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Antitrust Fines – Seeking Justice

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In this paper, I propose that the methodology for assessing fines provided in the 2006 European Commission's fining guidelines should be amended. This is because the methodology is not fair. The grounds for alleging unfairness are as follows: (i) the variable mark-up is arbitrary; (ii) the guidelines fail to treat different violations differently as object and effect-based infringements are assessed through the same methodology; (iii) the methodology itself is not methodical in the sense that it fails to separate the disgorgement/compensation goal from retribution and deterrence. Hence there is a call for fairer guidelines. The fairness that is herein proposed requires that the guidelines be better formalised. This naturally comes with the attendant effect of ensuring legal clarity. It is also likely to contain the Commission's discretion. In addition to these typical advantages, I advocate fair fining guidelines on two grounds. The first reason is that such fair guidelines could aid in attaining optimality. I make this argument by linking fairness to legitimacy and legitimacy to constitutional economics which is then expressed in the light of Pareto. Even if I am wrong on the first ground, my second argument is that the fair guidelines should be applied because justice (as fairness) is a value worth seeking in itself. Aside from its intrinsic value, it does have a distinct benefit of bolstering a 'more economic approach' in antitrust fining policy. Moreover, in this specific context, the advantages of the fair guidelines far outweighs the rather (likely minimal if at all) negative welfare effect.

INTRODUCTION

The imposition of fines remains a key tool to antitrust enforcers in their quest to attain their objectives. Thus, as a result of its importance, the European Commission continues to surpass itself by increasing the amount of antitrust fines at an exponential rate.¹ In principle, these fines are meant to suppress illegal activities and to prevent recidivism.² However, antitrust enforcers should not limit their concerns to these goals as they have to be concerned about legal issues as well. Thus, claims that have continuously plagued the Commission's practice relate to justice and fairness concerns.

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¹ Increases are acceptable as can be inferred from the case of *Mustique Diffusion Francaise v Commission* [1983] ECR 1825, para 15. Since the mid 1990's the average fine has been on the increase see Iwan Bos and Marten Schinkel, 'On the Scope for the European Commission's 2006 Fining Guidelines under the Legal Fine Maximum' *Amsterdam Center for Law & Economics Working Paper No. 2006-13* pg 2.

² See *Zinc Phosphate Case C-76/06 P Britannia Alloys v Commission* [2007] ECR 1-4405, para 22; *Graphite electrodes Case C-289/04 P Showa Denko v Commission* [2006] ECR 1-5859, para 16. See also Damien Geradin and David Henry, 'The EC Fining Policy for Violation of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgements' *03/05 Global Competition Law Centre Working Paper Series*, College of Europe, pg 1.

While most of such concerns have been on procedural justice³ and proportionality, I herein focus on form-based justice issues arising from the 2006 guidelines. My claim thus is that the guidelines could be fairer than they presently are, therefore there is a need for ‘fair guidelines’.

To substantiate this claim, it is imperative to ascertain the fairness issues arising from the 2006 guidelines and to distinguish the claim herein made from other fairness notions such as proportional justice. The present guidelines are not as fair because, regarding the methodology for ascertaining the basic fine, the limit of the variable mark-up is arbitrary. Also, it fails to treat different violations differently⁴ as fines for object and effect-based infringements are computed through the same methodology. Finally, the methodology itself is not methodical in the sense that it fails to separate the disgorgement/compensation goal from retribution and deterrence. The fairness concerns arising from these problems are thus largely formal and, as such, different from proportional justice claims.

Issues on the proportionality of antitrust fines are primary centred on the volume of fine. Thus where fines are very high, genuine questions could be asked.⁵ The fairness argument made here however is not directly linked to the proportionality argument because while the latter is a product of the retributive theory of justice⁶ the former has no link with either of the retributive, deterrence or efficiency theories. Also, while the proportionality of fines is assessed in the light of the total fine imposed, the fairness or unfairness assessed herein is about the form of the guidelines rather than the fines themselves.

³ See e.g. Adrianna Andreangeli, *EU Competition Enforcement and Human Rights* (Cheltenham, Edward Elgar Publishing, 2008). Donald Slater, Sébastien Thomas and Denis Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’, *Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08*, accessible at <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf> (‘GCLC Working Paper’), also (2009) 5 *European Competition Journal* 97, and A Andreangeli, O Brouwer, D De Feydeau, Ian Forrester, Damien Geradin, Assimakis Komninos, Karl Hofstetter, Yannis Katsoulacos, Christophe Lemaire, Mathew O'Regan, Luis Ortiz Blanco, Donald Slater Sébastien Thomas, David Ulph, Dennis Waelbroeck and Ute Zinsmeister, ‘Enforcement by the Commission – The decisional and enforcement structure in antitrust cases and the Commission’s fining system’, draft report presented at the Fifth Annual Conference of the Global Competition Law Centre, 11-12 June 2009, <http://www.coleurope.eu/template.asp?pagename=gclcfifthannual> (‘GCLC Report’); see also International Chamber of Commerce, ‘The fining policy of the European Commission in competition cases’, ICC Document No. 225/659 of 2 July 2009. Karl Hofstetter, ‘EU Cartel Fining Law and Policies in Urgent Need of Reform’ (2009) 2 *The Antitrust Chronicle*. Contra Wouter Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention of Human Rights’ (2010) 33 *World Competition* pgs 5-29.

⁴ See joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission* [2001] ECR II-3765 para 237.

⁵ See John Rawls, ‘Two Concepts of Rules’ (1955) 64 *Philosophical Review* pg 3 at 4-5. This is the more so important considering the provision of Article 49(3) of the Charter of Fundamental Rights of the European Union which requires that the severity of penalty must not be disproportionate to the offence.

⁶ See Wouter Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford and Portland, Hart Publishing, 2008) pg 64.

The fair guidelines provide details on how the fines should be computed – there should be the point at which the calculated fine is strictly a question of the impact of the anti-competitive practice. Where there is no such impact it should clearly state the method for assessing fine. It should then show the point at which the Commission exercises its discretion in order to punish and deter present or future violators. This formalism has a great advantage of ensuring clarity while it will also contain the ambit of Commission’s discretionary powers.

Aside from the hitherto mentioned advantages, the fairness that emanates from the proposed guidelines has two values. First, fairness boosts legitimacy which could consequently help in achieving optimality. Second, fairness as a virtue in itself has the advantage of encouraging a ‘more economic approach’ to the fining policy. In general, the proposal herein made does not impinge on the primary goals of fine and does not create significant obstacles to welfare.

In order to expound on my proposal, I divide this paper into five parts. In part 1, I identify some problems in the past and present guidelines then give a brief overview of how the problems could be corrected. In part 2, I substantiate my claim that fairness has the value of enhancing legitimacy while the legitimacy of the fair guidelines could serve as a key towards optimality of fines. In part 3, I establish the value of fairness in itself and also show the benefit of ‘a more economic approach’ which even though is not related to the notion of fairness, should be welcome as it accords with the Commission’s present effort at promoting economic analysis. In part 4, I give more details on how the fair guidelines are to operate while in part 5, I conclude accordingly.

1. ADVANCING THE FINING GUIDELINES – THE PAST, PRESENT AND FUTURE

So far, the problems of the fining guidelines have been stated clearly. The nature of the recommendation however requires that we are more specific. It is also important to show how the fair guidelines will make the fining regime better. These tasks will be easier once a brief historical account of these related problems are identified.

1.1. The Past

Fines imposed by the Commission in the primordial days of antitrust enforcement were ferociously challenged on grounds of justice.⁷ The Commission thus had to review its practice and, as a result, came up with the 1998 guidelines which substantially addressed earlier concerns. The improvements notwithstanding, there were still vivid flaws in the methodology of computing fines and the effect of such fines. For instance, the guidelines was criticised for failing to relate the methodology to economics⁸ as neither the individual assessment nor the proxy employed were ‘explicitly linked to a

⁷ In the earlier times, arguments were that fines were decided arbitrarily which made it a standard practice for undertakings to challenge the Commission on the fine imposed. Also, there was no precise methodology which rendered the system abysmally unclear.

⁸ See Geradin and Henry, above n 2, pp 13-15.

quantitative measure of the effect of the infringement'.⁹ In *District Heating Pipes*¹⁰ the court stated that the guidelines operated like a tariff-based system. Commentators were unequivocal about their disapproval and very uncompromising in their complaints. Joshua and Camesasca for instance stated that:

‘Companies charged with antitrust violations in the EC are kept guessing up until the moment when the Commission issues its final decision, and while it is usually (but not always) easy enough to follow the steps in the Commission’s calculation, the crucial initial figure chosen as the starting point for the whole exercise is largely discretionary’.¹¹

It has been shown that part of the reasons why the 1998 guidelines was changed was because it did not relate the infringement to the methodology and the starting point was arbitrary.

1.2. The Present

In the implementation of its duty to pursue a general policy and to steer the conduct of undertakings in the light of such policy,¹² the Commission through its 2006 guidelines was of the opinion that its objectives are best achieved where the total fine it imposes is a combination of the basic fine, the necessary multiplier depending on: years of violation; the gravity of the violation and; the need for deterrence.¹³ Aside it deterrence drive, the Commission is also interested in ensuring that the guidelines are less arbitrary/discretionary and more methodical and reasoned. It sought to achieve this by providing a two-step methodology for assessing fines. First, the Commission ascertains the basic fine. Second, it may adjust the sum of the basic fine upward or downward.¹⁴

The basic fine is determined with reference to the value of sales of goods and services.¹⁵ This requires two tasks first of which is to calculate the value of sales to which the infringement directly or indirectly relates¹⁶ while the second task requires that the Commission determines the basic amount of the fine with regard to a proportion of

⁹ Enrico Camilli, ‘Optimal Fines in Cartel Cases and the Actual EC Fining Policy’ (2006) 29 *World Competition* 592-593. Also Ingeborg Simmonsson, *Legitimacy in EU Cartel Control* (Oxford and Portland, Hart Publishing, 2010) pg 296.

¹⁰ Joined Cases C-189/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para 225.

¹¹ See Julian Joshua and Peter Camesasca, ‘EC Fining Policy against Cartels after the Lysine Rulings: The Subtle Secrets of X’ (2004) 5 *Global Competition*.

¹² European Commission’s Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) para 4 (hereinafter referred to as ‘2006 guidelines’). The Commission referred to the case of *P Dansk Rørindustri & ors v Commission* above 10 para 170.

¹³ As distinct from the 1998 guidelines which was primarily retributive.

¹⁴ The fairness issue addressed in this paper lies in the assessment of the basic fine thus, the second methodology will not be discussed any further.

¹⁵ 2006 guidelines para 5.

¹⁶ *Ibid* para 13-18.

the value of sale, depending on the gravity of the infringement,¹⁷ multiplied by the number of years of infringement.

Further on the second task, the proxy for assessing the fine will be set at a level of up to 30 percent of the value of sales.¹⁸ Whether the proxy in a particular case will be at the upper or lower end of the variable mark-up depends on various factors such as: the nature of the infringement; the combined market share of all the undertakings concerned; the geographical scope of the infringement; and whether or not the infringement has been implemented.¹⁹ The sum arrived at here is then to be multiplied by the number of years of violation. Depending on the nature of violation, the sum could, either as a matter of fact²⁰ or at the discretion of the Commission,²¹ be increased by the sum between 15 percent and 25 percent of the value of sales.

Similar to some of the problems identified under the 1998 guidelines, the starting point (the variable mark up) for assessing fines under the 2006 guidelines is rather arbitrary. There is a fundamental absence of reasoned underpinning as the Commission gave no justification (be it theoretical or empirical) for the mark-up. Also, it fails to segment discretion from legal requirement. For instance, if the primary requirement of the variable mark-up is to either disgorge the infringers of their illegal profit or compensate the society for the loss, it is not clear why factors such as the nature of the infringement and whether or not the infringement has been implemented should be considered in determining the proxy in specific cases. Further, the guidelines fail to treat different infringements differently. Under these guidelines, both object-based and effect-based infringements are treated alike when in fact fairness may require that the infringements (even if merely formally)²² should be treated differently. This is contrary to the decision in *Alloy Surcharge* wherein the General Court stated that:

‘the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable

¹⁷ This is to be determined on a cases-by-case basis taking into account the relevant factors of the case. Ibid, para 20.

¹⁸ Hereinafter referred to as ‘variable mark-up’.

¹⁹ 2006 guidelines above n 12 para 22.

²⁰ In cartel cases, it is commonly called ‘entry fee’.

²¹ Application of the gravity mark-up to other infringement other than cartel is at the discretion of the Commission.

²² Argument could be made that the exact proxy to be applied in any particular case could reflect the different. For instance, one of the factors that the Commission considers in order to ascertain whether the proxy should be at the higher end or lower end of the mark-up is to see if the infringement has been implemented. As convincing as this may sound, the fact that it comes as a discretion rather than a legal requirement could raise fairness concerns in individual cases. Moreover, the Commission clearly disclaims that the guidelines should not be regarded as the basis for an automatic and arithmetical calculation method. The procedure should be formally different even if the Commission is to add so much more for deterrence purpose.

situations are treated differently or different situations are treated in the same way'.²³

1.3. The Future

It is argued that the aforementioned concerns emanating from the 2006 guidelines could lead to unfairness. Thus, even though these concerns result from an oversight rather than a calculated attempt, the unfairness is still worth correcting. Hence, the fair guidelines of the future could, for instance, entail a three-step methodology whereby the basic fine will be strictly geared towards linking the violation to the methodology.²⁴ This second step could contain factors that will determine the multiplier for deterrence purpose²⁵ - this multiplier could be further increased based on the gravity of the infringement.²⁶ The third step could contain the provisions in the present guidelines regarding the adjustment of basic fine.²⁷

The primary task here is centred on the basic fine. In order to correct the problems identified in the 2006 guidelines, the first task is to develop a separate methodology for assessing object and effect-based infringement with particular regards to the basic fine. Then within each methodology, the Commission should attempt to, as practically as possible, link the infringement to the methodology. A brief analysis of how it should work is given below.

1.3.1. Economic Reasoning for Infringement by Effect

With regard to infringements by anti-competitive effect, it is imperative to forge a link with economics. This could be by assessing effects either through the loss to society or the gain to the violator. Whichever route we decide to follow, a proper economic assessment would entail the 'but for' test. In *Zinc Phosphate*, it was stated that the 'but for' test requires us to 'take as a reference the competition that would normally exist if there were no infringement'.²⁸ This test, as shown in *Methionine*,²⁹ will be applicable only where all objective conditions on the relevant market are taken into account, including the economic context and legislative background.

Admittedly, we might not be able to arrive at a perfect representation of what the position would be but for the infringement. This is because a hindsight consideration of the slope of the demand curve is almost impossible and in any case disputable. Thus, *practical fairness* demands that the linkage need not be perfect as some margin for error

²³ Above n 4 para 237.

²⁴ Either through effect (loss or gain) or where there is no effect, an assessment scale.

²⁵ i.e. the factors considered in 2006 guidelines above n 12 para 22.

²⁶ i.e. the 15-25 percent 'entry fee'.

²⁷ See 2006 Guidelines above n 12 para 27-35.

²⁸ Above n 2.

²⁹ *Methionine*, Commission decision of 2 July 2002, 2003/674/EC, OJ L/255, 8/10/2003 1-32.

and estimations could be allowed. Moreover, there is support from the jurisprudence of the General Court in *FETICA*³⁰ where it stated that assessment need not be precise.

There are two imperfect but generally acceptable economic methods that can be applied in ascertaining the alternative prices and quantities which invariably link the methodology to the infringement. First is by assessing the market power exercised by the undertakings, or second, by measuring through a comparison of the difference between the price currently met and the alternative price that would come up in the equilibrium if the competitive process was free to operate.³¹

The first method requires the use of statistical model in ascertaining the ‘but for’ price through information obtained from the affected undertakings such as the cost, price and quantity information before and during the time of the infringement. These information are then processed so as to estimate the demand elasticity and the marginal cost and consequently the ‘but-for’ price. The second method merely requires the use of benchmark in determining the alternative price. This approach gives consideration to certain exogenous elements such as price of products in similar sectors in other countries, historical prices or cost.³² It must be stated that though neither of these two options is not without its challenges, preference has been shown towards the benchmarking approach because its reference to exogenous elements could furnish a more realistic view of a real competitive price.³³

For infringements by effect, the mark-up under the fining guideline would commence on the right ground if, for example, it follows the benchmark method for assessing the alternative price.³⁴

1.3.2. Economic Reasoning for Infringement by Object

The need for a separate methodology for assessing object-based infringement cases is primarily because of the clarity and lucidity it affords the regime. This proposal should however not be seen as suggesting that undertakings’ implicated under this head should be treated lightly. Such proposition should be disregarded considering the ills of antitrust violations. Moreover, such statement will be out of line with the spirit in Europe as the General Court rightly stated in *Balloré and ors v Commission* that ‘the fact

³⁰ Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, para 342. It made reference to the Commission’s Twenty First Report on Competition Policy.

³¹ See Camilli, above n 9, pg 11.

³² Nonthika Wehmhöner, ‘Optimal Fining Policies’ Paper presented at the Amsterdam Center for Law and Economics Conference Remedies and Sanctions in Competition Policy, Amsterdam, 17-18 February 2005. [<http://www.kernbureau.uva.nl/acle/object.cfm/objectid=F07DE744-C1D1-4F2E-876EEB31F7FA5B9F>] pg 18 see also Camilli, *ibid*, pg 11.

³³ Camilli *ibid* pg 12.

³⁴ It would also have meant that some of the factors that determine the upward or downward movement within the mark-up cannot be applied.

that an undertaking has derived no profit from the infringement cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect.³⁵

There is however a good base upon which to establish a separate methodology for assessing anti-competitive object infringements. The Court in *Steel Beams*,³⁶ said that factors relating to the intentional aspect of an infringement may be more significant than those relating to the effect, particularly where they are infringements which are intrinsically serious, such as price fixing and market sharing. Though the mentioned case is an example of where an undertaking's behaviour is implicated both by object and effect,³⁷ it still lends itself to possibility of an object-based assessment. Thus, where an undertaking or group of undertakings have not yet put their cynical act into fruition thereby causing no anti-competitive effect, the guidelines may provide for ratios/percentages which should be applied in graduated steps depending on the nature of the violation.

2. THE LEGITIMACY CUM OPTIMALITY VIRTUE

I have shown why the 2006 guidelines may be unfair and how it can be cured by the fair guidelines. However, there is more to the fair guidelines that has been stated in the previous part. The aim in this part is to establish how the fair guidelines could help to reach optimal fines. This is done by drawing on the legitimacy³⁸ (that derives from fairness)³⁹ as a component of Pareto. If subjective considerations are part of the metric of welfare, then the fair guidelines are better than the 2006 guidelines because while the former is likely to meet the legitimacy criterion under Pareto, the latter is unlikely to meet the requirement because of the potential illegitimacy that may result from the relatively unfair guidelines.⁴⁰

In order to make this claim, it is pertinent to state the dominant theories on optimal fines. Thereafter, I consider legitimacy as a component of optimality.

³⁵ Joined Cases T-109/02, etc *Balloré and others v Commission* [2007] ECR II-947.

³⁶ *Steel Beams*, Case C-194/99 *P Thyssen Stahl v Commission* [2003] ECR I-10821, para 118.

³⁷ How the assessment should be done in such instance is discussed in part 4.

³⁸ Legitimacy is defined for the purpose of this exercise as the perceived legality of the system in the eye of the public. In relation to fines, legitimacy refers to both input and output legitimacy. It relates to the questions surrounding the adequacy of data necessary for the computation of an infringement which reflects the violation (input) and the consequence of such fines (output). See Simmonson above n 9 pgs 294-295.

³⁹ See generally Tom Tyler, *Why People Obey the Law* (New Haven, Yale University Press, 1990).

⁴⁰ The 1998 guidelines was criticised for failing on account of both input and output legitimacy because of its retributive stance. The output illegitimacy emanated from the absence of connection between raised fines and the economic value of the market concerned see Simmonson above n 9 pg 297, while the output legitimacy was doubtful based on the vagueness of the terms in the guidelines Geradin and Henry above n 2 pg 12 and the arbitrariness of the proxy see Joshua and Camesasca above n 11. As could be observed from the argument so far, some of the issues that rendered the 1988 guidelines illegitimate are still present in the 2006 guidelines.

2.1. The prominent ideas on optimality of fines

Notwithstanding the fairness concerns hitherto mentioned, antitrust enforcers are still to be assessed on the basis of the optimality of their practice. There are two prominent approaches to determining the optimality of fines - the deterrence approach and the internalisation approach. For the former, a fine will be optimal if it sends across the moral message about the seriousness of the violation.⁴¹ The manner through which this effect is achieved is not as relevant so long as the message is achieved.⁴² On the other hand, the internalisation approach, based on the Chicago school, regard an optimal fine as an efficient one. Efficiency thus requires that fine be determined through the harm caused.⁴³

2.1.1. Deterrence approach

Under the deterrence approach, an enforcement mechanism is optimal where it creates a credible threat of penalty which weighs sufficiently in the balance of expected costs and benefits to deter calculating undertakings from committing antitrust violations. In relation to fines, such measure will be optimal:

‘if and only if, from the perspective of the company contemplating whether or not to commit a violation the expected fine exceeds the expected gain from the violation’.⁴⁴

The value of the expected fine within this approach is the total fine divided by the probability of detection. Because the probability of detection is unlikely to be one, it is acceptable to factor in the probability of detection into the total sum especially where the harm from the infringement exceeds the illegal gain obtained by offender. The optimal sanctioning system thus require that penalties have to maximise deterrence without incurring inefficiency cost.⁴⁵

2.1.2. Internalisation approach

Under the internalisation approach, the premise for assessing optimal fines should be the net loss to persons other than the offender. After the multiplier has been applied to reach the optimal fine, the offender internalises all the costs and benefits of the violation, thus leading the offender to commit an ‘efficient breach’ where the total

⁴¹ Wils, above n 6 pgs 49-75.

⁴² Clear examples are *Ballore* above n 35 and *Steal Beam* above n 36.

⁴³ See Gary Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76(2) *Journal of Political Economy* 169; William Landes, ‘Optimal sanctions for Antitrust Violations’ (1983) 50 *University of Chicago Law Review* 652. As the 2006 guideline is based on the deterrence approach, reference to the internalisation approach will be merely theoretical.

⁴⁴ Wils above n 6 pg 56.

⁴⁵ Nadia Calvino, ‘Deterrent Effect and Proportionality of Fines’, in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition law Annual: Enforcement of Prohibition of Cartels* (Oxford and Portland Oregon, Hart Publishing, 2007) pg 320.

benefits exceed the total cost. On the other hand, such fines will deter ‘inefficient breaches’ if the total costs exceed the total benefits.⁴⁶

In effect, a fine is optimal where it is proportional to the harm and as such does not induce undertakings to forego behaviour that increases surplus. In order to attain the balance required, Posner states that:

‘The penalty for an antitrust violation should be calculated to impose on the violator a cost, whether in pecuniary or non-pecuniary terms, equal to the cost that his violation imposed on the society. This criterion is not derived from notions of symmetry or from the biblical notion of an eye for an eye. It is a criterion of efficiency.’⁴⁷

Thus they argue that the harm-based approach is optimal because, rather than deterring efficient breaches, it only deters inefficient breaches.

2.2. Legitimacy and optimality

In principle, the fair guidelines are not meant to impair the tasks of antitrust enforcers who are motivated by either of the two dominant approaches. In fact, the fair guidelines could complement these approaches. For instance, Wils states that the calculation of fines should commence with an amount equal to the violator’s expected gain.⁴⁸ This sounds fair even within the proposed guidelines particularly in relation to assessment of effect-based infringements. More importantly, the fair guidelines are unlikely to impede the dominant approaches because they are largely formal. It merely proposed that the guidelines should have a three-step methodology whereby we only specify the contents of the first step (basic fine). As such, there is still the latitude for the Commission to strengthen the latter two steps in order to achieve its enforcement goals.⁴⁹

Regardless of the possible synergies and complementarities, it is very possible that the fair guidelines may be at variance with what may be considered to be the optimal fine under either of the approaches.⁵⁰ On the other hand, the dominant approaches might not adequately reflect the optimality of their fines if fairness (legitimacy) is supposed to be a component of their optimality assessment. Accordingly, these approaches appear to portend a major problem since optimality is a constant end-state enforcers seek. I argue for legitimacy as a criterion of Pareto. From this premise, since the fair guidelines do not disparage the deterrence objective while the deterrence-propelled 2006 guidelines fail on fairness grounds, the former should be preferred because it represents a better measure of optimality.

⁴⁶ Becker, above n 43; Landes, above n 43.

⁴⁷ Richard Posner, *Antitrust law* (Chicago, University of Chicago Press, 2001) pg 267.

⁴⁸ Wils above n 6.

⁴⁹ Under both the object based and the effect-based aspects.

⁵⁰ For instance, where cost savings and administrative convenience are lost.

In Europe, the legitimate guidelines could attain the status of a Pareto criterion either because people value fairness enough that they subjectively assess it as welfare-enhancing (aesthetics) or because of the possible consequence it could have on the Internal Market as a whole.

In order to establish this claim, first, I show that Pareto, the primary vessel for assessing optimality, is a broad enough theory.⁵¹ Afterwards, I establish how legitimacy may fit into Pareto. Here I argue that the legitimacy of antitrust fines may be sought either for aesthetical purposes or for the positive consequence that derives from it. I however show the weakness of this argument through the Kaldor-Hicks theory.

2.2.1. Broadness of Optimality Criterion

With regards to fines, the interactions between efficiency theorist, deterrent theorist and legitimacy view are somewhat paradoxical - they are intertwined yet polarised. Efficiency and deterrence are intertwined in that they can fashion a role for deterrence but polarised in that they understand optimality in different ways. Efficiency and legitimacy are intertwined in that they both appreciate a harm-based method of assessing the basic fine but polarised in the sense that efficiency denies the need for notions such as legitimacy and fairness as an integral part of optimality. The deterrence and legitimacy view herein proposed are intertwined in the sense that the fair guidelines still consider deterrence to be primary and the deterrence theorists should have no arguments against the fair guidelines as long as the deterrence objective is achieved. They are however polarised in the sense that though deterrence theorists could possibly appreciate the logic behind differentiating object-based from effect-based ones, they might not be persuaded to alter the regime merely for fairness sake. Also, regarding effect-based infringements, though they might recognise the linking of the methodology for assessing the basic fine to the infringement as ideal in a perfect regulatory world, nonetheless, they do not consider it an important optimality criterion.

The notion of Pareto optimality means that laws and policies would be optimal where they make the society better off while making nobody worse off. In recent times, the most prominent underlying theories about optimality are that of the efficiency theorists who effectively link Pareto strictly to efficiency. The genesis is the celebrated work of Posner wherein he severed the connection between the economic analysis of the law and utilitarianism as the latter could not give an adequate metric of social welfare.

Posner's theoretical breakthrough shifted the metric for assessing optimality of social welfare. Thus, instead of ascertaining the utility of individuals' by seeking their consent (an impossible task indeed), he proposes that the metric should be the 'value' of people's preferences with their willingness to pay to have them satisfied. Thus '[u]nlike the utility of satisfying preferences which will remain imponderable forever, the value of satisfying them has the notable advantage of being measurable in money. Wealth

⁵¹ This requires elucidation of the efficiency theory. The reference to the theory is merely to show the broadness of Pareto. The conclusion is however vital to my claim that optimality sought by the deterrence approach could include factors other than the need to send a moral message to dissuade antitrust violators.

(the total value of satisfied preferences) thus replaces utility for Posner as the quantity that actions, policies and laws must maximize.⁵² Wealth maximisation is thus the theory that addresses Pareto strictly in the light of Coase⁵³ because to recognise any other will render the system unintelligible.

In order to show that Pareto has a broader ambit, Fletcher's criticism of the efficiency theory is instructive. He argued that the theory is wrong for regarding value as the sole metric for optimality. This claim was substantiated through an insightful analogy of the smoker and non-smoker⁵⁴ as against Coase's farmer and rancher analogy.

Fletcher commenced from the definition of rationality. He asserted that under both Coase and Pareto, to act rationally is to maximise individual utility.⁵⁵ However, Fletcher argued that the definition of rationality under Pareto standards are not necessarily defined through the Coasian theory which views rationality in terms of individuals' preference for profit maximisation, cost savings, welfare surplus etc. Acknowledging Fletcher's argument, Coleman states that there is nothing in or emanating from the Coasian theory that limits the farmer and the rancher's willingness to bid to their interest in maximising profit. This means that it is possible that the farmer could as well be willing to pay more than the market cost of the expected corn damage just to avoid any other 'ugly' cow in the neighbourhood.⁵⁶ In such instance, 'his utility will be a function both of his desire to profit and to live in an aesthetically pleasing

⁵² James MacDonald and Caryn Beck-Dudley, 'Are Deontology and Teleology Mutually Exclusive?' (1994) 13 *Journal of Business Ethics* 615.

⁵³ Coase argued that the problem with entitlement does not lie in the cost implication of the infringers action on another party. Rather, it is the conflict in demand for the use of resources. This conflict, he argues, should be resolved by reference to which of the two conflicting uses has the greater social value. Expounding on this through the rancher-farmer analogy, Coase argued that if a rancher and farmer have different interest in a particular land – the rancher wants the land to allow the cattle to stray while the farmer wants it free from the cattle so that the crop can grow. This problem is not to be solved by reference to who had pre-existing rights but by ascertaining which of the two uses has greater value. See Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* pg 1. Applied to the issue at hand, the interest of antitrust enforcers and that of violating undertakings can be understood as conflicting uses of the market. This can be solved by a bargain between the two parties on the basis of efficiency. Based on Coase and subsequently Posner's theory of wealth maximisation, an equilibrium bargain (Pareto efficient) for the use of the market should not be solely dictated by the antitrust enforcers' intent (either to deter, punish or for fairness sake) but by striving at efficiency regardless of who internalises the cost. This explains the institutionalisation approach as against the deterrence approach. The task here however is to show that Pareto is not limited either to efficiency or pre-existing institutional interest (i.e. deterrence) but includes normative interests such as legitimacy.

⁵⁴ Fletcher showed that the requirement for optimality may include normative interests through his insightful smoker and non-smoker analogy. He argues that while in the rancher-farmer case, both parties bid against each other on the basis of price, the bargain between a smoker and non-smoker is based on individual preferences which equally expresses the general principle that to act rationally is to maximise individual utility. See Jules Coleman, *Market Morals and the Law* (New York, Oxford University Press, 2003) pg 73.

⁵⁵ *Ibid.* This could also explain the rationality of deterrence as an objective.

⁵⁶ *Ibid.*

environment.⁵⁷ In effect, the efficiencies deriving from Coase are but a subset of definition of rationality in the Paretian sense.

The gap identified above seems a credible inroad to argue that considerations that either go beyond or exclude institutional efficiency could be required in ascertaining the optimality of policies. It can also be the base upon which legitimacy and fairness can be brought into the deterrence approach. Thus, if we say that rational agents aiming at optimal deterrence impose fines because they believe it helps in avoiding the negative impact of antitrust violation, they could be equally interested in measuring the fairness of their practice as a component of welfare either because they value fairness in itself (aesthetics) or because they feel that fairness helps to avoid tangible welfare losses that may arise from unfair guidelines. In such instance, the question of optimality cannot be answered solely through deterrence but must also include fairness/legitimacy considerations.

2.2.2. Legitimacy as Components of Optimal Antitrust Fines

To establish a broad scope for the optimality of antitrust fines, we have to proceed on the understanding that in assessing whether such fines are optimal, we take into account issues beyond the confines of competition law. This argument, if made through constitutional economics, will have a strong theoretical grounding through the ordoliberal ideology which has great influence in Europe.⁵⁸ It is however not enough to identify the wholesomeness of the Union's goals. It needs to be shown how fairness factors in with Pareto.

The common agreement theory in Buchanan's constitutional economics provides that the network of rules constituting an institution are justified because they are freely consented to and that particular institutional events, in the form of actions, policies and decisions, are justified because they are required by rules that are consented to. It is believed within this theory that policies, market transactions or political decisions etc can be given content or meaning only within an institutional framework.⁵⁹ In the justificatory exercise, one should not address a rule in isolation. Rather, the network of rules should be considered since it is what 'gives it life and substance'.⁶⁰ Even though desirable end-states such as utility and welfare have a role to play in this consent theory, they are merely derivative of the main measure which is the level of acceptance that the set of rules enjoy within a given community. As such, welfare or utility will only be relevant to the extent that they figure in the evaluation of institutions.

⁵⁷ Ibid.

⁵⁸ Although it has been used mostly in the context of substantive antitrust, collectiveness of will and fairness has always been argued to be an integral part of competition law. See e.g. Commission Report on Competition Policy 1979, paras 9, 10; Commission Report on Competition Policy 1985 para 11.

⁵⁹ Coleman, above n 54, pg 135.

⁶⁰ Ibid.

Interpreting Buchanan's thesis, one could start from the premise that an efficient policy is that which achieves optimal welfare. Thus since rational individuals expect to promote their welfare, their consent to a policy presupposes that they have done so on the basis that it will promote their expected welfare.⁶¹ Hence, '[i]f everyone agrees to abide by a rule, then each person believes that adhering to that rule will be to his advantage. Where everyone is better off by a rule, it is efficient.'⁶²

From the foregoing, it does appear that under the constitutional economic, Pareto optimality is determined strictly by the level of consent given by individuals as this consent implies that the policy makes them better off. If this were to be the case, a prima facie conclusion would be that where anyone or a group dissent due to perceived illegality or injustice emanating from a particular measure, the agreement (the sole source of optimality) breaks down hence the enforcement regime becomes sub-optimal. Applied to the present context, though there is a common agreement for antitrust enforcement on the basis of deterrence, an illegitimate fining regime will render the enforcement sub-optimal. This will mean that legitimacy takes a prime position in Pareto analysis so that every component is measured by reference to it. It is however imperative that the argument is not understood in this way as it will be at best too simplistic and unrealistic and we will end up committing 'the fallacy of building efficiency into consent'.⁶³ This observation nonetheless, the theory of institutedness⁶⁴ implies that fairness as a non-consequentialist ideal could together with deterrence be the required components of optimality.

Conceiving fairness in consequentialist terms, the relationship between consent and optimality can be broadened so that it relates to Europe's economic goals. Thus, even though the issue of antitrust fines is a matter of competition policy, we should not access its optimality strictly through competition law as it is just one out of numerous other policies that are required for an effective functioning of the Internal Market.⁶⁵

Moving on with the justificatory exercise, it could be said that it is the link between welfare and justice that makes individuals either consent or question the legitimacy of

⁶¹ As a premise, it need be stated that the antitrust enforcement regime as a whole is a product of common agreement between European citizens. An easy assumption that could be drawn from such agreement is that individuals' would only have consented because they expect to be better off with it while leaving no one worse off.

⁶² Coleman above n 54 pg 135.

⁶³ Ibid.

⁶⁴ The sociological theory of institutedness was formulated by Polanyi. He stated that '[t]he human economy ... is embedded and enmeshed in institutions, economic and noneconomic. The inclusion of the noneconomic is vital. For religion or government may be as important for the structure and functioning of the economy as monetary institutions or the availability of tools and machines themselves that lighten the toil of labor' see Karl Polanyi, Conrad Arensberg, and Harry Pearson (eds), *Trade and Market in the Early Empires; Economies in History and Theory* (New York, Free Press, 1957) pg 34.

⁶⁵ Moreover, the intentional omission of competition goal from the Lisbon Treaty further buttresses the claim that we have to look more broadly. This premise finds teeth in the constitutional economic theory which requires that we consider a network of rules and not a rule in isolation.

antitrust policies. As such, it is not inconceivable that an overzealous drive to achieve antitrust goals either in substance or in enforcement might itself be counter-productive to the proper functioning of the Internal Market. For instance, negative welfare effects could arise from antitrust enforcers' failure to comply with the rule of law or fundamental rights in formulating or implementing its guidelines.

In the specific context of this paper, owing to law and psychology theories which argue that people support measures taken by legal authorities only where such measures produce positive outcome for them,⁶⁶ it can be said that a perception of welfare loss (through, for example, an undertaking's decision to 'pack up shop' from Europe) arising as a result of unfair guidelines could raise real legitimacy concerns. The perception of loss is even rife in Europe as there is the risk that mere psychological feeling of unfairness may make less and less people believe in Europe as an entity.

It would not take much to ignite the machinery of doubts into the European framework considering the fact that the legitimacy of the institution and its practice as a whole remain contested to date. This is more reason why the relevant authorities should not only avoid complicity but must also be seen to exercise extra care because of the sensitive nature of their duties. This however does not mean that the Commission should avoid all possible dissatisfactions as this would suggest that they are to be measured on the threshold of infallibility.

With regards to the standard of care placed on the Commission, it is contended that it might (perhaps inadvertently so) give room to a well grounded, deep seated suspicion which invariably could have a knock-on effect on the optimality of its fines.⁶⁷ In any case, the most indicative will be a suspicion that the Commission's 'mind' is coloured in dogma, incompetence or bias - the Commission's failure to provide a theoretically nourished base for its guidelines and its evasiveness in this regard together with some other 'slow burners' may engender a climate of dissatisfaction towards it and consequently competition law in general. For example, (no matter how far-fetched it may sound) it could be a ground for arguing that the Commission, rather than striving for robustness and detail in its fining practice, is more preoccupied with generating revenue for the Union. If this is the case, violators (or even the public) are entitled to suspect that they might not be getting fair treatment after all and thus regard such fines to be sub-optimal.

2.2.3. The Kaldor-Hicks Debacle

Even though an attempt has been made to fit fairness/justice and the resulting legitimacy question within the Pareto ranks, it will be unwise to ignore the likelihood that a Kaldor-Hicks efficiency claim may weaken the argument so far made.

⁶⁶ Tyler, above n 39 pgs 72-73.

⁶⁷ Both in the amount of fine and the methodology. It is even possible that subconsciously most people will disagree with the amount of the fine because they do not appreciate the method. As such, though the amount of fine is not the point of discussion here, it is likely that claims against the fine could succeed merely by casting substantial doubt on the Commission's discretion.

A typical criticism of Pareto is that it is impossible to formulate a policy that makes everyone better off without making anyone worse off. It is even the more unlikely where it affects a large and diverse population in complicated ways. This is because the ordering of relationships provided by the Pareto criterion is such that numerous states could be Pareto efficient. This criticism means that it cannot be conclusively stated that the legitimacy deriving from the common agreement in the fair guidelines is a component of Pareto.

An argument could thus be made that even if other criteria aside from welfare are to be considered, and even if the common agreement is required, individuals could still favour the present guidelines as against the fair guidelines even though some people are worse off. It can be argued, applying the Kaldor-Hicks efficiency, that despite the fairness trade-off, the deterrence effect and the legitimacy (absent of fairness) of the present guidelines could still attain an optimal status.

Kaldor criterion provides that a measure which has a net effect of making everyone better off but makes some people worse off will still be efficient where the ‘winners’ from the change would compensate the ‘losers’ and still be better off. Further, Hicks criterion provides that optimality will be attained where the ‘losers’ could not afford to bribe the ‘winners’ to prevent/effect the change.

Applied to the present context, it means that fairness and legitimacy are not synonymous. Thus even if legitimacy forms a component of optimal fines, the fair guidelines can be traded-off where the winners (perhaps the consumers and larger populace) perceive the 2006 guidelines as ideal despite the fact that there are losers (i.e. affected undertakings). The requirement that the populace will have to compensate the undertakings is absolutely theoretical. A further requirement is that the undertakings should be unable to influence the populace that such change is required.⁶⁸

There is thus an obvious possibility to reach optimality in constitutional economics outside of fairness. This possibility to some extent undermines the consequentialist value of the fair guidelines. Nevertheless, the possible aesthetic and welfare effect of such fairness is still likely.

3. THE FAIR GUIDELINES - DEONTOLOGICAL JUSTIFICATION

It is argued that antitrust fines should be fair and that fairness should be sought in its own right. To show that the proposed guidelines will be preferred to the present guidelines on the ground of fairness, much weight is placed on the seminal work of Rawls⁶⁹ where he employed a hypothetical model of a situation in which people are to choose the fundamental principles by which basic institutions of their society are to be evaluated and organised. For the purpose of my argument, the important aspect of Rawls postulation is the fact that a fair measure is that which will be chosen by persons

⁶⁸ If they could, perhaps through threats that they will take away their business then legitimacy and fairness will be synonyms hence the Kaldor-Hicks counter-argument would not stand.

⁶⁹ John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972).

who are in an hypothetical Original Position.⁷⁰ Of course, if we do not know the position we hold in a society (antitrust enforcer, consumers, violating undertaking, competitor etc) and we have to make a choice between the present guidelines and the fair guidelines, we would prefer to choose the fair fining guidelines.⁷¹

Moreover, even without the veil of ignorance, there are credible and practical arguments that contrary to this conventional approach to law and economics, people give a broader scope to their bounded self-interest so that even where they will be not be affected by a measure, many still care about both giving and receiving fair treatment in a range of settings.⁷²

Addressing the fairness in the proposed guidelines in its own terms is perhaps a better way to justify this proposition as it affords the independence and practicality lacking in the optimality arguments made in the preceding part.⁷³ The fair guidelines adopted for the sake of fairness comes with a simultaneous (but not constitutive) benefit which is that it encourages a more economic approach in the assessment - the methodical nature of the guidelines, the distinctions and detail required coupled with the flexibility it affords gives a practical example of the economic embeddedness required of the Commission.⁷⁴

This above advantage notwithstanding, one has to be concerned about consequentialist criticism since antitrust enforcement is primary assessed through its effect⁷⁵ which is

⁷⁰ Such person decides fairly because he is covered by the veil of ignorance.

⁷¹ Note however that Rawls' justice as fairness theory has been characterised as consequentialist rather than deontological. See Andrew Halpin, *Rights and Law: Analysis & Theory* (Oxford, Hart Publishing, 1997); Norman Daniels, *Reading Rawls* (Oxford, Blackwell, 1975).

⁷² Mathew Rabin, 'Incorporating Fairness into Game Theory and Economics' (1993) *83 American Economic Review*, pgs 1281-1302; Christine Jolls, 'Behavioural Law and Economics' Yale Law School, Public Law Working Paper No. 130, Yale Law & Economics Research Paper No. 342 Pg 17.

⁷³ For instance, the arguments made as to the optimality of fines under the deterrence/efficiency theories on the one hand and constitutional economics/legitimacy arguments on the other hand can be faulted because of their holistic assumptions on the motivation of law and its subjects. This credible criticism further waters down the justification of the fair guidelines on the basis of optimality. As such, while the former can be faulted for its belief that '[a]ctors ... behave or decide as atoms outside a social context', see Mark Granovetter, 'Economic action and social structure: The problem of embeddedness' (1985) *91 American Journal of Sociology*, pg 481-510 at 487. See also Cass Sunstein David Schkade, Daniel Kahneman, 'Do People Want Optimal Deterrence?' (2000) *29 Journal of Legal Studies* pgs 237-53. The latter could be equally faulted on the ground that it assumes that humans are exhaustively deterministic in building preferences when in fact it has been shown that where their decisions are influenced by end state such as welfare, they are rather stochastic. They do not choose from a preference menu. See Cass Sunstein, 'Introduction', in Cass Sunstein (ed) *Behavioural Law and Economics* (Cambridge, Cambridge University Press, 2000).

⁷⁴ For work on embeddedness in competition law see David Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in Josef Drexl, Laurence Idot and Jöel Monéger, *Economic Theory and Competition Law* (Cheltenham, Edward Elgar, 2009) pgs 20-44.

⁷⁵ Competition Authorities normally assess their performance through the effect. E.g. the Commission provides a report on competition policy on a yearly basis in which it emphasises the its effort in the previous year aimed at making the necessary impact. We however have to take account of the fact that the role of fines in achieving the deterrence effect has been downplayed by the UK Office of Fair Trading (OFT) in its 2007discussion paper titled, 'The deterrent effect of competition enforcement by the OFT', OFT 963.

welfare related. I argue however that fair guidelines are more advantageous as they need not negatively impact on the Commission's deterrence drive. Even if it will require any more cost and/or administrative work, they cannot be significant enough to warrant a trade-off. This conclusion thus has to adequately address the contention that any notion of fairness will lead to a choice that makes everyone worse off.

Kaplow and Shavell⁷⁶ argue that granting importance to any notion of fairness entails a conflict with Pareto as it implies that we are prepared to adopt a legal rule that reduces the well-being of every person in society. To them, the assessment of legal rules based on a notion of fairness will sometimes result in the choice of a legal rule that makes everyone worse off because it influences the selection of legal rules differently from those that would have been chosen if one were exclusively concerned with individuals' well-being. This claim was substantiated by differentiating the effect of fairness in identical and non-identical cases. In the identical cases, they assert that if everyone in society is identically affected by a rule, the consequence would be either that it makes everyone better off or worse off. To them, the position of a welfarist is quite straightforward in the sense that when faced with the two possible effects, he would surely endorse whichever rule that makes everyone better off. As such, a fair measure which diverges from the welfare measure (based on inferential logic) would make everyone worse off. The strength of this argument notwithstanding, the lingering uncertainty on the deterrence effect of antitrust fines⁷⁷ means that the fair guidelines cannot be effectively trounced on the 'identical cases' argument.

Stronger argument could be made against the fair guidelines through Kaplow and Shavell's non-identical cases. The position is that whenever a rule produces winners and losers, such rule cannot be evaluated without at least implicitly balancing the gains and losses that derive from it. This balancing will involve standard welfare economics which, for the purpose of their argument is left unspecified.⁷⁸ Thus, suppose we choose to align to fair guidelines, it will be difficult for anyone to criticise the fine emanating from the guidelines if it sufficiently deters. Its deterrence effect notwithstanding, let us suppose that the fair guidelines and the present guidelines are equally imperfect. Regardless of their imperfections, the 2006 guidelines could be said to make people better off while the fair guidelines will make people worse off simply because the latter is more costly and inconvenient. In such instance, according to Kaplow and Shavell, a person strongly disposed to fairness might prefer to stick to the fair guidelines despite the net welfare effect of the other guidelines. The trade-off under this postulation implies that a fairness proponent would be disposed to choosing rules that makes everyone worse off.

Moreover, welfare is still a value worth seeking even if individuals are motivated by other factors such as justice and fairness.

⁷⁶ See generally Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Massachusetts, Harvard University Press, 2002).

⁷⁷ Theoretically it extremely unlikely that we can assess the optimality of fines see Wils above n 6 pg 73.

⁷⁸ For instance, it could be based on Kaldor-Hicks efficiency or wealth maximisation etc.

Here lie two effects of a deontological application of fairness – a more economic approach versus cost/inconvenience. On the negative effect, it is argued that the time and cost commitment that is required in computing fines under the fair guidelines need not be enormous.⁷⁹ For example, benchmarking could still be applied under the fair guidelines in the effect-based aspect as there is no need for insisting on perfect input data. The convenience that follows from the object-based assessment is even more obvious as the basic fine is to be determined through a scale. Moreover, the advantage of a ‘more economic approach’ (a phrase increasingly dominant in Commission’s vocabulary) appears to outweigh the likely cost increase.

4. THE FAIR GUIDELINES – MORE DETAILS

Assessment of the basic fines under the fair guidelines is highly instance specific – we have object based assessment and effect based assessment. The specific nature of these assessment means that first, we need to be clear on how each aspect should work and second, how to address complicated cases, for example, where object and effect are implicated in a single case and an effect-based assessment will generate far less total fine than an object based assessment and vice-versa.

4.1. Object-based Assessment

The basic fine here is geared towards either punishment or deterrence. In order to ensure its effectiveness, it is better if the mark-up is not fixed as it might be necessary that the methodology reflects the level of severity of the anti-competitive object. Thus, for this purpose, a point-based system may be adopted. If the anti-competitive intent has been in play for a tangible duration, a multiplier reflecting such duration could be included. Some of the factors that could be considered in ascertaining the proxy are the market power of the infringing undertaking, the nature of the infringement, and a rough econometric forecast of the possible effect had the violation been implemented. This analysis could also take the undertakings’ plans into account.

4.2. Effect-based Assessment

Where an infringement has anti-competitive effect, the basic fine must link the infringement to the effect. There are two broad options that could be adopted here. First is to determine the basic fine through an assessment of the illegal gains. Second is to ascertain such basic fine through loss incurred by society as a result of the practice. With regards to gain-based assessment, the basic fine could be structured to disgorge all the illegal gains⁸⁰ through a historic econometric analysis of the undertaking’s activities. Because of the difficulty that may attend such analysis, an empirical study could be embarked upon in order to ascertain the average gain made from different types of infringements. This thus allows for the use of benchmarks. However, the use of ratios

⁷⁹ Details provided on the workings of the fair guidelines below shows that the computation need not be unduly elaborate.

⁸⁰ Wils above n 6 pg 55.

and proxies is not enough to suggest that the fining regime takes seriously the need for linkage as even though benchmarking is used in the 2006 guidelines the link is not evident.

With regards to the harm-based approach, benchmark could also be applied. Assessment could either be based on overcharge or deadweight loss.⁸¹ Deadweight loss is a net loss to social welfare that results because the benefit generated by an action differs from the forgone opportunity cost. It includes a form of inefficiency associated with reduced output⁸² which occurs where equilibrium for goods and services are not Pareto optimal. Usually, it contains both the lost consumer surplus and the lost producer surplus. With regards to the consumers, the deadweight loss is the opposite of what obtains in a perfectly competitive market where the marginal consumer purchases the last unit of a commodity at price equivalent to the marginal cost of producing that unit. Thus, the loss incurred is as a result of market inefficiencies that prevents consumers who would have more marginal benefits than marginal cost from purchasing the unit or empowering consumers who would have more marginal cost than marginal benefits to purchase the unit.

As observed by Leslie, regardless of what one believes to be the goal of competition policy, there seems to be unanimity in the assertion that deadweight loss should be avoided. However, despite the recognition of its importance, the concept has not been adequately theorised let alone meaningfully incorporated into antitrust doctrine.⁸³ As a result, the economic and legal principles inherent in it are far from established.⁸⁴

Such deadweight loss analysis of effect-based infringement could be an ideal exercise for the Commission.⁸⁵ Enforcers should be guided by the understanding that a

⁸¹ Deadweight loss analysis should be preferred because it will cover for the practical difficulty that attends such claims in private actions. Thus even though the Court of Justice had stated in *Manfredi* that private parties can recover both actual loss (*damnum emergens*) and loss of an increase in those assets which would have occurred if the harmful act had not taken place (*lucrum cessans*), (as definition by Advocate General Capotorti in *Ireks-Arkady*), the fact is that the institution of deadweight loss claims by private parties remains an ideal with no parallel in reality. As such, by making violating undertakings pay for the effect caused where if left to private parties, may remain unknown, the system is able to maintain that link whilst also taking the opportunity to show the violating undertakings the evil of their ways.

⁸² Christopher Leslie, 'Antitrust Damages and Deadweight Loss' in Kevin Marshall (ed) *The Economics of Antitrust Injury and Firm Specific Damages* (Arizona, Lawyers & Judges Publishing Company, 2008) pg 4.

⁸³ Ibid, Leslie pg 54.

⁸⁴ William Tye and Stephen Kalos, 'Antitrust Damages and Lost Opportunities' in Kevin Marshall (ed) *ibid* pg 137.

⁸⁵ It is however noteworthy that it has downsides. It could for instance be criticised on the ground that it might lower the deterrence level of fines especially in the light of assertions that deadweight losses caused by anti-competitive practices are small. Even if this were true, it is not enough reason to jettison the idea as multipliers could be included to achieve deterrence. Another potential concern is that deadweight loss analysis are impractical and almost impossible to ascertain. The response is that even with the attendant difficulties, such analysis are well possible since complete accuracy is not a requirement. When faced with this problem, the authorities can find support in the decision of the General Court in *Citric Acid* when addressing the 'but for' that 'consideration of the impact of a cartel on the market necessarily involves recourse to

deadweight loss analysis does not require an accurate result as long as it is reasonable.⁸⁶ As shown by experts, a reasonable assessment of deadweight loss is not an impossible task.⁸⁷ In the analysis, Leslie suggests elements that should be considered. They are: the market value of the violation (QM); the amount of the overcharge; what the market output would have been but for the violation (QC); the price that would have been charged but for the violation; and, the shape of the demand between QM and QC.

Referring to Landes' statement that optimal penalty should equal the net harm to persons other than the offender, Leslie states further that:

[the] list [of elements to be considered in calculating deadweight loss] excludes one obvious factor: the shape of the supply curve. It is not necessary to know the shape of the supply curve between QM and QC because the defendant should not be responsible for paying antitrust damages based on the lower part of the deadweight loss triangle. The deadweight loss triangle is composed of lost consumer surplus and foregone producer surplus. The shape of the bottom part of the triangle need not be defined at all because deadweight loss should not include lost producer surplus. The [undertaking] has already paid for this by not collecting the profits on the sales it decided to forgo.⁸⁸

He argues further that, by not including the producer surplus, the estimation process is easier as the calculation is done as though marginal cost curve were horizontal.

4.3. Complicated Cases

Having separate guidelines could be exploited by undertakings especially where, for example, the assessment of fine for an infringing undertaking under the object-based methodology will be less than that under the effect-based methodology and vice versa. As an illustration, an undertaking could be implicated by both anti-competitive object and effect. It could happen that such undertaking might be required to pay a relatively lower fine if assessed under effect-based methodology simply because the societal loss or illegal gains which determine the mark-up are rather negligible. Problems arise however where such an undertaking would incur a more substantial amount of fine if the object-based methodology is applied, perhaps because of the seriousness of the

assumption' which inevitable means that the Commission could rely on 'reasonable probability', which is not precisely quantifiable.

⁸⁶ Leslie, above n 82, pg 55.

⁸⁷ Jerry Hausman and Whitney Newey, 'Nonparametric Estimation of Exact Consumer Surplus and Deadweight Loss' *MIT-CEEPR 93-014WP* (September 1993) [<http://dspace.mit.edu/bitstream/handle/1721.1/50211/35721008.pdf?sequence=1>]. Also it has been stated that once profit deriving from the infringement has been estimated, the deadweight loss is easy enough to determine if price, quantity and cost under the infringement and under the alternative competitive condition are known and a straight-demand curve is assumed as well as constant cost. Even where the information is not given, it is argued that the deadweight loss can be estimated using the rate of return on sales, computed by dividing accounting profit adjusted from the normal rate of return on capital by revenue, an estimate of the elasticity of demand and the revenue under the infringement. See also Wehmörner, above n 32, pg 19.

⁸⁸ Leslie, above n 82, pg 56.

violation. Though such an undertaking can be assessed under both, the difference in the total fine would give room for preferences which could undermine the fining regime by encouraging corporate decisional tactics and manoeuvring.⁸⁹

In other to avoid such effect, the guidelines should be clear on cases where both object and effect are implicated. A possible provision could set out indicators that would help ascertain whether the guidelines that derives at the higher or lower total fine should be applicable.

5. CONCLUSION

The 2006 guidelines are not hopelessly bad even in the context of fairness. Considering the fact that they are primarily (and rightly so) aimed at deterrence, an uncompromising critique of the guidelines might be too harsh. However, it has been shown that there is room for improvement. More so, the fair guidelines have clear advantages that they bring to the regime. The proposal is further strengthened by the fact that the fair guidelines need not impinge on the primary goal of antitrust fines.

In general, the fair guidelines afford a clearer regime and in line with the rule of law, it contains the ambit of the Commission's discretion. In addition, fairness could help the fining policy to attain optimality while also engendering a more economic approach to the institution of antitrust enforcement.

Fairness in an object-based assessment is valuable in that it treats different violations differently. Also, the fair guidelines limit the liability of infringing undertaking to the extent of its violation through the point-based system. Third, considerations of fairness might result in easily applicable guidelines. Regarding effect-based assessment, fairness will help to enrich the reasoning of regulators and increase the level of sophistication.

Moreover, it should be applied as the negative welfare implications (if any) are likely to be minimal. The fair guidelines need not be extremely costly and time consuming thus there are greater reasons to accept the recommendations herein made.

⁸⁹ On how undertakings could exploit competition rules see Abayomi Al-Ameen, 'Restitutionary Remedies in Competition Law: Bull in a China Shop?' (2009) 32 *World Competition* 327 at 341-345.