I. Introduction

There is no doubt that cartel fines in the European Union (EU) have steadily increased over the last decade. Since the adoption of the ‘More Economic Approach’ in the early 2000s, high fines have been the hallmark of the European Commission’s determined cartel enforcement—and are consistently presented by Competition Commissioners as a deterrent in the battle against cartels. The ten highest fines, both per case and per individual company, have all been imposed since 2001.

In view of these high fines, addressees of cartel decisions may well find the prospect of appeal, and the consequential potential of fine reduction, increasingly attractive. Indeed, addressees of a decision that choose not to appeal fines are rather an exception. Appealing a cartel decision, however, is anything but a self-propelled move: the company incurs additional costs and must devote internal resources to prepare submissions. Most notably though, proceedings prolong uncertainty over the final amount to be paid while provisional payment must be made or a bank guarantee must be provided anyway. Nor are appeals without risk: where the Commission decision stands on shaky ground, losing the appeal may tip the balance for private claimants to file a damage action. Moreover, the appellate Courts have on two occasions actually increased the fine imposed by the Commission on appeal and the potential of increasing fines has been raised by the Court in a number of cases.

One of the key questions that will be addressed in the equation whether or not to appeal relates to the actual chances of appeal. As the Commission gains experience and carefully crafts its decisions to make them more appeal-proof, what are the chances of having the fine reduced on appeal—and on which grounds? Lawyers and their clients usually build their strategy—whether to appeal and how—to a series of assumptions regarding the chances of success. Having a look into the literature on cartel fines does not provide helpful guidance. Traditionally, the focus of legal analysis is whether the amount of fines and the review by
EU Courts satisfy established legal standards.\(^5\) Competition economists analyse Commission practice and Court jurisprudence in order to trace developments in the amount of fines and their micro- or macroeconomic repercussions.\(^6\) These are not the questions addressed in the present article.

In this article, we review the cartel precedent of both the General Court (GC) and the Court of Justice (CJ) to quantify the chances of success of an addressee of a cartel decision on appeal. When advising clients on whether or not to appeal a Commission decision, counsel will have to factor in additional aspects, for example, the client's preferred strategy (more or less aggressive), repercussions on other proceedings (eg, in the USA), the risk of damage claims, issues of redress. Moreover, depending on the situation of the client, some pleas just have to be brought forward, irrespective of their chances of success (eg, inability to pay). Nevertheless, we do see merit in providing a more robust basis for evaluating the appeals’ chances of success than individual experience and mere gut feeling.

II. Successful grounds of appeal

A. Introduction: scope of court review

The European Courts have unlimited jurisdiction in respect of fines under Article 261 TFEU. In principle, that is to say that the Courts conduct a full and comprehensive review of the law and the facts on which the Commission has based its decision. The Courts recognise the Commission’s broad discretion in fining matters. Nevertheless, they also review the use of that discretion. However, ‘review’ does not mean that the Courts substitute their own assessment for the Commission’s decision. The Courts have no jurisdiction to remake the contested decision.\(^7\) The Courts will uphold the Commission’s decision as long as it can be maintained under the applicable legal standard.

B. Chances of winning/reducing fine per ground of appeal

Having a look into previous EU Court jurisprudence naturally suggests itself as the way to obtain an indication of how the Courts are likely to handle a new case brought before them. However, classifying and drawing inferences from previous jurisprudence is difficult:

- Pleas and issues brought up before the Courts are frequently blended, that is, issues of facts may involve legal aspects (eg, if party challenges the applied standard of proof), or legal issues do not fall just into one category.
- The pleas are influenced by the available facts on which the decision is based, and by the Commission’s strategy in the investigation (eg, the choice of the theory of harm);
- The pleas are also influenced by strategic decisions of the parties, for example, the decision to bring forward the same aspect under various headings in order to test the receptiveness of the Court.

Taking these aspects into consideration, we have looked into the existing GC and CJ precedent for the individual cartel appeals. Our sample was made up of about 510 individual appeals proceedings in the period January 1998 through September 2012, including 200 GC judgments and 69 CJ judgments.\(^8\) The appeals had been lodged against the decisions in 75 Commission investigations, including re-adoptions of annulled decisions.

Based on the classical distinction between procedural, factual, and substantive issues as well as fining issues, we have defined categories of pleas or legal issues as they have come up in the actual decision practice of the GC and the CJ. Where the issues underlying the pleas were blended, we took the respective pleas into account in all relevant categories. We could not take into account why the particular pleas were brought forward at all (and others were not). That is, we did not try to investigate the facts that were under-

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8 The first case taken into account concerned the appeals against Commission decision of 14 October 1998, Case IV/33,708, British Sugar. The most recent case taken into account was Case 39.605, CRT Glass Bulbs. Recidivist appeals counted separately for each cartel investigation in which the parties were involved.
lying the Commission’s and the parties’ strategic choices with regard to the appeal.

1. The winning categories

Which was the overall success rate and which were the categories of pleas/issues that came up most often, and in which categories was it most likely that fines would be reduced on appeal?

Regarding the overall success rate, our findings confirm common knowledge—that Commission decisions are upheld on appeal, save for rare exceptions. Of the 510 parties fined, only 29 appealed the decision and had their fine annulled by the GC, and two parties had it annulled by the CJ. The GC modified the fine on appeal in 67 cases, and the CJ did so in two more cases. In 104 cases, however, the GC upheld the fine and dismissed the case, as did the CJ in 65 cases. The remaining approximately 310 parties are still awaiting a GC judgment or had their appeals removed from the GC register.

All 510 parties together had initially been fined a total of €18.3 billion by the Commission. Throughout the relevant period, the GC handed down judgments on decisions imposing fines in the amount of about €8 billion. The aggregate fine decrease for the 96 parties whose fines the GC annulled or modified was €1.8 billion. The 104 cases in which the GC upheld the fine equate to about €3 billion. At the CJ level, the annulments equated to about €15 million. In one of the two cases where the CJ modified the fines, this actually led to a fine increase as compared to the fine after the GC judgment (as noted above).9 However, the CJ fine was still below the Commission fine.

In our review, we found out that, before the GC, pleas relating to fines came up most often, and much more often than pleas relating to the Commission procedure, the facts and the standard of proof, or the legal assessment in substance. The pleas relating to the fines were also most successful overall. These findings are summarised in Table 1.

Among the pleas concerning the Commission’s fining decision, the pleas alleging errors in the Commission’s assessment of aggravating circumstances succeeded most often (7 cases; success rate: 2 per cent%),10 followed by pleas challenging the proportionality of the infringement duration (13 cases; success rate: 23 per cent),11 or claiming discrimination (14 cases; success rate: 17 per cent),12 or a misapplication of the Leniency Notice (8 cases; success rate: 13 per cent).13 It also seems to have paid off for leniency

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candidates to challenge their Commission decision on these grounds, because they generally achieve a higher reduction of their fine, but not face a significant risk of losing the benefit of the leniency award.\textsuperscript{14} The parties’ cooperation outside the Leniency Notice was also a promising aspect to be raised on appeal, being successful in three out of the 28 cases in which it was raised (success rate: 11 per cent). However, pleas relating to the duration of the Commission procedure or claiming an incorrect assessment/calculation of the fining turnover succeeded in less than 10 per cent of the cases where they were raised. Pleas relating to the gravity of the infringement (proportionality), against deterrence increases, or claiming mitigating circumstance or a lower market impact/cartel benefit only succeeded in very few cases, and other pleas never.\textsuperscript{15} With regard to the assessment/calculation of turnover, gravity, and mitigating circumstances, these results are truly astounding in view of the fact that such pleas are among the pleas most frequently raised on appeal (87, 66, and 63 cases respectively). It appears that in general, such pleas succeeded only where the appellant could show some discriminatory element in the Commission’s fining decision, for example because (i) the Commission allocated turnover inappropriately among the undertakings involved in the cartel (methodical error); (ii) the fine had to be adjusted to ‘reflect . . . the significant difference in size’ between two undertakings; (iii) the undertaking did not take part ‘in all aspects of the anti-competitive scheme’; or (iv) the Commission ‘erred in assessing the weight and importance of the undertakings in the relevant market’.\textsuperscript{16} Pleas concerning the assessment of facts and the standard of proof succeeded most often if they related to the infringement period (5 cases; success rate: 18 per cent).\textsuperscript{17} The success rate of pleas relating to the cartel participation of the claimant was slightly lower, but still significant (10 cases; success rate: 16 per cent).\textsuperscript{18} However, this category includes a variety of arguments covering direct participation as well as the imputation of liability. Other pleas in this category succeeded only in a few individual cases, but still had a success rate of more than 10 per cent where they were brought forward.\textsuperscript{19} Pleas directed solely against the Commission’s economic analysis of the market almost never met with success.\textsuperscript{20}

The ten successful pleas relating to the substantive assessment mainly concerned the existence of a single and continuous infringement (6 cases; success rate: 21 per cent)\textsuperscript{21} or the existence of an anticompetitive object (3 cases; success rate: 21 per cent).\textsuperscript{22} However, the question of a single and continuous infringement
again included a large variety of arguments and settings. In one case, the claimant succeeded in challenging the finding of an agreement (success rate: 4 per cent).23 Pleas based on the lack of anticompetitive effects or of an impact on trade and pleas based on overarching legal principles (legal certainty, legality, fairness) were never successful, nor were pleas directed against the Commission’s findings of recidivism.

The least successful group overall concerned the Commission procedure. That said, the seven claimants claiming the lapse of the limitation period still brought forward a rather successful individual plea (2 cases; success rate: 29 per cent).24 Other procedural pleas had success rates far below 10 per cent or were never successful at all. This is most remarkable with regard to the popular pleas concerning the lack of an adequate statement of reasons, or the breach of rights of defence.25

Before the CJ, the pleas raised most often again related to fines, but also quite frequently to the procedure before the Commission and/or the GC. The legal assessment of the infringement was only rarely an issue. Issues concerning the facts are not relevant before the CJ as it only reviews the GC judgments for fairness (foresee the CJ judgment of 9 July 2009, Case C-511/06 P), not yet officially published, paras 40–42; judgment of 19 March 2003, Case, T-213/00, CMA CGM v Commission [2003] ECR II-913, para. 516. Other categories: infringement of legal procedure (adoption/authentication, etc.), other procedural issues, unlawful inspection/questioning/misuse of power, fairness of proceedings.

The above numbers are telling, but they are not telling the whole story as European case law is in a continuous process of evolution. The Courts themselves are developing their jurisprudence, and they are doing this within the framework set by Commission policy and the appellants’ strategic choices. We therefore also tried to identify changes over time and trends in our data set.

The first question is whether the number of appeals has increased over time. The answer is not clear-cut. While most Commission decisions have been appealed by one or more parties, there is also a considerable number of parties who chose not to file an appeal.28 The amount of the fines appears to be just one relevant factor that appellants take into consideration, though an important one. There has been a continuous and substantial increase of fines over time, which was spurred by the adoption (1998) and revision (2006) of the Commission’s Fining Guidelines.29 According to the Commission’s statistics,30 fines in the period 1990–1999 amounted to approximately €833 million. In the period 2000–2009, the aggregate fines had increased to more than €12.9 billion. In the period 2010–2012 alone, the Commission imposed fines of roughly €5.4 million. During the same period, the number of investigations increased as well, with 230 decisions in the period 1990–1999, 361 decisions in the period 2000–2009, and 120 decisions in the period 2010–2012. Moreover, not all parties fined had an incentive to appeal against the Commission decision. The Commission’s leniency policy and the advent of settlement procedures has generally excluded appeals from parties

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25 Other categories: infringement of legal procedure (adoption/authentication, etc.), other procedural issues, unlawful inspection/questioning/misuse of power, fairness of proceedings.


28 Veljanowski (n 6), includes a sample in which 85% of all decisions have been appealed.


and more elaborate. Starting around 2001/02, appeals of their individual strategies, and the pleas became more remarkable as the Commission had not extended to the leniency which the Commission had granted to Excel’s former subsidiary, Allied Arthur Pierre.

Another question is whether certain types of pleas have become more or less popular over time, in particular considering the impact which the Commission Guidelines and policy changes have had on the risk of cartel detection and the fines. Our review started with cases subject to the Commission’s 1998 Fining Guidelines such that no comparison to earlier fining practice was possible.

As one would expect, pleas directed against the fining decision mostly consisted in sweeping objections at the very beginning of the reviewed period. Soon, however, parties differentiated their pleas according to their individual strategies, and the pleas became more and more elaborate. Starting around 2001/02, appeals have attacked the fining decision in a detailed way from various angles. Some pleas are only raised (eg, the duration of the Commission procedure) or are more frequently raised (eg, calculation of fines/application of the Fine Guidelines) in the earlier years, but most pleas relating to fines are raised more or less evenly throughout the relevant period. The ‘inability to pay’ defence did not show up particularly often in the relevant period, but has gained new importance in the pending appeals against Commission decisions since the eruption of the Financial Crisis. It is noteworthy that it seems to have become more and more difficult to succeed with pleas directed against the fining decision after 2006, the year in which the Commission issued its new Fining Guidelines. Before the CJ, the fines have been under attack from the beginning though no clear pattern emerges from the Court decisions. However, many cases where the Commission adopted its decision in the relevant period are still pending before the CJ.

As regards the pleas concerning the substantive assessment, there has been a shift over time from pleas claiming ‘no agreement’ to pleas claiming ‘no single and continuous infringement’. Pleas arguing the lack of effect or of an impact on trade lost importance over time, perhaps given their limited success. The same holds for claims that the party did not pursue an anticompetitive objective although a plea based on the lack of anticompetitive intent succeeded most recently in a judgment handed down in November 2011 in the Methylacrylates case. Pleas claiming a violation of more general legal principles and pleas concerning recidivism issues came up throughout the entire review period. The pleas in this group were too rarely successful to discern any trends. Before the CJ, such pleas never played an important role and were barely ever raised after the Seamless Steel Tubes and Austrian Bank cases.

Procedural pleas and pleas concerning the factual assessment/standard of proof came up throughout the entire period. Pleas in the latter category seem to have become slightly more successful over the years, suggesting an increased depth of Court review, but that trend does not seem significant.


32 Case COMP/38.543. The first Commission decisions applying the new guidelines were adopted in Case IV/35.814, Extra d’alliage (25 January 1998); IV/33.708, British Sugar, and IV/34.018, FEITSSA.


35 We counted 19 cases where parties relied on the ‘inability to pay’ (ITP) defence in the relevant period, never with success. ITP reductions under para. 35 of the Fining Guidelines of 2006 have only been granted since late 2009/early 2010, eg in the Heat Stabilizers, Animal Feed Phosphates, Prestressing Steel, and Bathroom Fittings cases.


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III. The risk of loss

When parties decide whether to file an appeal, the risks associated with losing the appeal are typically less important than the chances of winning and the costs of the appeal. It is true that the Courts will usually not go beyond the Commission fine even where the private appellant loses the appeal. In BASF, the General Court increased the appellant’s fine because it applied essentially the same methodology as the Commission, but disagreed with the Commission finding that the European and the global cartel agreements were part of the same infringement. In SGL Carbon, the CJ increased the fine imposed on SGL Carbon for its participation in the Graphite Electrodes cartel by annulling part of the reduction granted by the GC (both SGL Carbon and the Commission had appealed the GC judgment). That said, the risk of a increased fine has also been discussed in several cases where the appellant disputed a fact or issue for the first time before the Court, or where equal treatment called for a fine adjustment. The Commission has specifically requested a fine increase on such grounds recently in the appeals concerning the Copper Plumbing Tubes case (2010). Thus, parties should carefully consider an appeal where individual elements of the Commission’s fine calculation work in their favour, or whenever they base their attack on the fining decision on grounds not disputed during the Commission procedure.

IV. Balancing an appeal against other aspects

The chances and risks associated with the appeal are the most important ingredients to the advice on whether the client should appeal the Commission decision. As noted above, however, counsel will also have to consider other aspects, such as the client’s preferences (whether to appeal; re strategy), repercussions on/from other proceedings, or the potentially increased risk of damage claims following an appeals judgment. We will discuss some of these aspects in the present section.

The client’s preferences should always guide counsel in the advice provided to the client. For example, it is possible that counsel is asked to prepare an appeal directed at least against certain aspects of the Commission decision—notwithstanding the risks and the chances of success—because the client principally seeks legal clarification on such points and the positive or negative outcome of litigation is secondary. In determining whether an appeal is indeed necessary, counsel must also take into consideration that as a general rule, the EU Courts cannot rule on aspects concerning other addressees of the Commission decision than the applicant filing the appeal. It is an interesting development, however, that very recent CJ jurisprudence seems to open some room for manoeuvre in that respect if the client is part of a group and is considering an appeal in parallel to its parent or to a wholly owned subsidiary. In Tomkins, the CJ held that where the liability of the parent company is derived exclusively from that of its subsidiary and where the parent company and its subsidiary have brought parallel actions having the same object, the Court can take account of the parallel action without going beyond the applicant’s request (ultra petita).

If the client wishes to file an appeal or should be advised to appeal in view of its preferences or objectives, counsel also has to make an informed assessment how the client’s preferred strategy will influence the risks and chances of the appeal in court. To the extent that the client’s previous strategy has proved successful before the Commission, counsel will usually choose to continue with that strategy unless there is a clear argument for making changes (eg, if the client has meanwhile been taken over by a group advocating another strategy). To the extent that the client’s previous strategy has proved unsuccessful, counsel may still have to adopt the same strategy on appeal if discontinuing it might compromise the client’s credibility. Where previous strategy has proved detrimental and the client—as is often the case in such circumstances—has changed counsel, the new law firm may opt for a completely new strategy from the outset, or at least gradually abandon the old strategy by laying the stress on different aspects of the case.

41 See Barbier de La Serre/Winckler, ‘A Landmark Year for the Law on Fines Imposed in EU Competition Proceedings’ (2012) 3 JECLAP 351, for a survey on the relevant cases, including Wieland-Werke (ibid.).
43 CJ judgment of 22 January 2013, Case C-286/11 P, Tomkins v Commission, not yet officially published, para. 49.
Repercussions either on—or from—other proceedings may exist in various ways where a Commission cartel decision is appealed to the EU Courts. Probably the most important issue is that relevant information from one set of proceedings may put the client at risk in parallel proceedings in another jurisdiction. For example, parties in, for example, a US damage action attempt to obtain disclosure of non-confidential versions of the decision, of evidence or submissions filed with the EU Courts, especially in the USA. Thus, handling parallel proceedings may complicate the overall defence strategy. On the other hand, filing an appeal may also be advantageous to the client if there are other proceedings pending to which the client is a party. For example where, in the wake of a Commission investigation, a damage claim has been filed in a Member State before the EU courts have handed down their judgments, that damage claim will typically be stayed, at least upon request, until the EU Courts have delivered their judgments.

Private damage claims are frequently based on the Commission’s cartel decision or an appeals judgment confirming the Commission’s findings. The risk of such follow-on damage claims has gained more and more importance since the CJ rendered its landmark judgments of 20 September 2001, Case C-453/99, Courage & Crehan and Manfredi. The Commission’s proposed Framework for Collective Redress is likely to boost court actions for damages. Claims for compensation in contract negotiations with suppliers or customers are already today likely to directly follow suit to a Commission cartel decision imposing fines. Actual court actions for cartel damages are still not as frequent as one might expect, due to the different national rules on civil liability and civil procedure. That said, vivid litigation around cartel fines has already developed in the UK. Damage claims have also become important in Germany, France, and the Netherlands, and more recently have also been reported from other jurisdictions such as Austria or Belgium. Where the client group includes a potential ‘anchor defendant’ in the UK or has relevant turnover in another Member State, the risk of damage claims is palpable. In Germany, presumptions working in favour of the damage claimant complicate the defence against the damage claim.

V. Strategic conclusions

It seems possible to draw some general conclusions from the above findings and considerations, although a decision on case strategy will always still depend on the circumstances of the individual case:

- The low overall success rate of appeals against the Commission’s cartel decisions underlines the need to investigate early on in the process whether the client can reduce exposure through cooperation, either as an immunity or leniency applicant or by accepting a settlement. The client and its counsel will have to weigh the benefit of such cooperation with the risk that cooperation increases its exposure towards third parties seeking cartel damage compensation.

- Once the Commission has rendered its decision, clients should consider appealing the Commission decision although the chances of success will regularly be slim. This even holds for clients that have been awarded leniency or that have submitted to settlement because a fine increase on appeal is generally still not very likely. Appealing the Commission decision may effectively reduce the risk that the Commission findings will be used by third parties in private damage claims or in negotiations with suppliers and customers. The client will at least gain valuable time, which it can also use in its defence against cartel charges in other, non-European jurisdictions.

- In order to raise the chances of success in the appeal, however, clients should focus on clear violations of their rights (eg, equal treatment). There is no consent as to whether relying on weaker grounds of appeal cannot be avoided for the sake of completeness or risks watering down the more important points. In any event, the Courts do not welcome that strategy, but limit their assessment of those weaker pleas to standard text-book reasoning, typically rejecting the plea as ‘clearly’ or ‘manifestly unfounded’.

44 An interesting feature of US law is that discovery can also work ‘the other way round’ as it is possible to file before US Courts for discovery with a view to using the disclosed information in non-US proceedings; see 28 U.S.C § 1782(a).


47 See KG Berlin judgment of 1 October 2009, 2 U 10/03 = WuW/E DE-R 2773, confirmed by BGH judgment of 8 June 2010, KZR 45/09.

48 As is indicated, eg, by CJ Orders 15 June 2012, Case C-494/11 P, Otis Luxembourg v Commission and C-493/11 P, UTC v Commission, where the CJ dismissed the cases as inadmissible in view of the lack of substance in the appellant’s reasoning.
• It still appears to be most promising to direct the appeal mainly against the reasoning underlying the fining decision, in particular if the Commission has increased the fine for reason of aggravating circumstances or for deterrence. Another point to raise is the Commission’s refusal to reward sincere cooperation. This is an argument that actually goes to the heart of Commission policy as the attractiveness of leniency and settlements is one of the cornerstones on which the Commission is building its cartel enforcement.

• Regarding substantive pleas and pleas directed against the Commission’s factual conclusions, clients should—to the extent possible—develop a convincing ‘story’ why the purported (single and continuous) infringement did not exist at all, or only existed to a lesser extent. The most promising arguments come into play where the Commission has built its case on mere indicia. While it is constant jurisprudence that coincidences and indicia can, in the absence of another plausible explanation, constitute evidence of an infringement,\(^49\) carving out the flaws (eg, that the client’s actions were not consistent with the allegedly pursued objectives) may allow the break up—or at least shake—of the theory underlying the Commission’s case. However, claims that individual arrangements were categorised too harshly as anti-competitive agreements will not win the case.

• The low success rate of procedural pleas appears to reinforce the CJ’s view that only ‘procedural irregularities capable of seriously harming the interests of the party invoking them can justify a reduction of the fine’.\(^50\) That means, procedural errors that do not blemish the Commission decision on its face may be invoked, but will probably be futile.


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