Chapter 4 The EU Legal Framework

A. Art. 81 of the EC Treaty

I. The Proscription of Art. 81 (1) and Its Legal Consequences, in Particular as Set by the 2006 Guidelines on Methods of Setting Fines

The milestone for the legal assessment of patent pools within the European Union, and their interface with competition and antitrust provisions, is embodied in Art. 81 of the Treaty establishing the European Community (hereinafter EC Treaty),[239] in the opening 1st Chapter, within Title VI, dedicated to the Rules on Competition, Section 1, for the Rules Applying to Undertakings. Indeed, both Art. 81 and the following Art. 82 of the EC Treaty, this latter about the abuse of dominant positions, as the very same heading suggests, are addressed to undertakings, i.e. any economic operator, other than the state, acting in its public capacity and participating in the exchange of goods or services on the market.[240] These articles complement the provisions on the "free movement of goods and services" contained in the EC Treaty - not to be undermined through anti-competitive behaviours by economic operators - as they prohibit certain typified practices and agreements to the extent that they are deemed to be incompatible with the realization of the Internal Market. In fact, the achievement of this goal, at a time, provides the basis of legitimacy for the European Commission's active intervention and traces the borderline of the actual scope of its interference with otherwise merely domestic matters.[241]

Coming closer to approaching the content of this provision, the first paragraph of Art. 81[242] sets a general mandatory prohibition and reads:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have

239 As for its scope of application, it shall be reminded that the EC Treaty represents a source of "primary" European Community law, thus directly binding for all Member States, as if national law.

240 For a clear overview on the main issues in EC competition law and policy in this regard, see i.a.: Albors-Llorens A., "EC Competition Law and Policy" – "The Scope of Application of Art. 81 and 82 EC", Willan Publishing, 2002, p. 4 *et seq.*

241 For a closer analysis on the aims and objectives of Art. 81 and 82 EC, see i.a.: Fairhurst J., "Law of the European Union", Pearson Education, 2007, p. 637 *et seq.*; For a broader, general overview on the criteria guiding the antitrust assessment of the EC authorities, see in particular: Immenga U. et al, "Wettbewerbsrecht EG: Kommentar zum Europäischen Kartellrecht", Beck, 2007.

242 For the text of the full provision, see: http://www.europa.eu.int/comm/competition/legislation/treaties/ec/art81_en.html

as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical developments, or investment; (c) share markets or source of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their method or according to commercial usage, have no connection with the subject of such contracts".

It should be borne in mind that the list is not exhaustive, but only typifies some agreements and concerted practices among undertakings, which are generally deemed to be, in consideration of their object or effect, anti-competitive and to negatively affect trade within the common market. Nevertheless, the inventory of Art. 81(1) is extremely broad and comprehensive in scope, as can particularly be inferred from the first of the named anti-competitive restraints, explicitly encompassing also clauses that (lett. a), as literally reported: "directly or indirectly fix […] trading conditions", which may well apply to practically all commercial contracts, where parties, in the course of their trade, are typically going to be bound by specific, reciprocal obligations.[243]

When confronted with such agreements or practices, Member States "shall" prohibit them "as incompatible with the common market". As penalty, pursuant to Art. 81(2)[244] it is ruled that: "Any agreements or decisions prohibited pursuant to this article shall be automatically void", therefore neither it can be legally enforced, nor shall third parties be considered bound by it. Moreover, antitrust cases falling under the proscriptions of Article 81 and 82 of the EC Treaty may also result in the imposition of heavy fines against the contravening undertakings, according to the criteria outlined by the recent Commission's Guidelines,[245] which entered into force in September 2006[246] (hereinafter 2006 Guidelines).[247]

243 For a general overview on the issue, see i.a.: Foster N., "EU Law", "Competition and Merger Law", Oxford University Press, 2007, p. 157 *et seq.*

244 For a legal commentary on the underlying antitrust enforcement measures, see i.a.: Fairhurst J., "Law of the European Union", "Enforcement of Competition Law: Powers and Procedures", Pearson Education, 2007, 6 ed., p. 685 *et seq.*

245 European Commission, "Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003", Official Journal of the European Union, OJ C 210/2, 1 September 2006, also available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_210/c_21020060901en00020005.pdf

246 The new Commission's Guidelines were in fact adopted on 28 June 2006, but they only applied to cases for which a statement of objections was notified after the 1st September 2006, which is the date of publication of the Guidelines in the Official Journal: OJ C 210/2, 1 September 2006.

247 These further refined the parameters partly already applied under the preceding Guidelines on Methods of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No 17, issued in

The driving principles introduced by the 2006 Guidelines may be reported as follows:[248]

- First of all, by deploying a clear reference to the "value of sales" of each undertaking, the focus is shifted on the actual economic importance of the infringement, both as a whole and reflecting the relative weight of each participating firm, thus a more pragmatic approach is adopted.[249] In fact, the 1998 Guidelines, which were based on a lump sum system, were frequently criticized with regard to this particular aspect;
- Second, the duration of the infringement had previously only marginal consequences on the basic amount of the fine, since each additional year in which the transgression was perpetuated may merely have led to a maximum 10% increase of the starting sum. Instead, the 2006 Guidelines still multiply by 10 the impact of the duration on the level of the financial penalty to be determined. Hence, the period of the violation eventually becomes a key-factor for sanctioning purposes, as each year of involvement in the infringing activities will be fully reflected in the basic amount to be charged;[250]
- Finally, the classification of the violations among "minor", "serious" and "very serious", which appeared in the previous Guidelines, have been abandoned, as mostly representing a blurry and unnecessary step, where, in particular, the category of minor infringements was indeed quite useless in practice.

Within the limits set by the Regulation at issue, the Commission enjoys wide discretional powers on undertakings,[251] having regard to the gravity and the duration of

January 1998 (hereinafter 1998 Guidelines), substantially reflecting the Commission's most recent practice in antitrust cases.

248 For an overview, see, *i.a.*: Broca H., "The Commission Revises its Guidelines for Setting Fines in Antitrust Cases", Competition Policy Newsletter, Autumn 2006, no. 3, p. 1 *et seq.*, also available at: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf

249 See Point 13 of the 2006 Guidelines: "In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographical area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales')".

250 See Point 19 of the 2006 Guidelines: "The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement".

251 Specifically, following Art. 23(2)(a) of Regulation No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (OJ L 1, 4 January 2003, p. 1 *et seq.*, as amended by Regulation No 411/2004, OJ L 68, 6 March 2004, p. 1 *et seq.*), as now also reflected in Point 1 of the 2006 Guidelines, the Commission may decide to impose financial sanctions on undertakings or association of undertakings either intentionally or negligently violating the above-mentioned antitrust provisions. However, infringements by negligence, which along with intentional violations is one of the two kinds of infringements covered by Art. 23(2) of Regulation No 1/2003, may justify the granting of a fee reduction, representing one of the mitigating factors to be taken into account following the Commission's Guidelines. Nevertheless, such circumstance actually plays a quite marginal role, as it

the restrictive practices eventually ascertained. This prerogative does not only entail the obligation to investigate and punish individual infringements on a case-by-case basis, but also encompasses the more general duty to pursue an overall policy vowed to transparently apply the principles laid down by the EC Treaty in competition matters in order to grant a higher degree of legal predictability and, consequently, steer business practices in the light of those propositions.[252] Accordingly, fines should have a sufficiently broad deterrent effect, in order to also discourage other undertakings from engaging in anti-competitive behaviours, this being the ultimate purpose of the Commission's intervention.[253]

With these objectives in view, in order to determine the final amount of the fine, it seemed appropriate to refer, on the one hand, to the value of the sales of goods or services to which the infringement relates[254] and, on the other hand, to the duration of the violation, as having a more or less severe impact on the marketplace and, consequently, providing a reliable proxy of adjustment to reflect the economic importance of the infringement.[255] Accordingly, following this two-step methodology, the Commission may correct the final amount of the fine to be imposed upwards or downwards, according to the respective presence of aggravating or mitigating circumstances.[256]

On the one hand, examples of the former may be the repetition of the same or similar infringements, after the Commission or the competent national competition authority has eventually ascertained a given violation; the refusal to cooperate with,

did already under the 1998 Guidelines, as practice shows that the types of conducts that are fines by the Commission rarely appear to be characterized by mere negligence.

252 Indeed such Guidelines shall constitute rules of practice whose implementation shall not depart from the underlined principles in an individual case without providing for specific reasons, in compliance with the principle of equal treatment, as affirmed, *i.a.*, in: Case C-189/02 P, Dansk Rørindustri A/S a.o. v. Commission, ECR, 2005, p. I-5425, para. 209.

253 See Point 4 of the 2006 Guidelines, last sentence: "Fines should have a sufficiently deterrent effect, not only in order to sanction the undertaking concerned ('specific deterrence') but also in order to deter other undertakings from engaging in, or continuing, behavior that is contrary to Art. 81 and 82 of the EC Treaty ('general deterrence')".

254 For the reference, see: "Basic Amount of the Fine", Points 12 to 26 of the 2006 Guidelines: specifically, the determination of the basic amount of the fine will be first of all established by reference to a proportion of the value of the sales to which the infringement relates, as confined, on the one side, in terms of territory, to the relevant geographic region within the European Economic Area (EEA), appropriately reflecting the scope of the Commission's sphere of action and, on the other side, in terms of time, to the last full business year in which the anti-competitive practice took place.

255 See: "Adjustment of the Basic Amount", Points 27 to 31 of the 2006 Guidelines.

256 No major changes have been introduced to the possible adjustments factors in the 2006 Guidelines, which mainly draw the conclusions of the Commission's case law and practice in the recent years, reflecting its most crucial developments.

or the obstruction of, the Commission's investigations;[257] the role of a particular undertaking as leader in, or instigator of the infringement.

On the other hand, mitigating circumstances may well occur when the firm concerned supplies evidence that the infringement has been promptly brought to an end after the competition authority's intervention, or when the undertaking has effectively collaborated with the Commission beyond the scope of its legal obligations.

However, in the former case, the new Guidelines, in line with the current jurisprudential practice,[258] specify that said mitigating factor does not apply to secret agreements,[259] since it is apparent that in such circumstances firms could always enter into confidential anti-competitive arrangements trusting that, once discovered - where by force the secrecy would subsequently be unveiled and thereby brought to an end - they would in any event benefit from a fine reduction, if they just stop their conduct once the authorities have tracked it down anyway; in other words, here the termination of the infringement at issue is actually induced by the discovery itself, and thus cannot be directly credited to the good will of the undertaking alone.

Anyway, the principles outlined are always to be applied in a flexible manner, considering the specific circumstances of each case under scrutiny. Besides, the final amount of the fine must not, in any event, exceed 10% of the undertaking's worldwide aggregate turnover in the preceding business year, as laid down in Art. 23(2) of Regulation No 1/2003 and correspondingly reflected in Point 32 of the 2006 Guidelines.[260] Moreover, under certain circumstances, those who consider to have been harmed by the anti-competitive agreement may also bring up private actions for damages before the national competent authorities.[261]

II. The Scope of the Individual Exemption under Art. 81 (3)

The prohibition contained in Article 81(1) of the EC Treaty is not absolute. Restrictive agreements will be valid and enforceable if they satisfy the exemption criteria of Article 81(3) of the EC Treaty. An exemption under Article 81(3) of the EC

257 See, for instance, Case C-308/04 P: Judgment of the Court (Second Chamber) of 29 June 2006 — SGL Carbon AG v Commission of the European Communities, Official Journal, C 212, 2 Sept. 2006, p. 0003 – 0004.

258 As confirmed in Case C-328/05 P: Appeal brought on 30 August 2005 by SGL Carbon AG against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 15 June 2005 in Joined Cases T-71/03,T-74/03, T-87/03 and T-91/03 Tokai and Others v Commission of the European Communities, in respect of Case T-91/03, Official Journal C 281, 12 Nov. 2005, p. 0007 – 0008.

259 See Point 29, first indent, last sentence, of the 2006 Guidelines.

260 See for a confirmation of the fine's level and its underlying mechanism, i.a.: Bradgate R. et al., "Commercial Law", Oxford University Press, 2007, p. 378.

261 Carlin F. *et al.*, "The Last of Its Kind: The Review of The Technology Transfer Block Exemption Regulation", Symposium on European Competition Law, Northwestern Journal of International Law and Business, vol. 24, Spring 2004, p. 603 *et seq.*