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Editorial - Due Process and Innovation in EU Competition Law: At the Gates of Reform?

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Undoubtedly the innovation with the greatest impact has been the adoption of the 2002 Leniency Notice and the adoption of the updated Notice in 2006. The EU leniency notice has generated large numbers of cartel cases for DG Competition resulting in dozens of cartels being busted and the Commission imposing over €10 billion fines over the last four years.

This procedural impact of the successful innovation was the centrepiece of the discussion at the first CLaSF workshop to take place in Brussels. In an extremely compelling and closely argued presentation Professor Wouter Wils, now one of the Commission's Hearing Officers, argued that the despite the success of the Commission its current procedures could cope with the procedural impact of a greater number of cases and much larger fines. His well argued presentation sparked a vigorous debate amongst the participants and set the scene for the rest of the presentations.

The core argument in favour of further reform was that the current procedures are essentially based on Council Regulation 17/1962 & Commission Regulation 99/1963, with the only major amendments being the introduction of the Hearing Officer in the 1980s and the updating of Regulation 17 with Regulation 1/2003, which significantly increased the Commission's sanction powers but which did very little to address due process concerns.

These regulations were adopted in the expectation that they would be principally deployed to assess applications for exemptions under Article 101(3). As such placing extensive investigative powers together with the command of the entire procedure, from laying out the Commission's concerns in a statement of objections, to running the procedure and making the final decision-was eminently sensible and efficient. Equally granting the Commission significant financial sanction powers and relying on a turnover calculation to assess the scale of fine to be paid also had merit. Allowing the Commission to levy fines increased the efficiency of the process and a turnover fine provided a rough and ready link between the infringement and its market impact.

The overwhelming majority of speakers at the workshop however took the view that the Commission's procedures were now unsustainable. In the first place this was because DG Competition was now dealing with large numbers of cartel cases rather than one every other year. A system designed for essentially administrative policy focussed cases had great difficulty adjusting to dealing with a significant number of

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penal cases. This was compounded by the scaling up of the fines under the 1998 and 2006 Fines Notices, the 'penal rhetoric' used by the Commission and the prospect of parallel personal consequences for culpable employees.

In the second place is that European understanding of procedural law had moved on significantly since 1962. The case law of the European Court of Human Rights has so developed in the last two decades that a series of legitimate questions can now be raised as to the integrity of the Commission's evidence gathering and contentious procedures. These concerns are reinforced by the coming into force of the Lisbon Treaty in December 2009 which requires compliance with the Convention and eventual Union ratification. Andreas Scordamaglia and Jamie Flattery in their papers comprehensively discuss the sustainability of the Commission's procedures in the light of the twin pressures of significant numbers of cartel cases and the potential conflicts with the ECHR case law.

A further question concerns the calculation of fines. A fine calculation based principally on turnover is a rough and ready to calculate a fine on an affected market. When fines are relatively small and not related to price-fixing in most cases this may be an acceptable way to proceed. However, when fines, as a result of the 1998 and 2006 Notices significantly increase in size the procedures are likely to come under a lot more scrutiny. One difficulty for instance with the application turnover calculation in the Fines Notice 2006 is that it is not able to take account of the economic reality that some cartels are much more profitable than others. Many cartels are defensive operations which make little or no money, whereas others are extremely profitable. Imposing a minimum entry fee for price-fixers of between 15-25% of the turnover of the affected market ignores that economic reality.

There is a real danger of creating a market consolidation machine where some members of a weak and defensive cartel either go out of business entirely or merge with competitors in order to cope with the fines imposed. Abayomi Al-Ameen takes these issues into a broader policy setting in his paper *Antitrust Fines-Seeking Justice*. He provides an extensive overview of the major concerns related to the operation of the Fines Notice 2006.

One illuminating paper also addressed the way other EU procedures can catch up and overtake specific competition procedures. Julian Nowag's paper on the application of the European Evidence Warrant to competition cases and the sharp contrast with the procedures under the Network Notice and Regulation 1 provoked an intense debate on parallel EU rules side stepping carefully constructed EU competition structures.

Despite these concerns the overarching discussion of both the workshop and papers are positive for the Commission. A number of papers examine ways of effectively reforming the Commission's procedures. Notably Nicolo Zingales who provided a careful analysis of the development of the role of the Hearing Officer. Consideration was also given by Gurgen Hakopian to the legal and constitutional prospects for a criminal price-fixing regime.

Overall the Commission is facing is these procedural problems created by its success in the cartel field. These 'growing pains' can, with some debate and hard work, be sorted out. If as a result of reform the competition procedures demonstrate a greater fidelity to the ECHR and fining policy that has a better calibration industry should not reckon on being on the receiving end of any great benefit. In truth, once the Commission has a legally unassailable procedure targeted on price-fixers and a re-tooled Fines Notice the numbers of cartels that will be uncovered and the size of the penalties that will be imposed will be very unlikely to shrink.