CHAPTER 11

The Commission’s Powers of Investigation

11.1 Sanctions

One of the most important powers of the European Commission is the power to sanction the undertakings that breach Articles 101 or 102 TFEU. A retrospective view on the Commission’s fining practice indicates that in the early years of European competition law, the fines for breaches of cartel legislation or for abuses of dominant position were low. Legal certainty was a concept foreign to the European Commission as shown by the Commission’s change of heart starting with the well-known decision in Pioneer adopted by the Commission in 1980.¹

By 1991 however, the Commission was ready to make full use of Regulation 17 and impose fines of up to 10% of the annual turnover of the companies involved. In the recent years, the fines imposed by the Commission have raised many eyebrows, until it became clear that a fine of 1 billion Euros would no longer be an exception.

The CJEU has consistently held that the Commission benefits from a large margin of discretion when it comes to calculating and imposing fines for breach of Articles 101 and 102 TFEU. The reproach, however, was that the method of setting the fine should be a transparent one, so as to enable the addressee to understand how the Commission reached that amount and to grasp the connection between the behaviour that is reproached and the fine that is imposed.

In one of those critiques, the Court held that

the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees of the decision to verify that the level of the fine is correct and to assess whether there has been any discrimination.²

In response to these critiques, the Commission issued in 1998 its first fining guidelines.³ These guidelines were intended to

¹ C-100/80, Musique Diffusion française v Commission, quoted above.
² T-347/94, Mayr-Melnhof Kartongesellschaft v Commission, paragraph 285.
³ Information from the Commission – Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9, 14.1.1998, pp. 3–5.
ensure the transparency and impartiality of the Commission’s decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must however follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules.4

In 2006, the Commission issued a revised version of the fining guidelines to further develop and refine its policy on fines.5 The Commission stressed in the introduction that the power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe on Article 101 or 102 of the TFEU is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles. For this purpose, the Commission must ensure that its action has the necessary deterrent effect. (...) 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).6

The European courts have also considered the question of the legal value of the fining guidelines in view of their soft law nature. The CJEU found in Dansk Rorindustry and Others that

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4 Information from the Commission – Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, quoted above, introductory paragraph.
5 Guidelines of method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, quoted above.
6 Guidelines of method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, quoted above, p. 2.
depart from those rules under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be excluded that, on certain conditions and depending on their conduct, such rules of conduct, which are for general application, may produce legal effects.\(^7\)

Article 23 of Regulation 1/2003 holds that fines can be imposed for two types of breaches: (1) fines for procedural infringements and (2) fines for substantive breaches of European competition law.

Articles 23(1) of the Regulation on Procedure indicates that the Commission may impose by decision a fine for the following behaviours: supply of incorrect or misleading information in response to a request made by the Commission, or disrespect of the time limit to provide the information; production of the required books or other records related to the business in incomplete form during an inspection or refusal to submit to an inspection; refusal to answer questions during an inspection; or breaking of seals.

Despite the Commission’s large use of its fining powers, the instances where Article 23(1) is applied are rare. It is more likely that the Commission will consider the behaviours described above as aggravating circumstances under Article 23(2).

Article 23(2) enumerates the situations in which the Commission may impose fines for breach of substantive competition rules: infringement of Article 101 or Article 102 TFEU; contravention of a decision ordering interim measures under Article 8 of Regulation 1/2003; and failure to comply with a commitment made binding by a decision pursuant to Article 9.

Turning now to the method of calculating the fines, the Commission will first establish the basic amount that will then be adjusted to take into consideration all the aggravating or mitigating factors. The Commission may also add a specific increase for deterrence, making sure, however, that the fine does not exceed the 10% ceiling. On rare occasions, the Commission will also take into account the undertaking’s inability to pay the fine due to economic or social hardship.

### 11.2 Leniency

The Commission’s practice in the field of leniency was launched in 1996 by the introduction of the Leniency Notice.\(^8\) This was subsequently updated in

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7. C-189/02 P, Dansk Rørindustri and Others v Commission, ecli:eu:C:2005:408, paragraph 212.
8. Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 297, 18.7.1996, p. 4–6.
2002. A second update followed shortly after in 2006. The three leniency programmes in force so far have been successful. From 1996 until 2002, more than eighty leniency applications were lodged under the 1996 Leniency Notice and sixteen out of eighteen cartel decisions adopted by the Commission during this time were triggered by leniency applications. Under the 2002 Leniency Notice, the Commission received 104 applications for full immunity and 99 applications for reductions of fines.

The 2006 Leniency Notice provides for two procedures: full immunity from fines and reduction of fines.

The Commission can grant immunity from any fine which would otherwise have been imposed on an undertaking disclosing its participation in an alleged cartel affecting the internal market, provided that it is the first to submit information and evidence which can enable the Commission to carry out a targeted inspection or find an infringement in connection with the alleged cartel.

Immunity can be granted pursuant to Article 8(a) of the Leniency Notice if, at the time of the submission, the Commission had not already had sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

The leniency applicant must provide, first of all, a corporate statement which must include a detailed description of the alleged cartel arrangement, including its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts; and all relevant explanations in connection with the pieces of evidence provided in support of the application. Second, the application must include the name and address of the undertaking submitting the immunity application as well as the names and addresses of all the

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9 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, 19.2.2002, p. 3–5.
10 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above.
11 Arbault, François and Francisco Peiro. “The Commission’s New Notice on Immunity and Reduction of Fines in Cartel Cases: Building on Success.” Competition Policy Newsletter 2 (June 2002): pp. 15–22.
12 European Commission. Report on Competition Policy 2006. Luxembourg: Office for Official Publications of the European Communities, 2007, p. 12.
13 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.
14 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.
15 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.
other undertakings that are involved with the alleged cartel. Third, the applicant must provide the names, positions, office locations and home addresses of all individuals who are currently or have been involved in the past with the alleged cartel. Fourth, the leniency applicant must inform the Commission about other competition authorities, inside or outside the EU, which have been approached or would be approached in relation to the alleged cartel. Lastly the leniency applicant must provide other evidence in its possession or available to it at the time of the submission, including in particular any evidence contemporaneous to the alleged infringement.16

The corporate statement is the central piece of any immunity or reduction of fines application. The Commission defines it as "a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice".17 The corporate statement cannot be retracted once submitted and it forms part of the Commission's file. It can be presented either in written form or orally.

Immunity can be granted pursuant to Article 8(b) if the Commission does not already have enough evidence to find an infringement and that no undertaking had already been granted immunity under Article 8(a) in connection with the alleged cartel. Thus, in order to qualify for immunity, the undertaking lodging a leniency application must be the first to lodge such a request or would otherwise not qualify for immunity.

The undertakings have a duty to cooperate with the Commission genuinely, fully, on a continuous basis and expeditiously from the time they submit the application throughout the Commission's administrative procedure. The undertaking must also end their involvement in the alleged cartel immediately, except for what involvement would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections.18

The Commission can grant immunity status to only one undertaking involved in an alleged cartel, however it can also grant a few reductions of fines to the undertakings that do not qualify for immunity. Thus, undertakings disclosing their participation in an alleged cartel affecting the internal market

16 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.
17 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 21.
18 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.
that do not meet the conditions for immunity may otherwise be eligible to benefit from a reduction of fine.\textsuperscript{19}

In order to qualify for a reduction of fine, the undertaking making the request must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission’s possession and must meet the cumulative conditions set out above. The Leniency Notice defines the concept of “added value” as referring “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 alleged cartel.”\textsuperscript{20} To perform this assessment, the Leniency Notice indicates that the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.\textsuperscript{21}

The first undertaking to provide significant added value will receive a fine reduction ranging from 30–50\% of the fine which would otherwise be imposed. The second undertaking will receive a reduction of 20–30\%, and the subsequent undertakings will receive reductions of up to 20\%.\textsuperscript{22}

\subsection*{11.3 Sector Inquiries}

The Commission has the power to investigate sectors of the economy and types of agreements. Article 17 of the Regulation 1/2003 provides that

\begin{itemize}
\item \textsuperscript{19} Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.
\item \textsuperscript{20} Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.
\item \textsuperscript{21} Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.
\item \textsuperscript{22} Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.
\end{itemize}
where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a 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 Treaty and may carry out any inspections necessary for that purpose.23

The Commission can request the disclosure of any agreement, decision or concerted practice that it considers necessary.

Former Competition Commissioner Neelie Kroes explained that sector inquiries are to be launched in areas where there appear to be sustained competition problems, possibly due to competition infringements, with the possibility for introducing better regulation in a sector which is key for consumers and for competitiveness.24

The Commission publishes a preliminary report on the results of its inquiry and invites comments from interested parties.25 A final report is then released, taking stock of the findings and the views expressed by the third parties in writing or during an oral hearing.

The Commission has increasingly relied on sector inquiries in recent years, with inquiries authorised in the media sector, the energy sector, the financial services sector and the pharmaceutical sector.

Van Bael points out that “sector inquiries are first of all an information-gathering exercise that provides the Commission with in-depth knowledge about markets and is therefore ‘upstream’ of proceedings in specific cases. The knowledge gained about the market can form the basis of specific enforcement initiatives at a later stage”.26

23 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 17(1).

24 European Commission. Neelie Kroes. Fact-based Competition Policy – the Contribution of Sector Inquiries to Better Regulation, Priority Setting and Detection. Speech, 26 Mar 2007. Available at http://europa.eu/rapid/press-release_SPEECH-07-186_en.pdf accessed on 23 February 2021.

25 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 17(1).

26 Van Bael, op. cit. p. 149.
The decision to authorise a sector inquiry can be challenged before the CJEU.

11.4 Requests for Information

The Commission can, by simple request or by decision, require undertakings and associations of undertakings to provide all information necessary for the performance of its investigative duties.\(^\text{27}\)

When the Commission sends a simple request for information to an undertaking or association of undertakings, it states the legal basis and the purpose of the request, specifies what information is required and fixes the time limit within which the information is to be provided. The Commission also informs the undertakings about the penalties provided for in Article 23 in cases of supplying incorrect or misleading information.\(^\text{28}\) The Commission also indicates the right of the undertaking to have the decision reviewed by the Court of Justice.\(^\text{29}\)

The Commission forwards a copy of the request for information to the government and national competition authorities concerned, which in turn provide the Commission with all the necessary information for the performance of its duties.\(^\text{30}\)

The Commission invites the addressees of the request for information to identify in their replies any information that contains business secrets or other confidential information.

11.5 The Power to Take Statements

Article 19 of Regulation 1/2003 provides that the Commission may interview any natural or legal person who consents to be interviewed for the purpose of

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\(^{27}\) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(1).

\(^{28}\) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(2).

\(^{29}\) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(3).

\(^{30}\) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(5).
collecting information relating to the subject-matter of an investigation.\textsuperscript{31} The Commission has to inform the person of the voluntary nature of the interview and of its intention to record it.\textsuperscript{32} The interview may be conducted face-to-face, by telephone or by electronic means.\textsuperscript{33}

When the interview is granted at the premises of an undertaking, the Commission must 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 state, its officials must assist the Commission in conducting the interview.\textsuperscript{34}

\textbf{11.6 \hspace{1em} Powers of Inspection}

Article 20 of Regulation 1/2003 contains extensive provisions concerning the Commission’s powers of inspection. The regulation strengthened these powers, confirming that the Commission’s right to inspection includes the powers:

– to enter any premises, land and means of transport of undertakings and associations of undertakings;

– to examine the books and other records related to the business, irrespective of the medium on which they are stored;

– to take or obtain in any form copies of or extracts from such books or records;

– to seal any business premises and books or records for the period and to the extent necessary for the inspection; and

– to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.\textsuperscript{35}

\begin{footnotesize}
\begin{enumerate}
\item Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 19(1).
\item Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty, quoted above, article 3(1).
\item Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty, quoted above, article 3(2).
\item Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 19(2).
\item Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 20(2).
\end{enumerate}
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There is no limit as to the number of officials and other accompanying persons who are authorised to perform the inspection. They will, however, exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. The decision must specify (a) the subject matter and purpose of the inspection, (b) the date of the inspection, (c) the penalties provided for in Articles 23 and 24 and (d) the right to have the decision reviewed by the CJEU. The Commission shall take such decisions after consulting the competition authority of the member state in whose territory the inspection is to be conducted.

The undertakings and associations of undertakings must submit to inspections ordered by decisions of the Commission.

36 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 20(3).

37 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 20(4).