Selected Issues Raised by Recent Cartel Fines Decisions

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Introduction

Fines are one of the Commission's main tools for the enforcement of Articles 101 and 102 TFEU. While the Commission's fining policy has evolved over time towards a higher degree of transparency and predictability, as illustrated by the publication of the 1998 and 2006 Guidelines for the setting of fines,[1] certain aspects of the calculation of fines nonetheless remain controversial. This article discusses selected issues raised by recent Commission or Court decisions in respect of cartel fines, in particular as regards (i) the addressees of cartel fines decisions in case of vertically integrated undertakings, (ii) the inclusion of captive sales in the basic value of sales for the calculation of fines on cartel participants, (iii) the EU Courts' full jurisdiction with respect to cartel fines decisions, and (iv) the policy issues raised by this jurisdiction, in particular regarding the proportionality principle.

The addressees of cartel fines decisions in case of vertically integrated undertakings

According to settled case-law, where a parent company and its subsidiary form a single economic unit and therefore a single undertaking for the purposes of Article 101 TFEU, the Commission may address a decision imposing a fine to the parent company without having to establish its actual involvement in the infringement.[2] In order to be able to impute the conduct of a subsidiary to the parent company, the Commission must find that (i) the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, and (ii) the parent company actually exercised that decisive influence. In the case of a wholly-owned subsidiary, the Court considers that the parent company is able to exercise decisive influence over the conduct of its subsidiary, and there is a rebuttable presumption that the parent company does in fact exercise such influence.[3] Even if this presumption is rebuttable, both the Commission and the EU Courts have made it clear that it is in practice extremely difficult for parent companies to escape liability for the conduct of their wholly-owned subsidiaries.[4]

In the case of joint ventures the Court in *Avebe* had already acknowledged that two parent companies may be liable for the conduct of their 50-50 joint venture, but this case

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1 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, [1998] OJ C 9/3 ("1998 Guidelines"); and Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/2 ("2006 Guidelines").

2 Case C-97/08 P, *Akzo Nobel and Others v Commission* [2009] ECR I-8237, para 59.

3 See e.g. Joined Cases C-628/10 P and C-14/11 P, *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others* [2012] ECR I-0000, para 46.

4 Although this did not concern a case of a wholly-owned subsidiary, see however Case C-521/09 P, *Elf Aquitaine SA v Commission* [2011] ECR I-8947, where the Court annulled the Commission's decision on the ground that the Commission failed to provide an adequate statement of reasons in that it imputed to Elf Aquitaine liability for the unlawful conduct of its subsidiary solely on the basis of the size of Elf Aquitaine's shareholding in the subsidiary (98% in this case), without providing further explanations.

concerned a purely contractual joint venture without separate legal personality from its parents, as opposed to a full-function joint venture.[5] In the recent *EI du Pont de Nemours*[6] and *Dow Chemical*[7] cases, the Court of Justice extended further the scope of parent liability by confirming the General Court's judgement retaining the liability of the two parent companies El DuPont and Dow for the conduct of their full-function joint venture DDE.

El DuPont and Dow argued that it was "*impossible for the parent companies of a joint venture to exercise 'decisive influence'*" and therefore to be held liable for the conduct of their joint venture since "*the joint control exercised by parent companies over their joint venture gives them only a negative power to block the latter's strategic decisions*" as opposed to the exclusive control exercised by a parent company over its wholly-owned subsidiaries which gives it power to determine the latter's strategic decisions.[8] The parties claimed in particular that a finding that parent companies form a single economic unit with their full-function joint venture would be contrary to the legal framework established by the EU Merger Regulation. The Court rejected that argument, holding that *"the autonomy which a joint venture enjoys within the meaning of Article 3(4) of the EC Merger Regulation does not mean that that joint venture also enjoys autonomy in relation to adopting strategic decisions, and that it is therefore not under the decisive influence of its parent companies for the purposes of Article 81 EC."*[9]

The Court did not extend the presumption of decisive influence on the part of parent companies over their wholly-owned subsidiaries to joint ventures. On the contrary, the Court stressed that "*it is […] only in so far as the Commission has demonstrated, on the basis on factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit"*.[10] But the Court confirmed the idea that parent companies of a joint venture may be implicated in cartel fines decisions as a result of the conduct of their joint venture and retained El DuPont and Dow's parent liability in this case. The judgment thus confirms the quasi-systematic liability of companies for infringements committed by their affiliates including joint ventures.

However, the issue of parent liability in vertically integrated groups may in some cases collide with the calculation of the fine, in particular with respect to so-called "captive" sales.

The inclusion of captive sales in the calculation of cartel fines

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5 Case T-314/01, *Avebe v Commission* [2006] ECR II-3085, paras 136-141.

6 Case C-172/12 P, judgment of 26 September 2013, *EI du Pont de Nemours v Commission*.

7 Case C-179/12 P, judgment of 26 September 2013, *Dow Chemical Company v Commission.*

8 *Ibid,* para 39.

9 *Ibid*, para 65.

10 *Ibid*, para 58. This requirement of a concrete demonstration that parents have actually exercised influence in their subsidiary was already mentioned in the *Otis* case, which concerned a 75%-held subsidiary of a parent company. See Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07, *General Technic-Otis Sàrl and Others v Commission*, judgment of 13 July 2011, [2011] ECR II-4977, paras 109 and 110. The judgment was confirmed on appeal by the Court of Justice in Case C-494/11 P, *Otis Luxembourg and Others v Commission*, Order of 15 June 2012, not yet published, para 49.

"Captive" sales concern products that are sold by one undertaking to another within the same corporate group to be incorporated into another finished product. Captive sales can be common in sectors where vertical integration is favored by companies as a way to secure a steady supply of a key input and avoid delivery problems or to correct market failures due to externalities. Prior to the adoption of its 2006 Fining Guidelines, the Commission's decisional practice in cartel cases was generally to include such sales in the turnover of an undertaking to determine the basic amount of the fine.[11] This approach was endorsed by the European Courts on the ground that ignoring the value of a cartel member's internal sales would "*inevitably give an unjustified advantage to vertically integrated companies. In such a case the benefit derived from the cartel might not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates*."[12]

It is difficult to reconcile this blanket approach with the Commission's 2006 Fining Guidelines, which state that to determine the basic amount of the fine the Commission must take an undertaking's "*sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA*".[13] Accordingly, it would seem untenable simply to presume that captive sales are part of a cartel agreement and thus relate *per se* to an infringement, without carrying out a careful case-by-case assessment in order to determine whether such sales were actually affected by the infringement, for instance because they were discussed at cartel meetings.

A more specific and "effects-oriented" approach is all the more commendable if one considers that cartel fines are aimed at punishing harm, more precisely "net harm to others".[14] Thus, the idea that a fine for a cartel infringement should relate to the *external* (and actual) harm provoked on cartel victims is difficult to reconcile with an approach that takes into account the *internal* sales between two companies belonging to the same group that participated in a cartel.

The Commission has been confronted with this issue in several recent decisions.
In the *Flat Glass* case, the Commission fined several undertakings without including in the basic amount of the fine the captive sales of certain of the cartel participants. The Commission reached this conclusion as it had found that the intra-group sales were not

11 Case IV/C/33.833, *Cartonboard*, Commission decision of 13 July 1994, [1994] OJ L 243/1; and Case C.38.359, *Electrical and mechanical carbon and graphite products*, Commission decision of 3 December 2003, para 292.

12 Case C-564/08 P, *SGL Carbon AG v Commission* [2009] ECR I-191, paras 28–31; Case C-248/98 P, *KNP BT v Commission* [2000] ECR I-9641, para 62; Case T-304/94 *Europa Carton v Commission* [1998] ECR II-869, para 128; and Case T-16/99 *Lögstör Rör v Commission* [2002] ECR II-1633, para 360.

13 2006 Guidelines (n1 above), point 13 (emphasis added).

14 *See* Camilli, '*Optimal fines in cartel cases and the actual EC fining policy*' (2006) 29(4) World Competition, 575; and Landes, '*Optimal sanctions of antitrust violations*' (1983) 50 University of Chicago Law Review, 652.

made on the free market where competition took place and that the cartel only concerned the prices applicable to independent customers.[15]

One of the non-vertically integrated participants to the cartel, Guardian, challenged the Commission's decision[16] and argued that by excluding captive sales of the other cartel participants the Commission had breached the principle of non-discrimination – the appeal thus followed a very similar reasoning to the one adopted by the Court in its pre-2006 Guidelines decisions. The General Court, however, rejected the claim and upheld the Commission's decision. The Court noted that (i) the Commission had only established the anti-competitive conduct for sales to independent customers and (ii) the Commission had not established that "*the vertically integrated members of the cartel […] drew an indirect advantage from the price increase agreed on or that the price increase in the upstream market resulted in an anti-competitive advantage in the downstream market for processed flat glass*".[17] In sum, according to the reasoning of the General Court, captive sales should not be included in the fine if (i) they were not part of the cartel discussions, and (ii) vertically integrated groups did not draw an indirect advantage in the downstream market from the cartel's price increases. This case-by-case approach appears to be much closer to economic reality and to the logic of the 2006 Fining Guidelines than the automatic inclusion of captive sales into the fine calculation.

By contrast, the Commission in the *LCD* decision appears to have followed a different methodology and included the captive sales of the undertakings participating in a cartel in the value of sales for the purpose of the fine. Interestingly, however, the Commission did not hold certain parent companies liable for the behaviour of their subsidiaries (in particular for joint ventures) despite having envisaged this possibility in the statement of objections.[18]

Although the Commission merely justified the inclusion of captive sales by stating that it had found that the parties had also included intra-group sales in their arrangements and the latter had been part of the cartel discussion,[19] its change of position between the statement of objections and the decision suggests that it considered that it had to choose between parent liability and the inclusion of captive sales. The Commission decision was challenged before the General Court and is currently pending.[20] The General Court's judgment, as in the *Guardian* case, might provide more clarity on the conditions under which captive sales may or may not be excluded for the calculation of the fine.

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15 Case COMP/39.165, *Flat Glass*, Commission decision of 28 November 2007, C(2007)5791 final, para 377.

16 Case T-82/08, *Guardian Industries and Guardian Europe v Commission*, judgment of 27 September 2012, not yet published.

17 *Ibid*, para 105. The judgment was appealed to the ECJ and is currently pending.

18 Case COMP/39.309, *LCD*, Commission decision of 8 December 2010, C(2010) 8761 final, para 68.

19 *Ibid*, paras 300 and 394.

20 Case T-91/11, *Chimei InnoLux v Commission*, lodged on 21 February 2011; Case T-94/11, *AU Optronics v Commission*, lodged on 22 February 2011 (removed); and Case T-128/11, *LG Display v Commission*, lodged on 23 February 2011.

The EU Courts' full jurisdiction to review cartel fines

Beyond the issues of captive sales and liability, several recent judgments of the EU Court of Justice and one Advocate-General opinion have breathed new life into the debate on the Courts of the European Union's full jurisdiction to review cartel fines imposed by the Commission. The Courts' full jurisdiction regarding cartel fines has been recognized since Regulation No 17 (now Regulation 1/2003, Article 31). But the General Court's reference to the Commission's *"wide margin of discretion"* when setting fines[21] and the rejection of a number of appeals against significant fines may have created the perception that, in the words of Advocate-General Bot, the General Court "*too often limit[s] itself to examining whether the Commission correctly applied the method it set out in its [own] guidelines, whereas the setting of fines normally does not involve complex economic assessments which […] should be subject to limited judicial review."*[22]

The significance of the General Court's full jurisdiction for the EU's cartel fining system was further highlighted in the European Court of Human Right's *Menarini* judgment, where full jurisdiction by a judicial body was considered as a key safeguard to ensure compatibility with the ECHR of decisions (such as Commission fining decisions) imposing "penalties" and adopted by administrative bodies in the first instance.[23] In this respect, the Court of Justice in a number of recent cases highlighted that the Courts' full jurisdiction should go far beyond the control of the errors of assessment, and in fact beyond the mere "review of legality" of Commission decisions imposing fines.

In two judgments issued shortly after *Menarini* and relating to the copper plumbing tubes cartel (the *KME* and *Chalkor* cases), the Court of Justice, while confirming the General Court's dismissal of the appeals brought by the parties, highlighted a number of principles regarding the scope of full jurisdiction. In *Chalkor*, the Court recalled its case law (already applied in the fields of merger control and State aid) according to which even in areas giving rise to complex economic assessments, the Courts of the Union must when reviewing the legality of a decision establish *"among other things"*, *"whether the evidence relied on is factually accurate, reliable and consistent"*, *"whether that evidence contains all the information which must be taken into account in order to assess a complex situation"* and *"whether it is capable of substantiating the conclusions drawn from it."*[24] In *KME*, the Court also explained that the Courts' full jurisdiction, which supplemented the *"mere review of the lawfulness of the penalty"*, empowered the Courts *"to substitute their own appraisal for the*

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21 Interestingly, the Court's reference to the Commission's margin of discretion did not necessarily prevent it from reducing the fine applied – See e.g. Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, para 239; and Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, para 134.

22 Advocate General Bot, 'La Protection des droits et des garanties fondamentales en droit de la concurrence' in De Rome à Lisbonne, mélanges en l'honneur de Paolo Mengozzi, Bruylant, 2013, p. 175 to 192 (our translation).

23 Judgment of the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v Italy*, no. 43509/08, 27 September 2011, para 59.

24 Case C-386/10 P, *Chalkor AE Epexergasiais Metallon v Commission*, judgment of 8 December 2011, not yet published, para 54.

Commission's, and consequently to cancel, reduce or increase the fine or penalty payment imposed."[25] The main limitation to the Courts' full jurisdiction was that in contrast with the procedure before the Commission, the proceedings before the Courts are *intra partes* and the Courts cannot raise pleas of their own motion (with the exception of pleas involving matters of public policy).[26]

These principles were also recalled in the recent judgments issued by the Court of Justice in connection with the elevators cartel (*Kone* and *Schindler* cases), where the Court insisted that *"the General Court cannot use the Commission's margin of discretion… as a basis for dispensing with the conduct of an in-depth review of the law and the facts."*[27] The result was however the same as in the copper tubes case – the appeals were dismissed.
Against this background, the recent opinion of Advocate General Wathelet in the *Telefonica* case may, if followed by the Court, mark a further step in the implementation of the principle of full jurisdiction. In this case, the Commission had imposed a fine of €151.875 million on Telefonica for an abuse of a dominant position in a number of Spanish markets – the second-highest individual fine for an infringement of Article 102 TFEU after the *Microsoft* case. The Commission decision had been confirmed in 2012 by the General Court.[28] Advocate General Wathelet proposes to annul the General Court's judgment in so far as the General Court failed to use its full jurisdiction in its assessment of the fine.
In its description of the Courts' full jurisdiction, Advocate General Wathelet draws on the recent stream of judgments highlighting this principle, in particular *KME* and *Chalkor*, and concludes that the General Court must "*assess by itself whether the fine is adequate and proportionate and must see by itself that the Commission took into account all the relevant factors for the purpose of the calculation of the fine"* (emphasis added by AG Wathelet).[29]
The Commission's alleged "wide margin of discretion" (which, according to Advocate General Wathelet, should no longer be mentioned in the General Court's future judgments)[30] seems a distant memory here.

Advocate General Wathelet also proposes that the Courts may, in reviewing the proportionate and non-discriminatory character of a fine, take into account similar precedents and if necessary require explanations from the Commission on possible differences with the amounts imposed in such precedents. EU Courts had until now been reluctant to adopt this approach and held in several instances that *"the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed."*[31] In the opinion, Advocate General Wathelet however recalls that the General

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25 Case C-389/10 P, *KME Germany and Others v Commission*, judgment of 8 December 2011, not yet published, para 130.
26 *Ibid*, para. 131.
27 Case C-510/11 P, *Kone Oyj and Others v Commission*, judgment of 24 October 2013, not yet published, para 42. See also Case C-501/11 P, *Schindler Holding Ltd and Others v Commission*, judgment of 18 July 2013, not yet published, paras 37-38.
28 Case T-336/07, *Telefonica and Telefonica de Espana v Commission*, judgment of 29 March 2012, not yet published.
29 Opinion of Advocate General Wathelet of 26 September 2013, in Case C-295/12 P, *Telefonica,* para 129 (our translation).
30 *Ibid*, para 126.
31 Case T-23/99, *LR AF 1998 A/S v Commission*, [2002] ECR II-1705, para 234.

Court had already envisaged (although in a hypothetical manner) the possibility of comparing decisions under the principle of non-discrimination when *"the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case."*[32] The comparison was particularly relevant in the *Telefonica* case, since the basic amount of the fine (€ 90 million), which was far above the highest basic amount ever calculated by the Commission (in the *AstraZeneca* case), was also respectively ten and nine times higher than the basic amount of the fine imposed on Deutsche Telekom and Wanadoo Interactive for similar practices, markets, products and undertakings. According to Advocate General Wathelet the General Court should have taken into account such precedents in reviewing the basic amount of the fine as well as the parameters (such as the gravity, or the deterrent effect) that affected the final calculation of the fine.

In sum, the Commission's alleged margin of discretion cannot, according to Advocate General Wathelet, be invoked to dispense the General Court from conducting *"an in-depth review of the law and of the facts"* or from "*the requirement that the Commission explains the change in its fine policy in a specific case."*[33]

Possible next steps for fining policy - the principle of proportionality and the proposed Directive on competition damages actions

The European Courts' recent insistence on a "full and unrestricted review" of the quality, completeness, reliability as well as the interpretation of the facts that give rise to a fine in light of the principles of proportionality and non-discrimination, raises new questions. This is the case both in respect of the Commission's enforcement policy as well as in terms of judicial standards, in particular in the context of the proposed Directive on damages actions.

In the past, the Commission has remained somewhat elusive in defining the applicable standard when assessing the proportionality of fines. Traditionally, while giving details of its methodology (presumably to address the non-discrimination requirement), the Commission has failed to provide a clear justification for the exact purpose of its fining policy against which the proportionality of the fine may be measured. In this regard, the only references to purpose or proportionality in the 2006 Fining Guidelines are allusive, and refer to ensuring *"specific"* and *"general deterrence"*.[34] In particular, the value of sales to which a multiplying factor is applied taking into account the gravity and the duration of the infringement is, according to the Guidelines, *"an appropriate proxy to reflect the economic importance of the infringement"*.[35] There is no definition or further explanation of what is meant by "deterrence" or "economic importance of the infringement" nor as to why the "value of sales" would be an appropriate proxy. This minimalist approach was until

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32 Case T-59/02, *Archer Daniel Midlands v Commission*, [2006] ECR II-3627, para 316. The judgment was annulled by the Court of Justice on other grounds.

33 *Ibid*, para 125 (emphasis added).

34 2006 Guidelines (n1 above), para 4.

35 *Ibid,* para 6.

recently upheld by the Courts, for instance in the *Pioneer*[36] and *ADM* cases[37]. Moreover, the assessment of "gravity" has been traditionally ascribed to the "many factors" which the Commission is allowed to take into account when setting a fine going beyond the illegal gain or consumer harm.[38] In practice, this has effectively meant that the Commission has enjoyed a nearly unfettered discretion in choosing the actual level of the fines it wanted to apply to the extent the legal cap was not exceeded, and the formal rules laid down in the Guidelines were complied with. Given the *Chalkor*, *KME* and *Kone* precedents, it would also be logical for the minimalist approach – where one is left to guess the exact purpose of the fine and thus the yardstick against which the proportionality of fines should be measured – to change. It may be time for the Commission to explain more clearly what the precise purpose of its fining policy is.

When looking for possible future answers, one may turn to the concept of optimal antitrust fines as developed for instance in a 2006 article by Wouter Wils.[39] Interestingly, this author, currently DG COMP's Hearing Officer, suggests that among the possible economic justifications for a fine, "deterrence" basically means an effort to wipe off the expected gain (affected by the inverse of the probability of being detected by a regulator) of a cartel offender. He further explains why the "deterrence" approach is preferable to the other economical ("internalization") methodologies e.g. based on the harm sustained by consumers. The implication is that the turnover of the relevant goods is only a valid, "proportional", proxy when it reflects the economic gain derived from the cartel by the offender (which arguably in many cases may happen to be the same thing as the economic harm suffered by consumers except when efficiencies of some sort come into play). This is a proposition, which economists and lawyers may be tempted to test in future cartel cases to establish when a fine is "proportional" or not.

This proposition also resonates with AG Wathelet's opinion in *Telefonica*, which specifically turns to Commission precedents as an indication as to whether a fine is proportional, admittedly raising similar issues and revolving around a "comparable" set of facts to determine whether a fine in a subsequent case is "proportional". As explained above, this is also an area that EU Courts in the past tended to avoid, based on the premise that infringements were generally linked to a highly specific set of facts that made comparisons impossible in most cases. If the Court of Justice were to follow the Advocate General's suggestion this would be again new and unchartered territory for the Commission's fining policy.

Finally, another critical development is the proposed Directive on actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. This proposal, and the Commission's efforts to

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36 Joined Cases 100/80 to 103/80, *Musique Diffusion Française and Others v Commission*, [1983] ECR 1825, paras 119-121.

37 Case C-397/03 P, *Archer Daniels Midlands and Archer Daniels Midland Ingredients v Commission*, [2006] ECR I-4429, paras 100-105.

38 *Ibid*, para 100. See also Case C-189/02, *Dansk Rørindustri and Others v Commission*, [2005] ECR I-5425, para 241.

39 W. Wils, '*Optimal Antitrust Fines: Theory and Practice',* (2006) 29(2) World Competition, 183.

encourage corrective private enforcement, also raises new policy questions. If, as the draft Directive suggests, victims should be able to claim full compensation of the harm caused by the infringement (Article 2), then it might be queried (at least in principle) whether assessing fines on exactly the same basis for private and public enforcement does not result in hitting the undertakings twice. This raises the question as to whether – as is currently proposed in the UK – the Commission should not logically be required to deduct from the fines, or at least take into consideration, the compensation that is paid by the offender to the victims – unless the EU would be adopting a "doubling" policy, which would arguably overshoot the "deterrence" objective. Taking into account the result of private enforcement in public enforcement actions would facilitate a consistent approach to both enforcement policies, and have the added benefit of creating an effective incentive to avoid forum shopping and judicial delaying tactics. More importantly, this may prevent cartel defendants from credibly arguing that if "deterrence" is the main purpose of the Commission's enforcement policy in the cartel area, then fines that do not take into account "private" compensation already paid to victims are necessarily disproportionate.

The Commission's decisional practice and the Courts' case-law on the calculation of fines are still a critical field of EU antitrust law. The recent or pending cases regarding vertically integrated groups are an illustration that in a context of ever-increasing fines, judicial review remains essential in order to ensure clarity on the applicable legal and economic concepts. In this respect, the General Court's full jurisdiction plays a key role. The recent stream of cases highlighting this jurisdiction as well as the opinion of Advocate General Wathelet in *Telefonica* could be a welcome development and help establish a more proportional, consistent and – ultimately – effective public and private enforcement policy.