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THE ADMINISTRATIVE PROCEDURE FOR THE ENFORCEMENT OF THE EU ANTI-TRUST LAW

***Key words**: Legal procedure, antitrust law, European union.*

Ključne reči: Pravni postupak, antimonopolsko pravo, Evropska unija.

The legal procedure for enforcement of the EU substantial anti-trust provisions is basically set in two levels (administrative and judicial). The legal procedure at the stage of first level taken by the European Commission or by national anti-trust commissions is an administrative by its legal nature although there are similarities to criminal procedure because of some legal authors allege it is a "quasi judicial" procedure. Decisions taken in the legal procedure on the first level are subjects of judicial control. The Commission decision can be charged by suit before the Court of First Instance and against the Court of First Instance judgement is allowed to submit a complaint to the Court of Justice, limited on legal reasons. Since proceedings pursued by the courts in control of first stage decisions given in the area of the competition law are not particularly prescribed but those are applied procedural rules

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the courts already proceed, this article is devoted to an analysis of the first leveled i.e. administrative legal procedure in the field of the EU anti-trust law.

INTRODUCTION

The EU anti-trust law procedure is regulated by the Council Regulation No 1/2003[1]. In pursuance of Article 45 of the Council Regulation No 1/2003 the Regulation has been applied since 1st May 2004 when stopped the application of the Council Regulation No 17. The Council Regulation No 17 was adopted 06th February 1962. Besides of its very significance in the sphere of the EU competition procedural law DG COMP[2] started internal works on the reform of it in February 1997. The starting point of these works was a threefold finding: 1) enlargement of the European Union; 2) the notification system is no longer an effective tool for enforcing competition rules and 3) the development of the Community competition law allows companies to assess themselves the legality of their agreements and practices. It quickly became obvious that a simple improvement of the existing administrative procedure would not suffice to face the upcoming challenges competition law was facing and a profound change was required to ensure an efficient protection of the rules of the Treaty in an enlarged Community. This conclusion was led by the publication of the White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty[3] on April 1999. It was followed by an intense public debate in which not only Community institutions but also industry, lawyers and academics took part. After public debate the Commission drew up a draft which was adopted without major changes by the Council.

Consideration of the EU anti-trust procedure law will include: investigation, hearing, Commission decisions, penalties and limitation periods.

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[1] *Council Regulation No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1, 04/01/2003, p. 001-025.

[2] The Competition Department of the EC Commission, formerly called DG IV.

[3] Articles III-161 and III-162 of the *Treaty Establishing a Constitution for Europe*, OJ C 310 of 16th December 2004.

INVESTIGATION

Investigation is the first phase of the EU anti-trust procedure where the Commission and the competition authorities of Member States, acting on their own initiative or on a complaint submitted by Member States or those natural or legal persons who can show a legitimate interest, have a power to apply articles 81 and 82 of the EC Treaty. Powers of investigation include: investigation into sectors of the economy and into types of agreements, requests for information, power to take statements and inspection.

Investigation into sectors of the economy and into types of agreements

Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be distorted within the common market, the Commission may conduct its inquiry into particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the EC Treaty and my carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or association of undertakings concerned to communicate to all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

Requests for information and power to take statements

The Commission may, by simple request or by decision, require undertaking or associations of undertakings to provide all necessary information.

When the Commission requires information it shall state the legal basis and the purpose of the request, specify what information is required, fix the time-limit within which the information is to be provided and indicate penalties for supplying incorrect or misleading information. Apart from that if providing information acquired by decision the Commission may impose periodic penalty payments in order to compel the undertaking to supply

complete and correct information and it shall further indicate the right to have the decision reviewed by the Court.

The Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. Where the interview conducted in the premises of an undertaking, the Commission shall inform the Competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member States, its officials may assist the officials and other accompanying authorised by the Commission to conduct the interview.

What is the scope of the Commission's powers in requirement of information and taking of statements was the subject-matter of judgements as in case T 112/98 *Mannesmannröhren Werke*. Namely, pursuant to § 37 of the Council Regulation No 1/2003 the Commission is charged to respect the fundamental rights and observe the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In case C 374/87 *Orkem*, plaintiffs considered that no one is charged to accuse itself and that human rights of them are breached by the Commission's request for information. The Court of Justice took a stance that legal principle plaintiffs cited on is more of criminal but business nature and concerns natural but not legal persons that means that undertakings have to provide the Commission all required documents and information with some kind of restriction that the Commission is not allowed to compel undertakings to supply replies by which they confess infringements because its task is to find out and prove infringements.

Inspection

The Commission may conduct all necessary inspections of undertakings and associations of undertakings. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

a) to enter any premises, land and means of transport of undertakings,
b) to examine the books and other records related to the business, irrespective of the medium on which they are stored,
c) to take or obtain in any form copies of or extracts from such books or records,
d) to seal any business premises and books or records for the period and to the extent necessary for the inspection,

e) to ask any representative or member staff of the undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject-matter and purpose of the inspection and penalties provided in cases that the production of the required books or other records related to the business is incomplete or where the answers are incorrect or misleading.

In good time before inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission.

If the undertaking opposes the inspection, the Member State concerned shall afford the necessary assistance of the police or of an equivalent enforcement authority, so as enable conduct of the inspection.

Special case is an inspection of private premises. Namely, in a global economy where infringements become more and more sophisticated, it is of paramount importance that the Commission is properly equipped with investigative powers that allow it to effectively detect infringements of the Community competition rules. "In our experience it is increasingly the case that incriminating documents are stored in private homes. In a recent case, where an undertaking choose to cooperate, it handed over documents some of which were marked 'for home archives'. One document stressed that all incriminating material had to be either destroyed or taken home and that all such material should be deleted from the computer system. To ensure that the Commission remains in a position to enforce the rules effectively it is essential that it be given the power to search private homes, when it can be suspected that professional documents are kept there"[4].

[4] Mario Monti, *Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?*, (Speech/00/295, 3rd Nordic Competition Policy Conference Stockholm 11-12 September 2000).

"If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport"[5].

The decision on inspection the private premises shall specify the subject-matter and purpose of the inspection, appoint the date or which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It in particular states the reasons that have led the Commission to conclude that a reasonable suspicion exists. The Commission takes such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted. The decision can not be executed without prior authorisation from the national judicial authority of the Member State concerned. However the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file.

In connection with the Commission inspection powers and described investigative procedure three important aspects are worth being mentioned. Firstly, the officials authorised by the Commission are empowered to seal premises for the period and to extent necessary for the inspection. This improves the effectiveness of the inspections, in particular when they are being carried out during several days. Secondly, the power to ask oral questions during an inspection has been dislinked from documents: the limit is the scope of the investigation as defined in the decision or in mandate. Thirdly, the officials authorised by the Commission are empowered to enter non-business premises when there is a reasonable suspicion that books and other records relevant for the inspection are being kept there. This power will be exercised only where the suspected violation is serious and it will be exercised under the control of national courts. Both for inspections at

[5] Article 21(1) of the *Council Regulation No 1/2003*.

business and at non-business premises, the case-law of the Court of Justice (C 94/2000 *Roquette Frere*) has been codified in the Regulation No 1/2003[6].

HEARING

Hearing is a phase of the EU anti-trust procedure law that is conduct for the sake of an oral and direct explanation of all disputed facts and other circumstances in presence of parties and other participants. Before taking decisions the Commission have to give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity of being heard on the matters to which the Commission has taken objection.

"The right to be heard is an established principle of the Community law"[7]. The principle has been restated in the EU Charter of Fundamental Rights, as part of the right of every person "to have his or her affairs handled impartially, fairly and within a reasonable time". Safeguarding that right during the Commission's competition proceedings is a special responsibility of the Hearing officer.

The position of the hearing officer was created in 1982. His initial responsibility was limited to the organisation, chairing and conduct of the oral hearing in anti-trust proceedings (and later in merger proceedings). Subsequently, this remit was updated and widened 1994 to ensure adequate protection of the rights of parties, with particular regard to confidentiality of documents and business secrets and adequate access to the case files of the Commission. In compliance with Article 2(2) of the Commission Decision C 1461/2001 of 23rd May 2001 on the terms of reference of hearing officers in certain competition proceedings OJ L 162, 19/06/2001 p. 021-024, the hearing officer no longer belongs to the Directorate General for competition but he is directly attached to the office of the Commissioner charged for the competition policy to further reinforce his independence and to enhance the objectivity and quality of the Commission's competition proceedings and the resulting decisions. All the Commission decisions on the appointment,

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[6] Celine Gauer & Dorothe Dalheimer & Lars Kjolbye & Eddy De Smijter, *Regulation 1/2003: A Modernised Application of EC Competition Rules*, "EC Competition Policy Newsletter" No 1/2003, p. 5.

[7] *European Commission Strengthens the Role of the Hearing Officer in Competition Proceedings*, (IP/01/736, Brussels 23rd May 2001).

termination of appointment or transfer of Hearing Officers are being published in the Official Journal (OJ) of the European Communities.

The hearing officer is charged for organisation and conducts the hearings. After consulting the director responsible, the hearing officer determines the date, the duration and the place of hearing. Where appropriate the hearing officer may, after consulting the director responsible, supply in advance to the parties invited to the hearing a list of the questions on which he wishes them to make known their views. The hearing officer decides whether fresh documents should be admitted during the hearing, what persons should be heard separately or in the presence of other persons attending the hearing. The hearing officer may, after consulting the Director responsible, afford persons, undertakings and associations of undertakings of submitting further written comments after oral hearing.

After an oral hearing had been completed the hearing officer reports to the competent member of the Commission on the hearing and the conclusions he drew from it. The observations in this report should concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing. A copy of the report is being given to the Director-General for competition and to the director responsible. On the basis of the draft decision to be submitted to the Advisory Committee in the case in question the hearing officer prepares final report. The hearing officer's final report is being attached to the draft decision submitted to the Commission in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

Except the right to be heard the rights of defense include having access to the Commission's file and protection the parties' business secrets. The right of access to the file is not extent to confidential information and internal documents of the Commission or the competition authorities of the Member States. As for protection of business secrets the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States must not disclose information acquired or exchanged by them covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee.

COMMISSION DECISIONS

Where the Commission finds that there is an infringement of Article 81 and 82 of the EC Treaty it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. If that decision is reached national authorities of Member States are not allowed to take decisions running counter to the decision adopted by the Commission. For the purpose of bringing the infringement to an end, the Commission may impose on them any behavioral or structural remedies, which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural one.

If the Commission has a legitimate interest it may also find that an infringement has been committed in the past. Legitimate interest there is when there is a risk of repetition of infringement or in other cases when it's needed to ensure a consistent enforcement of the competition rules or consequent enforcement of the competition rules. By the way, as it'll be explained later, duration of the infringement is an element for setting the amount of the fine.

In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative, may by decision, on the basis of a *prima facie* finding of infringement, order interim measures, always for a specified period of time with the possibility of being renewed in so far this is necessary and appropriate.

Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertaking concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on undertakings. If that decision is reached the proceedings are deemed concluded without determination of the infringement and without imposing fines. However, the Commission may, upon request or on its own initiative reopen the proceedings where:

a) there has been a material change in any of facts on which the decision was based,
b) the undertakings concerned act contrary to their commitments,
c) the decision was based on incomplete, incorrect or misleading information provided by the parties.

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission acting on its own initiative, may by decision find that Article 81 of the EC Treaty is not applicable to an agreement, a decision by association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the EC Treaty are not fulfilled or because the conditions of Article 81(3) of the EC Treaty are satisfied. The Commission may likewise make such a finding with reference to Article 82 of the Treaty. Power to make these decisions belongs to the Commission only to ensure uniform application of the EC competition law. This decision is not a substitution for notification system and exemption decisions because it may be brought when the Commission acting on its own initiative that excluded private interest. On the contrary, where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of the anti-trust rules, individual undertakings may wish to seek informal guidance from the Commission.

PENALTIES
(FINES AND PERIODIC PENALTY PAYMENTS)

The Commission is authorised to impose penalties on undertakings and associations of undertakings. It may impose fines that occurring once and periodic penalty payments.

Fines may be imposed concerning the two groups of legal bases. First group of legal bases for imposing fines is regard to the Commission's investigation powers and second group of them is regard to established infringements of Articles 81 or 82 of the EC Treaty.

The Commission my by decision impose on undertakings and association of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently,

a) during investigations into sectors of the economy or into types of agreements and on requests for information supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
b) during inspections produce the required books or other records related to the business in incomplete form or refuse to submit them;
c) in response to a question asked to any representative or member staff of undertaking or association of undertaking
   - they give an incorrect or misleading answer,

- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer or
- they fail or refuse to provide a complete answer on facts relating to subject-matter and purpose of the inspection;

d) seals affixed during inspections of premises have been broken.

Second group the legal bases authorises the Commission to impose fines up to 10% of total turnover of the undertaking in the preceding business year where they, either intentionally or negligently:

a) infringed Article 81 or 82 of the EC Treaty,
b) contravened a decision ordering interim measures,
c) failed to comply with a commitment made binding by a decision.

When a fine is imposed on an association of undertaking that is not solvent, the association is obliged to call for contributions from its members to cover the amount of fine. Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association but no more of its own total turnover in the preceding business year and no from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

"In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement"[8].

In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements are thus put into one of three categories: minor infringements, serious infringements and very serious infringements. Minor infringements might be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market. Likely fines are from EUR 1000 to EUR 1 million. Serious infringements will more often than not be horizontal or vertical restrictions the same type as minor ones but more rigorously applied, with a wider market impact and with effects in extensive areas of the common market. There might also be abuse of

[8] Article 23(3) of the *Council Regulation No 1/2003*.

dominant position (refusals to supply, discrimination, exclusion, loyalty discounts made by dominant firms in order to shut competitors out of the market, etc). Likely fines are from EUR 1 million to EUR 20 million. Very serious infringements are generally horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopolies. Likely fines are above 20 million Euros.

As for duration the infringement a distinction should be made between the following,

- infringements of short duration (in general less than 1 year): no increase in amount of fine,
- infringements of medium duration (in general, from one to five years): increase of up to 50% in the amount determined for gravity and
- infringements of long duration (in general, more than five years): increase of up to 10% per year in the amount determined for gravity.

According to the gravity and duration of the infringement is being determined the basic amount of the fine. The basic amount may be increased or decreased in dependence of existence of aggravating or attenuating circumstances.

The basic amount will be increased where there are aggravating circumstances such as:

- repeated infringement of the same type by the same undertaking(s),
- refusal to co-operate with or attempts to obstruct the Commission in carrying out its investigations,
- role of leader in, or instigator of the infringement,
- retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement,
- need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount,
- other.

The basic amount will be reduced where there are attenuating circumstances:

- an exclusively passive or 'follow-my-leader' role in the infringement,
- non-implementation in practice of the offending agreements or practices,
- termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks),

- existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement,
- infringements committed as a result of negligence or unintentionally,
- effective cooperation by the undertaking in the proceedings, outside the scope of the Notice on the non-imposition or reduction of fines in cartel cases,
- other[9].

The Commission reserves the right, in certain cases, to impose a symbolic fine of EUR 1000, which would not involve any calculation based on the duration of the infringement or any aggravating or attenuating circumstances.

The Commission may, by decision, impose on undertakings or association of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

a) to put an end to an infringement of Article 81 or 82 of the EC Treaty,
b) to comply with a decision ordering interim measures,
c) to comply with a commitment made binding by a decision,
d) to supply complete and correct information and
e) to submit to an inspection.

Where the undertakings or associations of undertakings have satisfied the obligation, which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision.

Statistically, from 1969, when the first decision in a cartel case was adopted to 2001, the Commission has adopted 57 decisions against secret cartels. The fines imposed totaled EUR 3,3 billion. In 2001 alone the fines imposed exceeded EUR 1,8 billion. This was more than the total of the fines imposed by the Commission in the whole of the preceding period, from the establishment of the European Community to the year 2000. The year 2001 also saw the heaviest fines yet imposed on individual companies: *Hoffman – La Roche* was fined EUR 462 million for its role in the eight vitamins cartels, and *Arjo Wiggins Appleton* was fined EUR 184 million in the *carbonless paper*[10]

[9] Lists of aggravating and attenuating circumstances are not exhaustive.

[10] Eleven firms, including two from France, three from Germany, one from South Africa, three from Spain and two from United Kingdom, participated in a six-year conspiracy to raise prices and allocate markets for carbonless (self copying) paper. In the last year of conspiracy

case, which was the heaviest fine ever imposed for a single infringement. "These figures show that the Commission has a policy of stepping up its activity against cartels, and at the same time increasing the level of fines in order to achieve a genuine dissuasive effect on firms. The purpose of substantial fines of this kind is to ensure that firms have an incentive to avoid joining any kind of unlawful agreement or concerted practice"[11].

In 1996 the Commission began to carry out a leniency programme[12]. The leniency scheme has proved a formidable tool for encouraging firms to co-operate with the Commission. Not only does it allow specific cartels to be uncovered but more generally the mere apprehension that a member of a cartel might go to the authorities and secure immunity tends to destabilise the activity of the cartel itself.

At the one side the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic if no decisive significance. At the other side certain undertakings involved in this type of illegal agreements are willing to put an end to their participation in a cartel and inform the Commission of the existence of such agreements but they are dissuaded from doing so by the high fines to which they are potentially exposed. It is in Community interest to grant favorable treatment to undertakings, which co-operate with the Commission in detection of existence of restrictive agreements or concerted practices. This favorable treatment is provided by the leniency programme that means that companies which provide information on a secret cartel before the Commission has opened an investigation can benefit even from total immunity from fines and companies

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the size of the European market in this product was approximately EUR 850 million. In implementing the agreement the conspirators participated in at least 25 secret meetings over period. Five of these meetings were at a European level and were attended by the chief executives of other high level executives of the firms. There were at least 20 meetings held at national levels and attended by lower level executives. As with other cartels of this kind, the agreement was facilitated by a trade or professional organisation, in this case, the Association of European Carbonless Paper Manufacturers (AEMCP). Participating companies, except the South African firm, were fined a total of EUR 313,69 million. The South African firm received total immunity from fines by participating in the leniency programme (it will be more said in next passages about).

[11] Mario Monti, *The Fight Against Cartels*, (Speech/02/384, EMAC Brussels 11th September 2002).

[12] "The United States was the first country to introduce a leniency programme, doing so in 1978" (*Hard Core Cartels – Recent Progress and Challenges Ahead*, (OECD 2003), p. 20).

which co-operate with the Commission in the course of a pending investigation can benefit from a substantial reduction of their fines[13].

Although the concept has been confirmed in practice, gained experience showed that its effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted. That's why the Commission adopted new Notice on the leniency programme[14] providing higher level of legal certainty.

In pursuance of the Notice, the Commission will grant immunity from any fine which would otherwise have been imposed if undertakings voluntary and before receiving of any request or decision by the Commission, provide it by evidence that, in the Commission's view, a) may enable it to adopt a decision to carry out an investigation or b) may enable it to find an infringement of Article 81 of the EC Treaty and in both cases under condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt mentioned decisions. In addition to the mentioned conditions, the following cumulative conditions must be met in any case to qualify for any immunity from a fine:

a) the undertaking must co-operate fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement,
b) the undertaking must end its involvement in the suspected infringement no later than the time at which it submits evidences,
c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.

As for reduction of fine an undertaking must provide the Commission with the evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence. The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the

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[13] Mario Monti, *Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?*, (Speech/00/295, 3rd Nordic Competition Policy Conference Stockholm 11-12 September 2000).

[14] *Commission Notice on immunity from fines and reduction of fines in cartel cases* C 45, 19/02/2002, p. 003-005.

facts in question. In this assessment, the Commission generally considers written evidence originating from the period of time to which the facts pertain to have a greater value then evidence subsequently established. Similarly, evidence directly relevant to the facts in question is generally considered to have a greater value that that with only indirect relevance.

If the evidence provided by an undertakings represents significant added value with respect to the evidence in the Commission's possession at that same time, the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, would be as follows:

- for the first undertaking from cartel that begin to co-operate with the Commission a reduction would be 30-50% as in *Lisine* case,
- for the second undertaking from cartel to accept to participate in leniency programme a reduction would be of 20-30% and
- for subsequent undertakings up to 20%.

The Commission may to reduce a fine to the undertaking that is not met conditions for total immunity from fines.

From 1996, following the first Leniency Notice, up to and including 2001, the Commission adopted 24 decisions imposing fines concerning almost 160 firms where more than 80 companies co-operated with the Commission under the leniency scheme in 17 cases and where the Commission imposed a total of EUR 2,8 million in fines[15].

"The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC"[16].

LIMITATION PERIODS

It should discern limitation periods for the imposition of fines or periodic penalty payments and limitation periods for enforcement of the decision on imposition fines or periodic penalty payments.

Limitation periods for imposition of fines are:

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[15] Mario Monti, *The Fight Against Cartels*, (Speech/02/384, EMAC Brussels 11th September 2002).

[16] § 31 of the *Commission Notice on immunity from fines and reduction of fines in cartel cases* C 45, 19/02/2002, p. 003-005.

a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections,
b) five years in the case of all other infringements.

Time begins to run on the day on which the infringement is committed. However, in case of continuing or repeated infringements, time begins to run on the day on which the infringement ceases.

Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement interrupts the limitation periods. Each interruption starts time running afresh.

The period for the inspection of fines shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Anyway the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine.

Limitation period for the Commission to enforce decisions on imposition fines is five years.

Time begins to run on the day on which the decision becomes final. The limitation period for the enforcement of fines interrupts a) by notification of a decision varying the original amount of the fine or refusing an application for variation or b) by any action of the Commission or of the Member State, acting at the request of the Commission, designed to enforce payments of the fine. Each interruption starts time running afresh. The limitation period is suspended for as long as time to pay is allowed or enforcement of payment is suspended pursuant to a decision of the Court of Justice.

REVIEW BY THE COURT OF JUSTICE

The Court of Justice has unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Summary

Council Regulation No 1/2003 allows more efficient enforcement of the EU anti-trust law by abandoning of the notification system and a direct application of the legal exemption system, focussing the action of the Commission on the serious violations of the anti-trust rules and by more involving of national authorities and courts in the enforcement of European Community antitrust law.

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UPRAVNI POSTUPAK ZA PRIMENU ANTIMONOPOLSKOG PRAVA EVROPSKE UNIJE

Administrativni postupak za primenu antimonopolskog prava Evropske unije je uređen Pravilom Saveta No 1/2003 o primeni pravila konkurencije propisanih čl. 81. i 82. Ugovora o osnivanju Evropske Zajednice (*Council Regulation No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, L 1, 04/01/2003, p. 001-025*). Njegova primena je počela od 01. maja 2004. godine kada je prestalo da važi Pravilo br. 17 kojim je do tada ova materija bila regulisana. Pravilo br. 17. je donešeno 06. februara 1962. godine. I pored izuzetnog značaja koje je ovo Pravilo imalo u sferi procesnog prava konkurencije, Generalni Direktorat Komisije zadužen za konkurenciju (DG IV ili DG COMP.) je u februaru 1997. godine počeo sa internim radom na reformi Pravila br. 17. Polazna tačka rada na reformisanju Pravila br. 17 bila je svest o značajnom proširenju Evropske unije nakon čega sistem notifikacije kakav je ustrojen za šest zemalja članica više ne bi mogao biti efikasan pravni instrument za sprovođenje komunitarnog prava konkurencije. Zbog toga se i navodi da su centralne karakteristike Pravila br. 1 napuštanje sistema notifikacije i direktna primena čl. 81 (3) Ugovora o osnivanju EZ. Tokom pomenutog internog rada na reformi Pravila br. 17 došlo se do zaključka da sitna poboljšanja postojećih administrativnih procedura nisu dovoljna da bi se savladali nadolazeći izazovi sa kojima se organi koji primenjuju pravo konkurencije imaju suočiti i da su neophodne duboke i korenite reforme kako bi se osigurala efikasna zaštita pravila o privrednom takmičenju u proširenoj Zajednici. Ovakav zaključak je aprila 1999. pratilo izdavanje Bele knjige o modernizaciji Pravila o primeni čl. 81. i 82. Ugovora. Sledila je javna debata u kojoj su osim komunitarnih institucija učestvovali industrijalci, advokati, profesori. Nakon javne rasprave Komisija je sačinila nacrt novog pravila koje je Savet kao Pravilo br. 1 usvojio 16. XII 2002. godine bez većih izmena. Pravilo br. 1 je

usvojeno da bi se obezbedila efikasnija primena materijalnog prava konkurencije Evropske Unije čemu u najvećoj meri osim napuštanja sistema notifikacije treba da doprinese decentralizacija u primeni Pravila pod kojom se podrazumeva veće uključivanje nacionalnih antimonopolskih vlasti i nacionalnih sudova što će Komisiji ostaviti dovoljno prostora da se fokusira na najteže povrede pravila konkurencije.