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The Commission's Policy on Recidivism: legal certainty for repeat offenders?

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This paper discusses the application by the European Commission of recidivism as an aggravating circumstance in competition law cases. It considers the largely unexplored questions of the legal basis for recidivism; the application of recidivism as an aggravating factor in the calculation of a fine and, in particular, whether the Commission should be able to treat recidivism as a perpetual aggravating circumstance without regard to the time limit that elapses between the relevant infringements. It concludes that the Commission's current policy, which does not recognise any period of limitation for recidivism, may not respect the basic principles of proportionality and legal certainty.

1. INTRODUCTION

This paper discusses the application by the European Commission of recidivism as an aggravating circumstance in competition law cases. It concludes that the Commission's current policy, which does not recognize any period of limitation for recidivism, may not respect the basic principles of proportionality and legal certainty.

The Commission's practice is to increase the amount of the fine imposed on an undertaking following an infringement of the competition rules in the EC Treaty if that undertaking had previously breached those rules. The legal basis for this practice is Regulation 17/62¹ (now Regulation 1/2003,² together the 'Regulations') and the Commission's 1998 Fining Guidelines³ (the 'Guidelines'). The Guidelines thus create an equivalent of a criminal (competition) record for companies that are caught infringing Articles 81 or 82 EC.

The Commission (rightly) views recidivism as a very serious aggravating circumstance and imposes a substantial fine increase on repeat offenders. In recent cases, however, the Commission extended this principle in order to increase the basic amount of the

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¹ Regulation No 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962, P 013.

² Regulation 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 (Text with EEA relevance), OJ 2003, L1/1.

³ 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 1998, C009.

fine by 50% based on infringements that occurred more than 20 years prior to the current infringement.

Recidivism has three particular characteristics that are relevant to the discussion here. First, recidivism is typically seen as a subjective status of the person committing the infringement, and not as an objective characteristic of the infringement itself. The rationale for recidivism, which exists in the legal systems of all the Member States, is that a repeat offender is more apt to commit crimes and therefore needs more severe punishment to be deterred from such behaviour in the future.

Second, recidivism is made up of two objective components forming an indivisible whole. Generally, the first component must be a conviction by a court or competition authority which has final effect. The second component is a further offence.

Third, because recidivism constitutes a second penalty based on the existence of a past infringement that has already been the subject of a penalty, it constitutes an exception to the principle of *non bis in idem*.

In almost all Member States, the punishment of repeat offences derives from specific, statutory provisions and safeguards that generally include a definition of recidivism, a definition of the type of infringement to which it applies, and a limitation period.

None of the important issues of principle raised by recidivism are addressed explicitly by European law. Moreover, the Commission's approach to recidivism raises a number of important questions and problems. In particular whether:

- (1) there is a sufficient legal basis for recidivism,
- (2) the application of recidivism as an aggravating factor in cases where the first infringement which forms the basis for recidivism took place before the adoption of the Guidelines may breach the principle of legal certainty and non-retroactive application of unfavourable law, and
- (3) the Commission can treat recidivism as a perpetual aggravating circumstance, without regard for the time that has elapsed between the relevant infringements.

The application of EC competition law by national competition authorities and courts increases the uncertainty for potential recidivist companies because fines may be increased for previous infringements committed and sanctioned in other jurisdictions.

These questions are discussed below. Section 2 sets out the relevant legal framework, including EC and Member State rules on recidivism. Section 3 discusses whether there is a sufficient legal basis for recidivism in EC law. Section 4 argues in particular that the Commission's failure to apply a limitation period for recidivism infringes the principles of proportionality and legal certainty. Section 5 offers some conclusions.

2. RECIDIVISM RULES

2.1. EC Legal Framework

The Regulations and Guidelines

Regulations 17/62 and 1/2003 both state that “[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.”

Prior to the publication of the 1998 Fining Guidelines, the Commission was criticized for the vague criteria it used in determining fines,⁴ and there was no explicit basis for punishing repeat offenders.

In announcing the Guidelines, the Commission noted that:

“The publication of these guidelines pursues the aim of transparency both with respect to companies and with respect to the [CFI] and to the ECJ. Their application should make it possible to strengthen the coherence of the policy of the Commission as regards fines while maintaining the deterrent character of the sanctions.”⁵

The Guidelines explicitly provide for the possibility to increase fines for repeat offenders. The Guidelines list in section 2 a ‘repeat infringement of the same type by the same undertaking(s)’ as an aggravating circumstance leading to an increase in the basic amount of the fine.

The Community Courts have accepted that the Commission enjoys a wide margin of discretion in deciding how to calculate fines as long as it bases its decision on the two criteria in the Regulations, namely the gravity of the infringement and its duration, and stays within the 10% of annual turnover limit established by the Regulations.⁶ For example, the Commission is not bound to consider turnover in deciding the basic amount of the fine although it may have done so previously. Furthermore, 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 the Regulations if that is necessary to ensure the implementation of Community competition policy.⁷ The Commission has the necessary discretion to ‘direct the conduct of undertakings towards compliance with the competition rules’.⁸

It is furthermore established case law that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of

⁴ See, for example, I Van Bael, ‘The lottery of EU Competition Law’, (1995) 4 ECLR 237.

⁵ Karel van Miert submits to the Commission clear guidelines on the method for the setting of fines in the context of European “anti-trust” legislation, IP/97/1075, 3 December 1997.

⁶ See, e.g., Case T-23/99 *LR AF v Commission*, judgment of March 20, 2002, [2002] ECR II 1705, para 231.

⁷ *Id.*, para 237 with further references.

⁸ *Id.*, para 236 with further references.

the case, its context, and the dissuasive effect of fines and that no binding or exhaustive list of the criteria which must be applied has been drawn up.⁹

Limited to person and similar offence

The Guidelines state that the repeated infringement must be 'of the same type' and 'by the same undertaking(s)'.

The Commission considers infringements based on similar conduct on different geographic markets and in different sectors as of the 'same type' for recidivism purposes.¹⁰

In *Michelin*, the Commission rejected the argument that because the previous abuse was on a different geographic market it could not constitute a repetition of the same infringement stating that:

‘when a dominant undertaking has been censured by the Commission it has a responsibility not only to put an end to the abusive practices on the relevant market but also to ensure that its commercial policy throughout the Community conforms to the individual decision notified to it.’¹¹

In a decision against BASF which concerned the vitamins and animal feedstuff sector, the Commission increased the fine for recidivism despite the fact that the earlier decisions were concerned with entirely different sectors. The 1969 Decision concerned dyestuffs (*Matières Colorantes*)¹² and the 1994 Decision concerned bulk thermoplastic PVC.¹³

Likewise, in the Belgian Beer cartel case, the Commission imposed an increased fine based on the existence of concerted practices by a different affiliate (which had been sold) in the glass sector.

The concept of 'same undertaking' includes any legal entity within the same economic unit. In *Michelin*, the CFI confirmed that the Commission could apply recidivism to a company which had not previously been found guilty of any offence, but which was 99% owned by the same parent company that also held 99% of a company that had committed a previous offence. The CFI concluded that the subsidiaries in question did not determine independently their own conduct on the market and that therefore they formed part of the same economic unit for purposes of Community competition law.

⁹ *Id*, para 236.

¹⁰ However, in the French Beer Case – *Brasseries Kronenbourg, Brasseries Heineken*, Decision of 29 September 2004, the Commission found that a previous decision from 1974 mainly involved price agreements which were of a different type from the armistice agreement at issue, and therefore refrained from taking the 1974 decision as evidence of a repeated infringement (see footnote 93). Summary of decision: OJ 2005, L184/57, also published on the Commission website:
<http://europa.eu.int/comm/competition/antitrust/cases/decisions/37750/en.pdf>

¹¹ *Michelin*, Commission Decision of June 20, 2001, OJ 2002, L143/1, para 362.

¹² Case IV/26.267 – *Matières colorantes*, Commission Decision of 24 July 1969, OJ 1969, L195/11.

¹³ Case IV/31.865 – *PVC*, Commission Decision of 27 July 1994, OJ 1994, L239/14.

The Court noted that the Commission could have imposed the fine on the same parent company in both decisions.¹⁴

2.2. Member State Laws

Where there is no clear Community rule, the Community Courts will look to national laws for principles common to the legal systems of the Member States to establish the applicable EC law. For example, in determining the scope of the protection of legal professional privilege under EC law, the Court of Justice referred to the substance of national laws.¹⁵ Principles common to the Member State laws are therefore very important in determining the appropriate EC rule.

In the Member States, recidivism is normally considered as an aggravating factor in criminal sentencing. Member State courts and competition authorities also take repeated offences into account in increasing fines imposed on undertakings for breaches of competition law. However, because recidivism implies an increase of criminal or administrative responsibility, national laws make recidivism subject to a number of conditions and safeguards.

In the criminal context, the legal basis for recidivism is generally a legally binding norm, which explicitly provides for the possibility of applying recidivism as an aggravating circumstance.¹⁶ In some cases, the legal basis for recidivism, because it affects the fundamental rights of the individual,¹⁷ ranks higher than regular norms.¹⁸ Where the legal basis for recidivism is not a legally binding norm, for example in Ireland, a statutory provision explicitly acknowledging this possibility is recommended.¹⁹

In several Member States, including France, Italy, Spain, Portugal, Sweden, the Czech Republic, and Slovakia, the national competition law provides explicitly for the possibility to increase fines for repeat infringements.²⁰ Where that is not the case, for example in the United Kingdom, Belgium, and the Netherlands, published guidelines provide for recidivism as an aggravating factor to increase fines.

The criminal legislation of the Member States in most cases introduces some time limit on the consideration of previous infringements even for the most serious crimes (with

¹⁴ Case T-203/01 *Michelin v Commission*, judgment of 30 September 2003, [2003] ECR II 4071, para 290.

¹⁵ Case 155/79 *AM&S v Commission*, judgment of 18 May 1982, [1982] ECR 1575.

¹⁶ See for instance Articles 132-8 to 132-11 of the French Criminal Code, Article 99 of the Italian Criminal Code, Section 46 of the German Criminal Code, Articles 22 and 136 of the Spanish Criminal Code, Article 75 and followings of the Portuguese Criminal Code, Section 143(2) of the British Criminal Justice Act 2003, Articles 54 to 57 of the Belgian Criminal Code, Article 421 of the Dutch Criminal Code, Articles 69 and 70 of the Czech Criminal Code, Articles 69 and 70 of the Slovak Criminal Code.

¹⁷ See Article 81 of the Spanish Constitution, which requires a “*ley orgánica*”, passed by absolute majority when a provision affects fundamental rights of the individual.

¹⁸ See for instance, the example of Spain, Código penal approved by Ley Orgánica 10/95, 23 November 1995.

¹⁹ Consultation Paper on Sentencing (LRC C-P 6 1993), Report on Sentencing (LRC 53-1996).

²⁰ See, e.g., Section 28a(3) of the Swedish Competition Act (SFS 1993:20) which provides that a fine may be set at a higher amount if the undertaking has previously infringed the prohibitions under the Act, Article 10.2(f) Ley de Defensa de la Competencia (Spanish Competition Act 16/1989 of 17th July, Official State Gazette N°. 170, of 18th July 1989), Article L. 464-2 of the French Commercial Code.

the exception of crimes against humanity).²¹ National legislations consider the time elapsed since the first conviction.²² The general trend is to determine a maximum period of time between the first and the second conviction, beyond which the first conviction cannot be taken into account for the purposes of recidivism. In general, this period of time varies depending on the seriousness of the offence committed. In some countries, such as Spain, Portugal, the Netherlands, the Czech Republic and Slovakia, recidivism is always temporary, meaning that after a maximum of 10 years following the first conviction, the Courts cannot take the first infraction into account in order to aggravate the penalty for the second one based on recidivism. In some other countries, such as France, Germany and Belgium, recidivism can in some cases be perpetual (while obviously not extending beyond the life of the natural person concerned), but only for the most serious criminal offences.

Several Member States have specific provisions imposing a limitation period for recidivism in competition law cases. For example, in Italy the first offence cannot constitute an aggravating factor after five years²³ and in Germany the limitation period is three or five years depending on the fine.²⁴ In cases where there is no specific provision, it seems unlikely that national judges would accept a limitation period in excess of the period that applies to the consideration of a previous offence as an aggravating factor under the applicable criminal law.

There is very limited national case law applying recidivism as an aggravating circumstance to increase fines for competition law infringements. In abuse of dominance cases concerning Telefónica, the Spanish competition authority in a decision dated March 8, 2000,²⁵ took into account a previous infringement which was subject to a decision 19 years earlier.²⁶ However, in a decision dated April 1, 2004 also concerning abuse of dominance by Telefónica,²⁷ the authority considered only previous decisions rendered in 2001 and 1999.

²¹ The criminal laws of several Member States restrict the consideration of offences which were committed in excess of five to ten years prior to the offence currently being sentenced. These include, for example, Belgium, the Czech Republic, France, Germany, the Netherlands, the Slovak Republic, Spain, Portugal, and the UK. More specifically, national administrative laws of Member States also limit consideration of previous infringements when imposing a fine for a new infringement. These include, for example, Italy or Germany where a five year limitation period applies.

²² See for instance, Section 143(2) of the Criminal Justice Act 2003 in the United Kingdom.

²³ Article 8 bis of the Law on Administrative Sanctions (to which the Competition Act, Law No. 287 of 1990, refers).

²⁴ In Germany a repeated competition law infringement can only be considered an aggravating factor if it has not been deleted in the Gewerbezentralregister. Pursuant to Section 153 of the Gewerbeordnung (Industrial Code), the extinction period is 3 years for fines not exceeding €300 and 5 years for fines exceeding €300. The period begins when the fining decision becomes final.

²⁵ Decision No. 456/99 *Retevisión/Telefónica*.

²⁶ Decision No. 167/80 of 26 March 1981.

²⁷ Decision No. 557/03.

The French Competition Authority (Conseil de la Concurrence) has increased fines based on repeated infringements in a number of cases.²⁸

3. IS THERE A SUFFICIENT LEGAL BASIS FOR RECIDIVISM?

3.1. Fundamental Rights and Principles Common to the Member States – No Punishment without Law and No Retroactive Application of Unfavourable Law

The Community Courts have consistently held that legal principles and fundamental rights common to the legal systems of the Member States, as well as rights recognized by the European Convention on Human Rights (the “Convention”, to which all Member States are signatories) and the case law of the Court of Human Rights, constitute fundamental principles of EC law which the Courts must respect and enforce.

In *LRAF*, the Court of First Instance (“CFI”) held that:

‘It is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature ... For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect ...’²⁹

The Treaty on European Union also provides that the Union shall respect fundamental rights, as guaranteed by the Convention, and the EU Charter of Fundamental Rights makes reference to the Convention and to the case law of the European Court of Human Rights.

Nulla Poena Sine Lege: Article 7 of the European Convention on Human Rights.

Article 7 of the Convention provides:

‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.’

This Article reflects the generally recognized fundamental principle of *nullum crimen, nulla poena sine lege*, *i.e.* only the law can define a crime and prescribe a penalty.

²⁸ See Decisions N 02-D-42 of 28 June 2002 (fines were increased based on a decision in 1980 relating to conduct at the end of the 70s), N 02-D-62 of 27 September 2002 (similar infringements took place in 1992, 1993, 1995 and 1997, but the competition council referred only to the decision taken in 1992 as a basis for recidivism), N 01-D-41 of 11 July 2001 (an opinion rendered in 1980 was the basis for increasing fines), and 01-D-67 of 19 October 2001 (1989 and 1998 decisions were referred to as a basis for recidivism).

²⁹ *Op cit* n 6, para 217.

Non-retroactive application of unfavourable law.

A related fundamental principle enshrined in Article 7 of the Convention and recognized by the Community Courts is the non-retroactive application of unfavourable law.

The concept of 'criminal' offence in the Convention has an autonomous meaning,³⁰ which arguably encompasses a breach of Articles 81 and 82 EC. Although the Regulations both state that 'decisions [imposing fines for competition law infringements] shall not be of a criminal law nature', the fact that such fines have a deterrent and punitive character and that the Article 81 and 82 EC prohibitions apply generally to all undertakings likely takes these provisions within the scope of application of Article 7 in the Convention.³¹

In any case, the Court of Justice has recognized that a penalty, even of a non-criminal nature, cannot be imposed unless it is based on a 'clear and unambiguous' legal basis.³²

The CFI stated in *LRAF* that:

'The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the Convention as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Community judicature. Although [the Regulations provide] that Commission decisions imposing fines for infringement of competition law are not of a criminal nature, the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition.'³³

In *LRAF*, the CFI further stated with specific reference to Article 7 of the Convention that

'[s]uch observance requires that the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed.'

3.2. EC Legal Basis

Commission practice

The Commission has applied recidivism as an aggravating circumstance based on Regulation 17/62 in 15 cases to date. In the six decisions taken since the adoption of

³⁰ *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22; *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, paragraph 81.

³¹ *Société Stenuit v. France*, Commission's report of 30 May 1991, no. 11598/85; Third Section Decision as to admissibility, *Neste and others against Russia*, June 3, 2004.

³² Case C-172/89, *Vandermoortele v Commission*, judgment of December 12, 1990, [1990] ECR I-4677.

³³ Op cit, n 6, paras 219-220.

the Guidelines in 1998, the Commission applied a 50% fine increase for recidivism.³⁴ In all of those decisions (dating from 2001, 2003, and 2004), the Commission based recidivism on previous infringements which occurred prior to the adoption of the Guidelines.

The Regulations

It is not clear that applying recidivism as an aggravating factor follows from the obligation in the Regulations to consider the “gravity” and “duration” of the infringement.

First, neither the EC Treaty nor the Regulations contain an explicit reference to the possibility of increasing fines based on recidivism.

Second, recidivism is based on a characteristic of the recidivist, *i.e.*, the legal person which infringed the competition rules, and has nothing to do with the nature of the infringement, its duration or gravity. Member States laws recognize recidivism as an aggravating circumstance which refers to the person who committed the offence, not to the gravity or to the duration of the infringement itself.

Arguably, therefore, the Regulations do not provide the necessary clear and unambiguous legal basis for recidivism.

The Guidelines

The Commission itself seems to consider that only the Regulations and not the Guidelines are a legal basis for imposing fines or increasing fines:

‘Les lignes directrices ne constitueraient pas, en elles-même, une base juridique, ni pour des sanctions, ni pour leur renforcement.’³⁵

It is questionable whether the Guidelines could constitute a sufficient legal basis for recidivism. Guidelines are not formally legally binding. The Guidelines may bind the Commission because they create legitimate expectations among undertakings that the Commission will calculate fines in a certain way. However, the Guidelines are primarily a policy and guidance instrument of the Commission, which can be set aside by the Community Courts. The Guidelines serve only to explain in more detail the Commission’s practical implementation of the framework for imposing fines provided by the Regulations and the EC Treaty. If the Regulations do not provide a legal basis for recidivism, then arguably the Guidelines go beyond the scope of the Commission’s discretion pursuant to the Regulations and are invalid on this point.

³⁴ *Michelin*, Commission Decision of 20 June 2001, OJ 2002 L143/1, *Belgian Beer*, Commission Decision of 5 December 2001, OJ 2003, L200/1, *Organic Peroxides*, Commission Decision of 10 December 2003, published at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37857/en.pdf>, *Sorbates*, Commission Decision of 1 October 2003, Summary of Decision: OJ 2005, L182/20, published at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37370/en.pdf>, *Industrial Tubes*, Commission Decision of 16 December 2003, Summary of Decision: OJ 2004, L125/50, published at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38240/en.pdf>, *French Beer*, Commission Decision of 29 September 2004, Summary of Decision: OJ 2005, L184/57, published at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37750/en.pdf>

³⁵ Case T-9/99 *HFB Holding and Others v Commission*, judgment of 20 March 2002, [2002] ECR II 1487, para 485.

The Guidelines have withstood a number of legal challenges before the Community Courts, but none of those cases concerned directly the legal basis for recidivism.

In *Michelin*,³⁶ the CFI dismissed the applicant's arguments that the first and second infringements were not of a similar nature and could therefore not be the basis for recidivism, that the applicant was not the legal entity that had committed the first infringement, and that the Commission had breached the principles of fairness and equal treatment in increasing the fine by 50%.

In *HFB*,³⁷ the applicant argued that the Commission had exceeded its discretion under Regulation 17/62 when it adopted the Guidelines because it had not provided that fines should be calculated taking into account the turnover of the undertaking in question. Furthermore, the applicant argued that the Guidelines introduced a new aggravating circumstance in providing for the need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement. However, the applicant did not make any argument based on the lack of legal basis for recidivism (recidivism was not applied to the applicant). In holding that the Commission had not exceeded its discretionary powers in adopting the Guidelines, the CFI concluded that although the basic amount is calculated without reference to turnover, the framework for calculating fines in the Guidelines respected the 10% of annual turnover limit in Regulation 17/62. The CFI also found that the Commission's assessment was based on the 'gravity' and 'duration' criteria in Regulation 17/62.

The CFI noted in *Michelin* that:

[t]he Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in [the Regulations] and in the Guidelines.³⁸

Conclusion

In conclusion, the Regulations and the Guidelines may provide an insufficient basis for the Commission's application of recidivism as an aggravating circumstance to increase fines on undertakings that infringe the competition rules of the EC Treaty.

3.3. At what Point in Time Should the Legal Basis be Assessed?

Interesting questions arise if the Guidelines were to be considered the legal basis for recidivism (given that the Regulations make no explicit reference to the possibility to increase fines based on repeat offences), or at least as providing the necessary legal certainty. The legal basis and legal certainty must be assessed at the time of the infringement. But is it the date of the first infringement or the second infringement that is relevant in this regard?

It can be argued that the relevant point in time is the date of the second infringement since an undertaking which commits an offence at that point in time, and which knows

³⁶ Op cit, n 14.

³⁷ Op cit, n 35.

³⁸ Op cit, n 14, para 254.

that it has committed a previous similar offence, can determine that it will be liable for higher fines due to recidivism based on the status of the law at the time of the second infringement. However, recidivism is also in a sense a punishment for the first offence. The undertaking will be at risk of incurring higher fines for a subsequent infringement following the first infringement. The first infringement is thus a necessary basis for recidivism, and it is arguably essential that a potential culprit be fully aware of all the consequences of its behaviour.

A recent judgment on recidivism from the European Court of Human Rights suggests that the relevant legal basis must be assessed at the time of the first infringement because the first and second offences, which constitute the basis for recidivism, must be seen as ‘forming an indivisible whole’.³⁹

If that is the case, and if the Guidelines provide the legal basis for recidivism, then the Commission cannot increase fines based on first infringements that occurred prior to 1998.

In *Achour v France*,⁴⁰ the European Court of Human Rights held that a French law that extended the period during which a person could be subject to a heavier penalty as a recidivist could not be applied to a person who had committed the first offence before the entry into force of the new (unfavourable) law. The Court noted that ‘new, more severe legislation cannot be applied to an ongoing situation that arose before it came into force’. In rejecting France’s argument (confirmed by the French Court of Cassation) that it was sufficient that the new law was in force before the date of the second offence, the Court held that:

‘It would be pointless to set up an opposition between the two components of recidivism, ... and to take only one into account or minimize the significance of one in relation to the other.’

The Court noted that there was no overlap between (i) the period when the person in question was subject to the ‘old’ 5-year recidivism rule, and (ii) the period when the ‘new’ ten-year recidivism rule applied, *i.e.*, the application of the new legislation restored a legal situation that had ceased to have effect after the expiration of the 5-year limitation period following the first offence.

Conclusion

Even if the Guidelines were to provide the necessary legal basis for the Commission’s application of recidivism as an aggravating circumstance to increase fines, then fines can only be increased on this basis for first infringements committed after the adoption of the Guidelines in 1998. All of the Commission’s decisions to date are based on first infringements committed prior to that date.

³⁹ *Achour v France*, Application no. 67335/01, judgment of 10 November 2004, para 36.

⁴⁰ *Achour v France*, Application no. 67335/01, judgment of 10 November 2004.

4. CAN RECIDIVISM BE PERPETUAL IN NATURE?

4.1. Proportionality and Legal Certainty

Principle of proportionality

It is a fundamental principle of EC law that the means used by the Community must be in proportion to their purpose. Article 5 EC provides that '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'. The principle of proportionality is particularly important in cases which involve the imposition of penalties or sanctions.⁴¹

Legal certainty

All legal systems are based on the principle that the application of the law to a specific situation must be predictable. The principle of non-retroactivity discussed above aims to ensure legal certainty. Time limits and periods of limitation also serve to guarantee legal certainty. In the *Dyestuffs Cases*, the Court of Justice invoked a limitation period as a general principle of law:

‘... the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose fines’.⁴²

4.2. The Commission's Recent Practice

As opposed to the five-year limitation period that applies to the investigation of the actual infringement under the Regulations,⁴³ the Commission's recent practice shows that it does not recognize any period of limitation for recidivism. In other words, the Commission applies recidivism without regard for the time that has elapsed since the previous infringement.

In its 29 September 2004 decision *Brasseries Kronenbourg and Heineken*, the Commission said that:

‘[T]he concept of repeated infringement or recidivism is not subject to any period of limitation. The guidelines do not set any time limit between the previous infringement and the current one. ... Furthermore, since a repeated infringement demonstrates that the penalty previously imposed was not a sufficient deterrent, increasing the fine to take account of a repeated infringement is not disproportionate, even if the earlier decision dates from twenty years previously.’

A review of the case law and Commission decisions shows that the Commission has increased fines based on previous infringements that occurred several decades prior to the second offence. In December 2004, the Commission imposed a 50% fine increase

⁴¹ See HG Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Sixth Edition, Kluwer Law, 2001), para 181.

⁴² Case 48/69 *Imperial Chemical Industries v. Commission*, judgment of July 14, 1972, [1972] ECR 619, para. 49.

⁴³ Regulation 2988/74 and Article 25 of Regulation 1/2003.

on BASF because it had already been fined for cartel activities between 1964 and 1967 and between 1980 and 1984, *i.e.*, conduct committed almost forty years previously.⁴⁴

The basic principles of proportionality and legal certainty arguably require the application by the Commission of a limitation period after which an infringement can no longer lead to the imposition of a fine (or an aggravated fine).⁴⁵

This would be in line with Member State laws described above.

Legal certainty requires that the Commission must act within a reasonable time in adopting decisions.⁴⁶ It should therefore also require some limitation on the Commission's consideration of previous infringements when calculating fines.

Although the conditions for applying recidivism do not arise until the time of the second infringement (and therefore arguably the time limit for the Commission to act would only start to run following the second infringement), the fact that companies have a perpetual life while their managers and owners change, and that recidivism can apply based on previous infringements in other geographic markets which may have concerned different products sold by the same undertaking, makes it very difficult for companies to understand the implications of their illegal behaviour with any certainty if recidivism applies perpetually. An infringement of the EC competition rules at any point back in time, anywhere in the world, with respect to any product market, by any entity within the same economic unit could potentially lead to an increased fine.

Arguably, there is even less legal certainty now that competition authorities and courts in 25 Member States have parallel competence to enforce the competition rules of the EC Treaty, including increasing fines for repeat offenders based on recidivism. Member State authorities and courts may decide to respect the limitation periods applicable under national law also when imposing fines based on Articles 81 and 82 EC, but then the argument could be made that they are not giving full effect to EC law. It is clear that at least some authorities contemplate applying recidivism as an aggravated circumstance in cases where the previous infringement was sanctioned by another authority in a different Member State. For example, in Sweden, there is a pending proposal to change the Competition Act to provide that fines can be increased under

⁴⁴ Case No. COMP/E-2/37.533 – *Choline Chloride*, Commission Decision of 9 December 2004, Summary of Decision: OJ 2005, L190/22, published at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37533/en.pdf> and Case IV/26.267 – *Matières colorantes*, op cit, n 12 (article 1); Case IV/31.865 – *PVC*, op cit, n 13, para. 54. BASF brought an action against the decision (see OJ 2005, C115/28) submitting among other things that the 50% increase of the fine for recidivism based on infringements that happened almost 40 and 20 years ago is contrary to the principle of legal certainty and the principle of proportionality.

⁴⁵ Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, OJ 1974, L319/1 and Article 25 of Regulation 1/2003. See also *Ford Agricultural* OJ 1993, L20/1, ¶22 where the Commission did not impose fines because a period of six years had elapsed since the infringement: 'The Commission takes into account that the greater bulk of the infringements that have been established relate to a period six or more years ago', and for this and other reasons no fine was imposed.

⁴⁶ Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission*, judgment of 22 October 1997 [1997] ECR II-1739, 'It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy.'

the Act not only based on previous infringements of the Act but also based on previous infringements of Articles 81 and 82 EC. The rationale for this proposed change is that infringements sanctioned in other EU jurisdictions should also be taken into account for recidivism purposes.⁴⁷

The perpetual nature of recidivism seems clearly disproportional when compared to even the most serious crimes under national law which are typically subject to a limitation period for repeat offences and which moreover concern natural persons who do not – as opposed to undertakings – have a perpetual life. The longer the limitation period, the harsher the penalty for “recidivism”. A recidivism policy which equates EC competition law infringements with the most serious crimes cannot be proportional.

The absence of any limitation period for recidivism in competition law cases moreover results in an absurdity. Because of the existence of a five-year limitation period for imposing fines,⁴⁸ a company cannot be fined for an infringement committed more than five years ago. However, a company's fine can be and has been increased because of an infringement committed almost 50 years ago.

5. CONCLUSIONS

Under the Commission's recidivism policy, any company or group of companies which have ever infringed Articles 81 or 82 EC are regarded as guilty of a 'repeated infringement' for an infinite number of years irrespective of the sector or geographic market where the infringement took place. It is questionable whether this policy has a sufficient legal basis in the Regulations and whether it complies with the principles of proportionality and legal certainty.

The fundamental principles of *nulla poena sine lege* and legal certainty may require a clear and unambiguous legal basis for recidivism at the time of the first offence and the imposition of a period of limitation between the first and second offence. This is confirmed by the fact that Member State laws respect these principles by providing for such clear legal basis and limitation periods.

The recent modernization and decentralization of EC competition law raises additional issues and requires a clear legal basis and practice for applying recidivism. Not only the Commission but also national competition authorities and courts are imposing fines based on infringements of Articles 81 and 82 EC. It is not completely clear, for example, in what circumstances and to what extent the Commission or the authorities of a Member State would consider a fine imposed in another Member State for recidivism purposes.

⁴⁷ SOU 2004:10, at 11.1, p 159.

⁴⁸ Regulation 2988/74 and Article 25 of Regulation 1/2003.