of the entire fine."
[27] Fines annulled by the GC on substantive and procedural grounds (e.g. the abusive alteration of the competitive structure of the market had not been proved to the requisite legal standard by the Commission; the TACA parties could, notwithstanding the case law to the effect that agreements entered into by a dominant undertaking are liable to constitute an abuse, legitimately have been unaware that their practices on service contracts were likely to be regarded as such (novelty/legitimate expectations)).
[28] The GC reduced the fine from €20 million to €19 million as the Commission was wrong to find that an aggravating circumstance existed.
[29] The GC reduced the fine from €10 million to €8 million as the Commission wrongly assessed the duration of the infringement and as the Commission was wrong to find that an aggravating circumstance existed.
[30] The GC reduced the starting amount by €5 million as the Commission failed to establish to the requisite legal standard that the deregistrations of the marketing authorisations at issue were capable of preventing or restricting parallel imports in Denmark and Norway.
[31] Another set of Commission decisions where no fines were imposed, concerns the behaviour of certain airport operators. In the Decision of 14 January 1998 on the application of Article 9 of Council Directive 96/67/EC to Frankfurt Airport ((98/387/EC - Flughafen Frankfurt/Main AG) [1998] OJ L173, FAG abused its dominant position by denying potential third-party handlers access to the ramp and airport users the right to self-handle. In the Commission Decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 - Alpha Flight Services/Aéroports de Paris) [1998] OJ L230, the Commission concluded that Aéroports de Paris abused its dominant position by imposing discriminatory commercial fees on suppliers or users engaged in groundhandling or self-handling activities. Illmailulaitos/Luftfartsverket infringed art.102 TFEU by using its dominant position as Finnish airport administrator to impose discriminatory landing charges in Finnish airports, according to the type of flight, namely domestic or intra-EEA (Decision of 10 February 1999 relating to a proceeding pursuant to Article 86 of the Treaty (IV/35.767 - Ilmailulaitos/Luftfartsverket) [1999] OJ L69.). The Commission did not impose a fine in any of these decisions; instead, it merely required the parties to put an end to the infringements.

> "[T]he unprecedented nature of a decision cannot be pleaded as a ground for a reduction of the fine, provided that the gravity of the abuse of a dominant position and of the resulting restrictions of competition are undisputed."[32]

Similarly, in *Irish Sugar*, the GC held that:

> "[A]lthough it is well-established case law that, in fixing the amount of the fine, account may be taken of the fact that the infringements fall within an area of the law in which the competition rules have never been clearly stated there are many factors to show that, in this case, the applicant is not entitled to rely on the alleged novelty of the concept of a joint dominant position."[33]

According to the GC, the abusive practices, namely the protection of its market position and prevention of imports, were not novel even though the concept of joint dominance had not yet been established at the time when the abuse was committed.[34]

The Commission did not impose a fine—or only a symbolic fine—in:

- *Deutsche Post AG—Interception of cross-border mail*[35]: The Commission decided to only impose a symbolic fine of €1,000 as "the legal situation was unclear".[36] The Commission adds that at the time when the abuse took place "no community case law existed that concerned the specific context" of the abuse.
- *1998 Football World Cup*[37]: The Commission only imposed a symbolic fine of €1,000 on the Comité français d'organisation de la Coupe du monde de football 1998 ("CFO") for abuse of its dominant position by applying discriminatory arrangements in 1996 and 1997 relating to the sale of entry tickets for World Cup finals matches. The Commission argued that, as the ticketing arrangements implemented by the CFO were similar to those adopted for previous World Cup finals tournaments and,

  > "as the issues raised in relation to the application of EC competition rules are of such a specific nature as not to enable conclusions to be easily drawn from previous Commission decisions or case-law of the Court of Justice,"

  the CFO could not have been aware that its sales arrangements were in breach of Community law. Furthermore, the CFO took positive steps to ensure that the sales arrangements for the 1998 Football World Cup complied with Community law.
- *GVG/FS*[38]: Although, according to the Commission, Ferrovie della Stato SpA ("FS"), the Italian national railway carrier, must have been aware that its behaviour prevented Georg Verkehrsorganisation GmbH ("GVG"), a German railway organisation, from entering the Italian railway network, the Commission refrained from imposing a fine:

  > "[I]n particular because of the novelty of the case, as GVG has been the first and only new entrant railway undertaking to approach FS with a view to forming an international grouping."[39]

  In addition, FS proposed undertakings which would ensure that it would not repeat the abuse in the future and which were intended to contribute to the dismantling of entry barriers for international rail-passenger services into Italy. Again, the Commission did not impose a fine due to the novelty of the case; however, the novelty here was not connected with the abuse itself, but with the fact that FS had never been confronted with a similar situation prior to entry by CVG.
- *Clearstream*[40]: The Commission did not impose a fine on Clearstream International SA and its subsidiaries as, "[t]here is no Community decisional practice or case law relating to the complex area of clearing and settlement services".[41] The Commission's decision analysed for the first time the clearing and settlement processes in the context of market definition and other sector-specific issues such as

[32] Judgment of the Court of First Instance of October 21, 1997 in *Deutsche Bahn AG v Commission of the European Communities* (T-229/94) [1997] E.C.R. II-1689; [1998] 4 C.M.L.R. 220 at [130].
[33] Judgment of the Court of First Instance of October 7, 1999 in *Irish Sugar Plc v Commission of the European Communities* (T-228/97) [1999] E.C.R II-2969; [1999] 5 C.M.L.R. 1300 at [291].
[34] See also the judgment of the GC in the AstraZeneca Decision [2006] OJ L332/24 where the GC in para.901 held that, "the fact that conduct with the same features has not been examined in past decisions does not exonerate an undertaking".
[35] Decision relating to a proceeding under Article 82 of the EC Treaty (C-1/36.915—Deutsche Post AG—Interception of cross-border mail) [2001] OJ L331/40.
[36] According to the Commission, Deutsche Post AG behaved in a manner which—at least partially—was in accordance with the case law of the German courts; however as Deutsche Post AG's behaviour went beyond what could be determined with certainty from German case law, the Commission concluded that the said case law resulted in a situation where the legal situation was unclear (see *Deutsche Post AG* Decision para.139).
[37] Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA agreement (IV/36.888—Football World Cup) [2000] OJ L5/55 paras 121–125.
[38] Decision relating to a proceeding pursuant to Article 82 of the EC treaty (COMP/37.685—GVG/FS) [2004] OJ L11/17.
[39] GVG/FS [2004] OJ L11/17 para.164.
[40] Decision relating to a proceeding under article 82 of the EC Treaty (COMP/38.096—Clearstream (Clearing and Settlement)) [2009] OJ C165/7.
[41] Clearstream Decision [2009] OJ C165/7 para.344.

internalisation. Furthermore, the Commission concluded that in light of the existing case law at the time of the infringement, it could reasonably be argued that it was not sufficiently clear that the behaviour in question would constitute an infringement of EU competition law. In addition, the Commission stressed that the clearing and settlement services sector is an evolving sector, in particular when cross-border transactions are concerned, as was the case here, and that different institutions and fora had been for some time discussing issues connected with the functions of the various actors in the industry. For all these reasons, the Commission took the view that no fines should be imposed.

- *DSD*[42]: In this decision, the Commission argued that the payment system operated by Duales System Deutschland ("DSD") represented an abuse of a dominant position. According to DSD's payment system DSD customers had to pay fees corresponding to the volume of packaging bearing the Green Dot trade mark rather than fees corresponding to the volume of packaging for which DSD was actually providing a take-back and recycling service. Yet, the Commission did not impose a fine on DSD for abuse of its dominant position as it recognised that DSD could not easily assess, on the basis of previous decisions of the Commission or judgments of the courts, the compatibility of its behaviour with EU competition law. However, the Commission stressed that following the clarifications given in the decision in question, it would not hesitate in the future to bring proceedings in similar cases and, where necessary, to impose fines.[43]

As indicated above, *Van den Bergh Foods* seems to be a distinct case since it did not present a novel abuse. It is consistent with many of the abovementioned commitment cases where the Commission imposed no fines for exclusivity arrangements by alleged dominant undertakings and instead approved the commitments offered by the undertakings concerned:

- *Van den Bergh Foods*[44]: The Commission conducted a detailed economic analysis of the effects of so-called freezer exclusivity whereby a retailer is not allowed to use the supplier's freezer for stocking competing ice-cream brands. The Commission established that such exclusivity constituted an infringement of arts 101 and 102 TFEU, however, it did not impose a fine, but required Van den Bergh Foods to bring the infringements to an end and to inform the retailers with whom it had concluded the freezer-cabinet agreements that the exclusivity provisions in question were void. In its decision, the Commission does not explain why it did not impose a fine. A plausible explanation is that the behaviour was not qualified as per se illegal unlike, e.g. tying in cases such as *Tetra Pak*,[45] nor was it a purely unilateral abuse, but constituted an exclusivity *agreement* covered by arts 102 and 101 TFEU.

Although there is no reliable body of law confirmed by the courts, these decisions where no or insignificant fines were imposed seem to suggest that where it was not sufficiently clear to the undertaking concerned, in light of the existing case law at the moment of the infringement, that the behaviour in question would constitute an infringement of EU competition law, i.e. in the absence of a clear and unambiguous legal basis, the Commission must refrain from imposing fines. This approach is consistent with the principles of *nulla poena sine lege certa* and legal certainty (see further below).

Conclusion

As with the Commission's policy on cartel fines under art.101 TFEU, it is virtually impossible to detect any predictable pattern in the level of fines set under art.102 TFEU. If anything, the case law shows even more variation, it provides less clarification and scope for reductions than under art.101 TEFU. While such discretion is arguably defensible for hardcore cartels where authorities deliberately create uncertainty so as to undermine the stability of cartels, it is not clear whether there is a similar justification under art.102 TFEU. As such, the Commission's reasoning should be improved and perhaps it should create a distinction in its policy on fines when dealing with cartels or abusive behaviour—perhaps even a separate set of guidelines.

Guidance paper: rule of reason

In 2009, the Commission adopted its long awaited Guidance Paper on exclusionary abuse, reflecting the Commission's intentions to shift its analysis of abuses of dominant position from a form-based to an effects-based analysis. No behaviour will be per se illegal, no behaviour will be qualified ex ante as illegal, on the basis of the object of the behaviour. This approach seems to

[42] Decision relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/D3/34493—DSD) [2001] OJ L166/1.
[43] See Commission press release IP/01/584, April 20, 2001.
[44] Decision relating to a proceeding under Articles 85 and 86 of the EC Treaty (IV/34.073, IV/34.395 and IV/35.436—Van den Bergh Foods Ltd) [1998] OJ L246/1.
[45] Decision relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043—Tetra Pak II) [1992] OJ L72/1.

correspond with the Commission's assessment of horizontal or vertical restraints that are not qualified as hardcore under art.101 TFEU.

Although the Guidance Paper is not intended to constitute a statement of law—it merely provides guidance on the Commission's enforcement priorities—it is viewed as a departure from previous case law.[46] With a few exceptions, the Commission's case law on abuse is very much based on a per se illegality approach with little scope for an effects-based analysis or efficiency defence. Due to this approach, the abuses listed in art.102 TFEU and identified in previous case law are considered illegal save in exceptional circumstances. As held repeatedly by the courts: "abuse is an objective concept referring to the behaviour of an undertaking in a dominant position"; as such:

> "For the purposes of establishing an infringement of Article 102 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect."[47]

In contrast, under the new approach, the Commission must show, on the basis of cogent and convincing evidence, that the allegedly abusive conduct is likely to lead to anti-competitive foreclosure.[48] In so doing, the Commission will take into account a number of factors that relate to the relevant economic context rather than the exact form of the conduct in question. No behaviour can thus be qualified as abusive per se or ex ante without an examination of the effects of that conduct. Indeed, the Commission holds that there can be no presumption of illegality unless the conduct can only raise obstacles to competition without any apparent efficiencies.[49]

The Commission's statement that this approach is not fundamentally different from that adopted in previous cases, such as *Wanadoo*, *Microsoft* and *Telefónica*,[50] is understandable but not correct.[51] For instance, in *Telefónica*, the Commission only examined the impact of Telefónica's practices on competition after having stated that there was no requirement to demonstrate that the abuse in question actually had concrete effects on the markets concerned. In order to establish an exclusionary abuse, it is sufficient that the dominant undertaking implements a practice whose object is to oust a competitor.[52] Likewise, in *Wanadoo*, the Commission argued that its findings as to the possible anti-competitive effects of Wanadoo Interactive's pricing strategy were not seen as a prerequisite for establishing an abuse under art.102 TFEU.[53]

The implications of the Guidance Paper still need to be tested in actual cases and it is unclear whether this effects-based approach can be fully reconciled with the jurisprudence of the courts.[54] As noted above, it is unlikely that this change will result in a more lenient risk assessment as even the smallest risk of substantial fines will make companies reluctant to engage in conduct that could be viewed as abusive. There is no clear line between abusive versus non-abusive conduct. On the contrary, it is a grey area where no legal certainty can be provided even with detailed and thorough analysis and where lawyers encounter great difficulty in assessing the legality of their clients' behaviour.

This lack of certainty is less problematic under art.101 TFEU for non-hardcore restrictions where the risk of fines is effectively absent. We are not aware of recent cases where the Commission imposed fines on agreements or concerted practices that were not hardcore restrictions. There is, therefore, an inconsistency in the Commission's policy on fines for arts 102 and 101 TFEU: for each provision, the Commission now employs an effects-based rule of reason but one is without risk of fines and the other is not. Under art.101 TFEU, there is no presumption of illegality for non-hardcore restrictions and the Commission will adopt an economic approach, i.e. an effects-based approach, in the application of art.101 TFEU to such restrictions.[55] The Commission generally does not impose fines on such restrictions even if entered into by dominant companies. For instance, the Commission has not imposed fines on exclusivity agreements such as exclusive purchasing agreements under art.101 or 102 TFEU (e.g. *Van Den Bergh Foods*, *Coca-Cola*,[56] etc.). In contrast, if companies were to pursue exclusivity through discounting, which is purely unilateral, and thus only covered by art.102 TFEU, they are more likely to be fined.

This change in policy from a per se illegality approach to a rule of reason raises questions as to the legal justification for punitive fines under art.102 TFEU.

[46] Guidance Paper, para.3.
[47] *Manufacture Française des Pneumatiques Michelin v Commission* [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18 at [239].
[48] Guidance Paper, para.20.
[49] See para.22 of the Guidance Paper: "There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred."
[50] See press release IP/08/1877 of December 3, 2008, where the Commission states that: "Such an approach has already been used in recent Article 82 cases, including Wanadoo, Microsoft and Télefonica."
[51] See in this sense M. Kellerbauer, "The Commission's new enforcement priorities in applying article 82 EC to dominant companies' exclusionary conduct: A shift towards a more economic approach?" (2010) E.C.L.R. 175 for a comprehensive discussion of these cases.
[52] Decision relating to a proceedings under Article 82 of the EC Treaty (COMP/38.784—Wanadoo Espana v Telefónica) [2008] OJ C83/6 paras 543 et seq.
[53] Decision relating to a proceeding under Article 82 of the EC Treaty (COMP/38.233—Wanadoo Interactive) para.368.
[54] See in this sense M. Kellerbauer, "The Commission's new enforcement priorities in applying article 82 EC to dominant companies' exclusionary conduct: A shift towards a more economic approach?" (2010) E.C.L.R. 185; G. Monti, "Article 82 EC: What Future for the Effects-Based Approach?" (2010) 1(1) *Journal of European Competition Law & Practice* 7: L. Lovdahl Gormsen, "Why the European Commission's enforcement priorities on article 82 EC should be withdrawn" (2010) 2 E.C.L.R. 49.
[55] See inter alia Commission Notice Guidelines on Vertical restraints [2000] OJ C291/1 para.102.
[56] Decision relating to relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement (COMP/A.39.116/B2 – Coca-Cola) [2005] OJ L253.

The application of the nulla poena sine lege certa principle to the Commission's fining policy under art.102 of the Treaty on the Functioning of the European Union

Introduction

As a starting point, it is undisputable that a rule of reason essentially confirms that no conduct can be considered abusive per se and that the illegality of most conduct by (a likely) dominant firm can, therefore, not be determined ex ante with certainty. At best, the dominant firm may be able to obtain a rough indication of the antitrust risks involved. This is, of course, entirely different from hardcore cartels where there is no real grey area and where every firm can be expected to be able to distinguish right from wrong. As such, in many cases, there will be neither intention nor negligence on the part of allegedly dominant firms; without such culpability, it is questionable whether there is a legal basis for fines. According to art.6(2) of the European Convention of Human Rights ("ECHR"), no party can be punished without fault (*nulla poena sine culpa*).[57] There must therefore be an element of culpability. However, it is debated how the provisions laid down in the ECHR should be applied to competition proceedings and more in particular to the fines imposed under arts 101 and 102 TFEU.

The qualification of fines under art.102 of the Treaty on the Functioning of the European Union as "criminal" sanctions

The European Court of Human Rights has made it clear that, if *certain* conditions are met, i.e. the "*Engel* criteria",[58] administrative fines can be qualified as criminal in nature for the purposes of applying the ECHR. The European Court of Human Rights relies in particular on: (i) the classification of the offence under domestic law; (ii) the nature of the offence; and (iii) the nature and severity of the penalty. In its subsequent case law, the European Court of Human Rights clarified that a sanction will be criminal in nature if the sanction is not merely imposed for compensatory reasons but is truly punitive and meant to have a deterrent effect.[59]

The object of fines imposed under art.102 TFEU is not to recover unjustified gains, but, "to suppress illegal activities and to prevent any reference".[60] Even though art.23(5) of Regulation 1/2003 states that fines imposed under arts 101 and 102 TFEU "shall not be of a criminal law nature", with their intended function as a deterrent and punishment for a wrong committed, as confirmed inter alia by the language used in the Guidelines, they fulfil punitive purposes under criminal law.[61] Competition-law proceedings involve the determination of a "criminal charge" within the meaning of art.6 ECHR. The fundamental rights of defence, as mapped out in the ECHR, should therefore apply.[62] In the *Stenuit* case, the Human Rights Commission classified the proceedings conducted by the French competition authorities as criminal for the purposes of art.6 ECHR.[63] In *Jussila v Finland*, the ECHR clarified that[64]:

> "The autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties …, prison disciplinary proceedings … competition law … and penalties imposed by a court with jurisdiction in financial matters."

The EU courts' case law concerning the criminal nature of administrative fines imposed under European competition law is however rather ambiguous to say the least. A.G. Léger considered in *Baustahlgewebe* that:

> "It cannot be disputed — and the Commission does not dispute —, that, in the light of the case-law of the European Court of Human Rights and the

[57] "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."
[58] Judgment of the European Court of Human Rights of June 8, 1976 in *Engel v Netherlands* (1979–80) 1 E.H.R.R. 647 at [82]; judgment of the European Court of Human Rights of February 21, 1984 in *Oztürk v Germany* (1985) 7 E.H.R.R. CD251 at [50]; judgment of the European Court of Human Rights of November 23, 2006 in *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [30].
[59] Judgment of the European Court of Human Rights of February 24, 1994 in *Bendenoun v France* (1994) 18 E.H.R.R. 54 at [47].
[60] Judgment of the Court of Justice of July 15, 1970 in *ACF Chemiefarma NV v Commission of the European Communities* (41/69) [1970] E.C.R. 661 at [173].
[61] See for instance *ACF Chemiefarma NV v Commission* [1970] E.C.R. 661 at [4]: "Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC treaty (general deterrence)." Or at [7]: "It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices."
[62] See in this sense D. Slater, S. Thomas and D. Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?* (Global Competition Law Centre Working Paper 04/08); W.P.J. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights" in *World Competition*, March 2010; Andreangeli et al, *Enforcement by the Commission — The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System* (a draft report presented at the Fifth Annual Conference of the GCLC, June 11–12, 2009, *http://www.coleurope.eu/template.asp?pagename=gclcfifthannual_docs* [Accessed December 6, 2010], available at *http://www.learlab.com/learconference/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf* [Accessed May 14, 2010]). See also International Chamber of Commerce, *The Fining Policy of the European Commission in Competition Cases*, ICC Document 255/659 (July 2, 2009); A. Bouquet, "The Compatibility of the Commission's Role in Competition Procedures with the Fundamental Rights: A Real Pressing Problem or Just a Question of Opportunity? A Critical View of the (Draft) Report of Working Group 3 of the Global Competition Law Centre (GCLC)", forthcoming in M. Merola and D. Waelbroeck (eds), *Towards an Optimal Enforcement of Competition Rules in Europe — Time for a Review of Regulation 1/2003?* (Bruylant: GCLC Annual Conference 2009, 2010); and F. Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases, a paper presented at 14th Annual EU Competition Law and Policy Workshop (Florence: June 19–20, 2009)" (December 2009) 1 *World Competition* 32; and in C.D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart, 2010).
[63] Human Rights Commission Report of May 30, 1991 in *Société Stenuit v France* (1992) 14 E.H.R.R. 509 at [62]–[64].
[64] *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [43].

> opinions of the European Commission of Human Rights, the present case involves a 'criminal charge'."[65]

The ECJ concluded accordingly that:

> "[T]he general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights …, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law."[66]

In contrast, in *Compagnie Maritime Belge*, the GC confirmed that antitrust fines were not of a criminal nature as deciding otherwise would, "infringe seriously on the effectiveness of Community competition law".[67]

A middle course has been developed by the doctrine.[68] Within the range of procedures that are "criminal" within the meaning of art.6 ECHR, a distinction must be made between the "hard core of criminal law", and "cases not strictly belonging to the traditional categories of the criminal law", with competition law belonging to the second category. The defences laid down in arts 6 and 7 ECHR would not necessarily apply in the same manner to cases belonging to the second category.

In conclusion, there is no consensus whether fines under art.102 TFEU can be qualified as criminal in nature. Moreover, as far as we know, there is no precedent under art.102 TFEU that clarifies this issue. Even so, the question of the qualification of competition proceedings as "criminal" is not key to the present discussion as companies should be able to rely upon the principle of *nulla poena sine lege certa* that has been acknowledged by the courts. These are the minimum requirements that the Commission should adhere irrespective of its position on the criminal nature of fines under art.102 TFEU.

Clear and unambiguous legal basis

The courts have maintained that the principle of *nulla poena sine lege certa* is settled in the law of the EU: administrative fines can only be imposed if they are based on "a clear and unambiguous legal basis", a requirement which applies both to the legislative fixing of the elements of an offence and to the amount of the expected penalty.[69] This principle has to be respected, irrespective of whether the fines imposed under competition law are classified as purely administrative measures or as acts of state of a criminal nature.[70] An infringement must, therefore, be clearly defined by the law, a condition which is satisfied if a company can know from the wording of the relevant provision, and if needed with the assistance of the courts' interpretation, what acts or omission would make it liable.[71] It must have been clear to an undertaking that its behaviour was illegal.

The principle of *nulla poena sine lege certa* is a corollary of the principle of *legal certainty*, which requires that Community legislation must be certain and its application foreseeable by those subject to it.[72] The courts have confirmed that the requirement of legal clarity is imperative in a sector in which any uncertainty may well lead to the application of particularly serious penalties.[73] The criteria of intent and negligence, as included in Regulation 1/2003, must be interpreted within the context of the principles of legal certainty and *nulla poena sine lege certa*.

Application to existing cases

In many art.102 TFEU cases, the parties have put forward the argument that they were not guilty of intent or negligence. In response, the Commission and courts have essentially proposed a test that is so theoretical that the argument is unlikely to succeed irrespective of the merits: "it is sufficient that the company was aware that the object of the offending conduct was to restrict competition".[74] As explained above, the courts have indicated that abusive practices are considered to be unlawful by their very nature or object, so any company[75] is assumed to know

[65] Opinion of A.G. Léger in *Baustahlgwebe v Commission of the European Communities* (C-185/95 P) [1998] E.C.R. I-8422 at [31].
[66] Judgment of the Court in *Baustahlgewebe v Commisison* [1998] E.C.R. I-8422 at [21]. See also *Hüls* where the CJEU held in relation to art.6(2) ECHR that: "[I]t must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments." Judgment of the Court of July 8, 1999 in *Hüls AG v Commission of the European Communities* (C-199/92) [1999] E.C.R. I-4287; [1999] 5 C.M.L.R. 1016 at [150].
[67] Judgment of the Court of First Instance of July 1, 2008 in *Compagnie Maritime Belge SA v Commission of the European Communities* (T-276/04) [1998] E.C.R. II-1277; [2009] 4 C.M.L.R. 21 at [66].
[68] See for instance W.P.J. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights" in *World Competition*, March 2010.
[69] See, in this sense, Prof. Dr. J. Schwarze, "Deficiencies in European Competition Law; Critical analysis of current practice and proposals for change", 2008 *Gleiss Lutz* 26.
[70] Judgment of the Court of September 25, 1984 in *Karl Könecke & Co KG v Bundesanstalt für landwirtschaftliche Marktordnung* (117/83) [1984] E.C.R. 3291; [1985] 3 C.M.L.R. 451 at [11]; likewise in that sense: judgment of the Court of March 13, 1990 in *Commission of the European Communities v French Republic* (C-30/89) [1990] E.C.R. I-709 at [23].
[71] See, in this sense, the judgment of the Court of First Instance in *AC Treuhand AG v Commission of the European Communities* (T-99/04) [2008] E.C.R. II-1501; [2008] 5 C.M.L.R. 13 at [140].
[72] See, in this sense, Judgment of the CFI of April 5, 2006 in *Degussa AG v Commission of the European Communities* (T-279/02) [2006] E.C.R. II-897 at [66].
[73] Judgment of the Court of July 10, 1980 in *Commission of the European Communities v United Kingdom* (32/79) [1980] E.C.R. 2403; [1981] 1 C.M.L.R. 219 at [46].
[74] Commission AstraZeneca Decision [2006] OJ L332/24 para.905; and see for instance Judgment of the Court of First Instance of April 10, 2008 in *Deutsche Telekom AG v Commission of the European Communities* (T-271/03) [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9 at [295]: "[I]t has been held that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty."
[75] Especially major companies should have a high awareness of antitrust laws; see for instance AstraZeneca Decision [2006] OJ L332/24 para.904 or judgment of the Court of February 14, 1978 in *United Brands Co v Commission of the European Communities* (27/76) [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429 at [299].

that they had the object of restricting competition. See, for instance, the court's stance in *BPB and British Gypsum v Commission*[76]:

> "The Court considers that it is apparent from the very nature of the conduct referred to in the Decision, which was in fact characterized by the imposition of the requirement not to deal in plasterboard other that manufactured by the applicants, that the latter could not have been unaware that such conduct constituted an infringement of Article 86 of the Treaty. Accordingly, for the purposes of the application of Regulation No 17, that conduct must be regarded as having been pursued intentionally."

Where the practice has not yet been clearly defined as abusive, the Commission and the courts argue for a wide concept of abuse thereby referring to the definition of abuse which is any distortion or reduction of competition through other means than competition on the merits. Alternatively, they make use of vague language, e.g. the defendant, "ought to have expected that such a system would fall within the sphere of application of Article 86 of the Treaty".[77] As noted, there are a few cases where no fines were imposed due to the novel nature of the abuses concerned but such defence is only accepted under exceptional circumstances where there is really no comparable precedent.

Such circular reasoning provides companies with little chance of ever winning this argument: once a certain behaviour is qualified as abusive, companies should know that they cannot engage in such a behaviour. In *Tetra Pak v Commission*, the Court of Justice agreed with the GC's conclusion that:

> "[T]he manifest nature and particular gravity of the restrictions on competition resulting from the abuses in question justified upholding the fine, notwithstanding the allegedly unprecedented nature of the certain legal assessments in the contested decision."[78]

This jurisprudence not only ignores the fundamental principle of *nulla poena, sine lege certa*, it also defies the relevance of the conditions of intent or negligence as set forth in the Regulation: since companies are presumed to be familiar with the list of identified abuses, they cannot invoke lack of intent or negligence. Consequently, companies have had very limited success in arguing against (high) fines on such grounds under the per se illegality approach under art.102 TFEU.

Reconciliation with an effects-based approach

With the advance of a more effects-based analysis, it can no longer be held that a certain behaviour is by its object or very nature restrictive of competition and therefore abusive. As such, the Commission and the courts can no longer argue that the defendants are guilty of intent or negligence as they should have known that the behaviour was restrictive of competition by object.

Admittedly as explained in more detail by J. Schwarze, the application of general clauses and unclear legal terms in EU legislation does not, in itself, constitute a violation of the principles of legal clarity and the requirement of sufficient certainty in the application of legal norms, as these legal terms can be more precisely defined by case law.[79] As stated by M. Kellerbauer, the principle of legal certainty does, however, require that the lawfulness of a dominant undertaking's conduct does not depend on information which is generally not known to the dominant undertaking. If this were the case, the company would not be in a position to assess the legality of its own activities.[80] A company must be able to assess, based on the information that is available to it, whether or not its conduct infringes competition law.

Although companies should understand the theoretical concept of anti-competitive foreclosure as proposed by the Commission's new policy, it is questionable whether they are able to determine with any degree of certainty when certain behaviour results in such foreclosure in practice. Not only does the required analysis depend heavily on complex economics, often companies do not have access to the necessary information to conduct a reliable foreclosure analysis. For instance, while dominant companies obviously know their cost-structure, they are in no position to know the cost structure of their competitors and it is thus difficult, if not impossible, for them to self-assess their pricing practices. Also with regard to rebates, the foreclosure of an

[76] Judgment of the Court of First Instance of April 1, 1993 in *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities* (T-65/89) [1993] E.C.R. II-389; [1993] 5 C.M.L.R. 32 at [166].

[77] Judgment of the Court of November 9, 1983, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (322/81) [1983] E.C.R. 3461; [1985] 1 C.M.L.R. 282 at [107]. See also judgment of the Court of First Instance of April 1, 1993 in *BPB Industries Plc v Commission* [1993] E.C.R. II-389; [1993] 5 C.M.L.R. 32 at [165]-[166]; judgment of the Court of First Instance of July 2, 1992 in *Dansk Pelsdyravlerforening v Commission of the European Communities* (T-61/89) [1992] E.C.R. II-1931 at [157]; judgment of the Court in *Tipp-Ex GmbH & Co KG v Commission of the European Communities* (C-279/87) Unreported February 8, 1990 at [1]; and judgment of the Court of July 11, 1989, *Societe Cooperative des Asphalteurs Belges (Belasco SC) v Commission of the European Communities* (246/86) [1989] E.C.R. 2117; [1991] 4 C.M.L.R. 96 at [41].

[78] Judgment of the Court of November 14, 1996 in *Tetra Pak International SA v Commission of the European Communities* (C-333/94 P) [1996] E.C.R. I-5951; [1997] 4 C.M.L.R. 662 at [48]. The GC also considered Tetra Pak's quasi-monopolistic position to be a relevant factor; more generally, with respect to dominance, the ECJ held in *Hoffmann La Roche* at [133] that: "[A] prudent commercial operator is in no doubt that although possession of large market shares is not necessarily and in every case the only factor establishing dominance, it has however in this connection a considerable significance which must of necessity be taken into consideration in relation to his possible conduct on the market." In other words with very high shares exceeding the dominance threshold of 50% especially if the relevant markets have already been defined by competition authorities companies should act on a worst case basis.

[79] Prof. Dr J. Schwarze, "Deficiencies in European Competition Law; Critical analysis of current practice and proposals for change", 2008 *Gleiss Lutz* 18.

[80] See in this sense M. Kellerbauer, "The Commission's new enforcement priorities in applying article 82 EC to dominant companies' exclusionary conduct: A shift towards a more economic approach?" (2010) E.C.L.R. 185. This aspect was recently emphasised by the GC in *Deutsche Telekom*, in which the Commission applied the "as efficient competitor" test. See judgment of the Court of First Instance, April 10, 2008: *Deutsche Telekom AG v Commission* [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9 at [192] and judgment of the Court in *Deutsche Telekom AG v Commission of the European Communities* (C-280/08 P) Unreported October 14, 2010 at [202].

as-efficient-competitor will often be assessed on the basis of the contestable share of the customers' purchase requirements that can be switched from the dominant company to a competitor.[81] However, to what extent its customers are actually capable of buying from competitors will be unknown to the dominant company.[82]

Unfortunately, companies cannot seek rulings in doubtful cases even though the court acknowledged in *Hoffmann La Roche* that a company cannot claim absence of intent or negligence, as the prevailing system allowed a, "precautionary measure to be taken for a ruling on the application of article 86 to doubtful cases". In that case, the defendant:

> "[D]id not however consider that it should avail itself of this opportunity in order to obtain that legal certainty of which it claims it has been deprived."[83]

Since there is no precedent yet on the application of the Commission's new policy, it is unclear how the Commission will reconcile a rule of reason approach with the application of (high) fines.[84] From a legal perspective, the Commission and courts must present evidence of intent or negligence in accordance with the principle of *nulla poena sine lege certa*. In terms of policy, it does not make sense to impose such high fines for anti-competitive behaviours, which are not per se illegal; and which are not subject to high fines under art.101 TFEU.

Conclusion

On the basis of its past track-record, it seems that the Commission enjoys a wide discretion regarding the level of fines imposed for infringement of art.102 TFEU. In theory, the Commission sets its fines with reference to the gravity and duration of the infringement; in addition, the Commission takes into account aggravating and mitigating circumstances. Yet, in practice, hardly any distinction in the qualification of abuses is noticeable. All abuses have invariably been qualified as either "serious" or "very serious". Furthermore, only in a few cases has the Commission taken mitigating factors into account and, as there is no possibility of applying for leniency in art.102 TFEU cases, the parties concerned by an abuse of dominance decision seem to have no possibility to influence the level of the fines being imposed. If anything, the discretion enjoyed by the Commission appears to be more extensive for abuse of dominance cases than for cartel cases as is evidenced by the fact that the likelihood of reducing fines upon appeal is very small.

In 2009, the Commission adopted its long-awaited Guidance Paper on exclusionary abuse. It is unclear what impact the guidance will have, considering the conflicting jurisprudence of the European Union's courts. Nonetheless, if the Commission applies the Guidance Paper, its policy will shift from a form-based analysis to an effects-based analysis. Under the Guidance Paper, no behaviour is per se illegal and, therefore, no behaviour can be qualified ex ante as illegal, based on the object of such behaviour. As such, this analysis is similar to that of non-hardcore anti-competitive agreements under art.101 TFEU, which are not subject to fines.

The European Union's courts have consistently held that (administrative) fines can only be imposed if there is a clear and unambiguous basis for that imposition, a position which is a corollary of the principle of legal certainty. An infringement must be clearly defined by the law, a condition which is satisfied if a company can know from the wording of the relevant provision, and, if needed, with the assistance of the courts' interpretation, what acts or omission would make it criminally liable. The criteria of intent and negligence must be interpreted within this context. Both the courts and the Commission have argued, in relation to intent and negligence, that companies should have known that their behaviour was illegal as the behaviour in question was, by its very object, restrictive of competition. Leaving aside the apparent circularity of this reasoning, it is questionable whether this argument still applies in light of the Commission's new policy whereby a dominant firm's behaviour is no longer categorised as abusive on the basis that it has an anti-competitive object (the object-based approach) and if, therefore, the Commission's new policy is consistent with the principles of *nulla poena sine lege certa* and legal certainty.

[81] Guidance Paper, para.42.

[82] See also D. Geradin, *Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?* (March 12, 2010); available at SSRN: *http://ssrn.com/abstract=1569502*: "In addition, because a dominant firm is generally unable to determine the 'constable' share of the customers to which it grants rebates, it is not in a position to self-assess whether the rebates in question are compatible with Article 102.52 Thus, while the test proposed by the Commission is conceptually correct, and certainly more in line with economics than a per se prohibition, such as the one found in the case law, it is very hard to implement in practice and offers very little, if any, guidance to dominant firms wishing to grant rebates to, or asked to grant rebates by, their customers."

[83] Judgment of the Court of February 13, 1979 in *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) [1979] E.C.R. 461; [1979] 3 C.M.L.R. 211 at [134]. The Court referred to art.2 of Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204 implementing Articles 85 and 86 of the Treaty: "Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice." Pursuant to Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the notification system has been abolished, therefore this possibility is no longer available to companies.

[84] There has only been one Commission decision finding an abuse of dominant position since the adoption of the Guidance Paper, i.e. the Intel Decision [2009] OJ C227/07, in which the Commission explicitly excluded the application of the Guidance Paper, as the proceedings had already been initiated and the addressee had only been given the opportunity to make known its views on the Commission's objections before the Guidance Paper was published. It is therefore too early to see whether there will be any change in the Commission's reasoning.