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Cartel Appeals to the Court of Justice: The Song of the Sirens?

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I. Introduction

There is no doubt that cartel fines in the European Union (EU) have steadily increased over the last decade.[1] 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.[2]

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.[3] 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.[4]

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—on an array 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

Key Points

- This article reviews the cartel precedent of the General Court and the European Court of Justice to quantify the chances of success on appeal.
- It still appears most promising to direct the appeal mainly against the reasoning underlying the fining decision, in particular where the latter was increased for reason of aggravating circumstances or for deterrence.
- For factual or substantial pleas, clients should—to the extent possible—develop a convincing 'story' establishing why the purported infringement they are accused of did not exist at all, or only existed to a lesser extent.
- As regards procedural matters, they should focus on clear violations of their rights—for example unequal treatment.

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1 See for a general overview of fines: E Sakkers and J Ysewyn, *European Cartel Digest* (Wolters Kluwer).

2 See the Commission's cartel statistics, p. 3, available at: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 3 April 2013.

3 Notable exceptions: Commission Case COMP/38.432, *Videotapes* [2008] OJ C 57/10, Case COMP/39.165, *Flat Glass* [2008] OJ C 127/9, the first two cases under the new fining guidelines.

4 Fines were increased in GC Joined Cases T-101/05 and T-111/05, *BASF AG and UCB SA v Commission* [2007] ECR II-4949, paras 219–223; CJ, Case C-301/04 P, *Commission v SGL Carbon AG* [2006] ECR I-5915, paras 66–77. Further, see Section III below.

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, or 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-

5 See, e.g., Geradin/Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (26 October 2010), TILEC Discussion Paper No. 2011-008, available at: http://dx.doi.org/10.2139/ssrn.1698342 (accessed 3 April 2013); Soltesz, 'Due Process, Gesetzesvorbehalt und richterliche Kontrolle im Europäischen Kartellbußgeldverfahren', WuW 2012, 141; Riley, 'Modernising Cartel Sanctions: Effective Sanctions for Price-fixing in the European Union' (2011) ECLR ECLR 551, for an overview on the arguments for and against the lawfulness of the current fining practice.

6 For a statistical analysis, see Veljanovski, 'European Commission Cartel Prosecutions and Fines, 1998–2006: A statistical analysis' (21 November 2010), available at: http://dx.doi.org/10.2139/ssrn.1016014, and European Cartel Fines Under the 2006 Penalty Guidelines – A Statistical Analysis (10 December 2010), available at: http://dx.doi.org/10.2139/ssrn.1723843 (accessed 3 April 2013); Veljanovski, 'Cartel fines in Europe: Law, Practice and deterrence' (2007) 30 World Competition 65 ff. See also Motta, 'On cartel deterrence and fines in the European Union' (2008) 29 ECLR 4 209.

7 GC, Judgment of 10 March 1992, Joined Cases T-68/89, T-77/89, and T-78/89, *SIV and others v Commission* [1992] ECR II-1403, para. 319.

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.

Table 1. Pleas brought before the General Court

Pleas directed against . . .	Total number of pleas	Number of successful pleas
Fines	660	59
Procedure	162	6
Facts/standard of proof	139	19
Substantive assessment	120	10

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

9 CJ Judgment of 29 June 2006, Case C-308/04 P, *SGL Carbon v Commission* [2006] ECR I-5977.

10 However, note that a number of the successful pleas were made in appeals in the same case (with sometimes only summaries published). See GC judgment of 18 June 2008, Case T-410/03, *Hoechst v Commission* [2008] ECR II-881, paras 436 ff.; judgment of 25 October 2005, Case T-38/02, *Danone v Commission* [2005] ECR II-4407, paras 309 ff.; judgment of 15 July 2005, Joined Cases T-71/03 *et al.*, *Tokai Carbon v Commission* [2005] ECR II-10*, paras 328 ff.; judgment of 8 September 2010, Case T-29/05, *Deltafina v Commission* [2010] ECR II-4077, paras. 332 ff.; judgment of 13 July 2011, joined Cases T-144/07 *et al.*, *ThyssenKrupp Liften Ascenseurs v Commission*, not yet officially published, paras 308 ff.; judgments of 3 March 2011, Cases T-117/07 and T-121/07, *Areva and Alstom v Commission* [2011] ECR II-633, paras. 315 ff.

11 GC judgment of 20 March 2002, Case T-21/99, *Dansk Rorindustri v Commission* [2002] ECR II-1681, paras 250 ff.; judgment of 8 July 2004, Case T-44/00, *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paras 268 ff.; judgment of 8 July 2004, Case T-50/00, *Dalmine v Commission* [2004] ECR II-2395, paras 314 ff.; judgment of 8 July 2004, Case T-67/00 *et al.*, *JFE Engineering v Commission* [2004] ECR II-2501, paras 314 ff.; judgment of 24 March 2011, Case T-382/06, *Tomkins v Commission* [2011] ECR II-1157, para. 97; judgment of 12 September 2007, Cases T-30/05 and T-36/05, *Prym and Coats v Commission* [2007] p. II-107* (Summ.pub.), paras 190–191; judgment of 6 March 2012, Case T-64/06, *FSL Plast v Commission*, not yet officially published, paras 154 ff.; judgment of 6 March 2012, Case T-53/06, *UPM-Kymmene v Commission*, not yet officially published, paras 43 ff.; judgment of 25 October 2011, Case T-348/08, *Aragonesas v Commission*, not yet officially published, paras 302 ff.

12 GC judgment of 19 March 2003, Joined Cases T-213/00 *et al.*, *CMA CGM v Commission* [2003] ECR II-913, paras 431 ff.; judgment of 11 December 2003, Case T-59/99, *Ventouris v Commission* [2003] ECR II-5257, paras 221 ff.; judgment of 26 April 2007, Case T-118/02 *et al.*, *Bolloré v Commission* [2007] ECR II-947, paras 705 ff.; judgment of 29 April 2004, Joined Cases T-236/01 *et al.*, *Tokai Carbon v Commission* [2004] ECR II-1181, paras 232 ff.; judgment of 8 July 2008, Case T-53/03, *BPB Plc v Commission* [2008] ECR II-1333, paras 480 ff.; judgment of 19 May 2010, Case T-21/05, *Chalkor v Commission* [2010] II-1843, paras 104 ff.; judgment of 19 May 2010, Case T-18/05, *IMI v Commission* [2010] ECR II-1769, paras 170 ff.; judgment of 5 October 2011, Case T-11/06, *Romana Tabacchi v Commission*, not yet officially published, paras 301–302; judgment of 12 July 2011, Case T-133/07, *Mitsubishi Electric v Commission*, not yet officially published, paras 270 ff.; judgment of 12 July 2011, Case T-113/07, *Toshiba v Commission*, not yet officially published, paras 286 ff.

13 GC judgment of 20 March 2002, Case T-31/99, *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881, paras 242 ff.; judgment of 29 April 2004, Joined Cases T-236/01 *et al.*, *Tokai Carbon and UCAR v Commission* [2004] ECR II-1181, paras 416 ff., 437 ff., 453 ff.; judgment of 9 July 2003, Case T-230/00, *Daesang Corporation and Sewon Europe v Commission* [2003] ECR II-2733, paras 144–145; judgment of 18 June 2008, Case T-410/03, *Hoechst v Commission* [2008] ECR II-881, paras 581 ff.; judgment of 30 September 2009, Case T-161/05, *Hoechst v Commission* [2009] ECR II-3555, paras 99 ff.; judgment of 16 July 2011,

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.[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.[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'.[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).[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).[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.[19] Pleas directed solely against the Commission's economic analysis of the market almost never met with success.[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)[21] or the existence of an anticompetitive object (3 cases; success rate: 21 per cent).[22] However, the question of a single and continuous infringement

Case T-186/06, *Solvay v Commission*, not yet officially published, paras 377 ff.

14 This confirms a finding in Veljanovski 'Penalties for Price Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission' (2006) ECLR 510 (512).

15 Other pleas included pleas concerning legitimate expectations/legal certainty, the duration of the Commission procedure, double jeopardy (*ne bis in idem*), or the inability to pay.

16 GC judgments of 9 July 2003, Cases T-230/00, *Daesang Corp. and Saewon Europe v Commission* [2003] ECR II-2733, para. 71; T-220/00, *Cheil Jedang Corporation v Commission*, [2003] ECR II-2473 para. 62; T-224/00, *Archer Daniels Midland v Commission* [2003] ECR II-2597, para. 59; judgment of 5 April 2006, Case T-279/02, *Degussa v Commission* [2006] ECR II-897, para. 339; judgment of 26 April 2007, Joined Cases T-109/02 *et al.*, *Bolloré v Commission* [2007] ECR II-947, para. 429; judgment of 11 December 2003, Case T-61/99, *Adriatica di Navigazione v Commission*, [2003] ECR II-5349, para. 196.

17 GC judgment of 30 November 2011, Case T-208/06, *Quinn Barlo v Commission*, not yet officially published, paras 59 ff.; judgment of 16 June 2011, Case T-186/06, *Solvay v Commission* [2011] ECR II-2839, paras 101 ff. (especially paras 113 ff.); judgment of 16 November 2011, Case T-59/06, *Low & Bonar and Bonar Technical Fabrics v Commission*, not yet officially published, paras 61 ff.; judgment of 5 October 2011, Case T-11/06, *Romana Tabacchi v Commission*, not yet officially published, paras 139 ff.; judgment of 8 July 2004, Case T-48/00, *Corus UK v Commission*, [2004] ECR II-2325, paras 128 ff.

18 GC judgment of 20 March 2002, Case T-9/99, *HFB v Commission* [1999] ECR II-2429, paras 105 ff.; judgment of 15 September 2011, Case T-234/07, *Koninklijke Grolsch v Commission*, not yet officially published, paras 55, 65 ff.; judgment of 24 March 2011, Joined Cases T-385/06 *et al.*, *Aalberts Industries v Commission* [2011] ECR II-1223, paras 44–46, 57–61, 68; judgment of 24 March 2011, Case T-379/06, *Kaimer v Commission* [2011] ECR II-64* (Summ.pub), paras 56–59, 77–79; judgment of 27 October 2010, Case T-24/05, *Alliance One International v Commission* [2010] ECR II-5329, paras 222–224; judgment of 6 March 2006, Case T-64/06, *FLS Plast v Commission*, not yet officially published, paras 39 ff.; judgment of 6 March 2012, Case T-65/06, *FLSmidth v Commission*, not yet officially published, paras 37 ff.; judgment of 13 July 2011, Case T-45/07, *Unipetrol v Commission*, not yet officially published, paras 48–49, 59 ff.; judgment of 13 July 2011, Case T-53/07, *Trade-Stomil v Commission*, not yet officially published, paras 63–64, 68 ff.

19 Categories: probative value of the evidence (2 cases; success rate: 13%), the Commission's failure to prove an agreement/concerted practice (1 case; success rate: 11%).

20 Such pleas were brought forward quite frequently (we counted 25 times); see, eg, GC judgment of 16 November 2011, Case T-76/06, *ASPLA / Commission*, not yet officially published, paras 84–85; judgment of 8 October 2008, Case T-73/04, *Le Carbone Lorraine* [2008] ECR II-2661, paras 37 ff.; judgment of 13 July 2011, Joined Cases T-144/07 *et al.*, *ThyssenKrupp Liften Ascenseurs v Commission*, not yet officially published, paras 58–61. GC judgment of 14 December 2006, Joined Cases T-259/02 *et al.*, *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169, para. 452 ff., is apparently the only case where an erroneous economic categorisation of the applicant was deemed relevant (for reasons of proportionality).

21 GC judgment of 20 March 2002, Case T-21/99, *Dansk Rørindustri v Commission* [2002] ECR II-1681, paras 61 ff.; judgment of 6 May 2009, Case T-127/04, *KME Germany v Commission* [2009] ECR II-1167, paras 208 ff.; judgment of 19 May 2010, Case T-18/05, *IMI v Commission* [2010] ECR II-1769, paras 96 ff.; judgment of 6 March 2012, Case T-65/06, *FLSmidth v Commission*, not yet officially published, paras 39–40; judgment of 30 November 2011, Case T-208/06, *Quinn Barlo v Commission*, not yet officially published, paras 148–149.

22 GC judgment of 30 November 2011, Case T-208/06, *Quinn Barlo v Commission*, not yet officially published, paras 148–149; judgment of 24 March 2011, Joined Cases T-385/06 *et al.*, *Aalberts Industries v Commission* [2011] ECR II-1223, paras 111 ff.

Table 2. Pleas brought before the Court of Justice

Pleas directed against . . .	Total number of pleas	Number of successful pleas
Fines	85	1
Procedure	40	4
Substantive assessment	15	0

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 legal errors. The findings can be summarized as shown in Table 2.

Unlike the situation before the GC, there is no single category of pleas that has a particular chance of success before the CJ. The successful procedural pleas in two cases concerned a breach of the rights of defence, in one case an error in the decision procedure, and in one case an insufficient statement of reasons.[26] The successful plea based on the fine assessment concerned a misapplication of the Leniency Notice.[27]

2. Changes over time

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

23 GC judgment of 27 September 2006, Joined Cases T-56/02 *et al.*, *Dresdner Bank v Commission* [2006] ECR II-3567, paras 59, 75 ff., 118–119.

24 GC judgment of 16 November 2011, Case T-68/06, *Stempher v Commission*, 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.

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

26 CJ judgment of 9 July 2009, Case C-511/06 P, *Archer Daniels Midland v Commission* [2009] ECR I-5843, paras 88 ff., and judgment of 3 September 2009, Joined Cases C-322/07 P, *Bolloré v Commission* [2009] ECR I-7191, paras 40 ff. (rights of defence); judgment of 1 July 2010, Case C-407/08 P, *Knauf Gips v Commission* [2010] ECR I-6375, paras 87 ff. (decision procedure); judgment of 20 January 2011, Case C-90/09 P, *General Química v Commission*, [2011] ECR I-1, para. 92 (statement of reasons).

27 CJ judgment of 9 July 2009, Case C-511/06 P, *Archer Daniels Midland v Commission* [2009] ECR I-5843, paras 110–113.

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

29 Commission Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty [1998] OJ C9/3; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2 ('Fining Guidelines').

30 <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (accessed April 2013).

granted immunity or submitting to a settlement.[31] Parties fined only minor amounts have to weigh the cost of an appeal against the chance to get rid of their fines and to clear their reputation. That said, there does not seem to be a clear monetary ceiling below which parties would not consider a fine—for example, Coppens decided to appeal its relatively low fine (€104,000) in the *International Removals* cartel.[32] In contrast, Excel, the company incurring the second-largest fine (€8.9 million) apparently did *not* appeal against the Commission decision. This is all the more remarkable as the Commission had not extended to Excel 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.[33]

As one would expect, pleas directed against the fining decision mostly consisted in sweeping objections at the very beginning of the reviewed period.[34] Soon, however, parties differentiated their pleas according to their individual strategies, and the pleas became more and more elaborate.[35] Starting around 2001/02, appeals have attacked the fining decision in a detailed way from various angles.[36] 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.[37] 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.[38] 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.

31 Commission notices on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17 and [2002] OJ C 45/3; Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C 107/4 ('Leniency Notices'); Reg. No. 773/2004, as amended by Reg. No. 622/2008 [2008] OJ L 171/3; Commission Notice on the conduct of settlement procedures [2008] OJ C 167/1.

32 Case COMP/38.543.

33 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, *FETTSA*.

34 See GC, judgment of 12 July 2001, Joined Cases T-202/98, *Tate & Lyle v Commission* [2001] ECR II-2035; judgment of 19 March 2003, Case, T-213/00, *CMA CGM v Commission* [2003] ECR II-913; judgment of 11 December 2003, Case T-65/99, *Strintzis Lines Shipping v Commission* [2003] ECR II-5433.

35 See the appeals directed against Commission Case IV/35.691, *Pre-Insulated Pipe* (decided 21 October 1998), GC judgments of 20 March 2002, Cases T-9/99, *HFB v Commission* [2002] ECR II-1487; T-15/99, *Brugg Rohrsysteme v Commission* [2002] ECR II-1613; T-16/99, *Lögstör Rör v Commission* [2002] ECR II-1633; T-17/99, *KE KELIT v Commission* [2002] ECR II-1647; T-21/99, *Dansk Rørindustri v Commission* [2002] ECR II-1681; T-23/99, *LR AF 1998 v Commission* [2002] ECR II-1705; T-31/99, *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881; and subsequent appeals.

36 For example, in GC judgment of 26 April 2007, Joined Cases T-109/02 *et al.*, *Bolloré v Commission* [2007] ECR II-947; judgment of 29 April 2004, Joined Cases T-236/01 *et al.*, *Tokai Carbon v Commission* [2004] ECR II-1181; judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169; judgment of 9 July 2003, Case T-220/00, *Cheil Jedang v Commission* [2003] ECR II-2473, and the other appeals against the Commission decisions in Case COMP/36.545, *Amino Acids*.

37 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.

38 GC judgment of 30 November 2011, Case T-208/06, *Quinn et al. v Commission*, not yet officially published, paras 146 ff.

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,[39] or where equal treatment called for a fine adjustment.[40] The Commission has specifically requested a fine increase on such grounds recently in the appeals concerning the *Copper Plumbing Tubes* case (2010).[41] 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.[42] 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*).[43]

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.

39 See, eg, GC judgment of 11 December 2003, Case T-66/99, *Minoan Lines v Commission* [2003] ECR II-05515, para. 357 ff.; judgment of 29 April 2004, Joined Cases T-236/01 *et al.*, *Tokai Carbon v Commission* [2004] ECR II-1181, paras 81–118; judgment of 8 October 2008, Case T-69/04, *Schunk GmbH v Commission* [2008] ECR II-2567, paras 238–263.

40 See GC judgment of 8 June 2004, Case T-67/00 *et al.*, *JFE Engineering v Commission* [2004] ECR II-2501; judgment of 19 May 2010, Case T-11/05, *Wieland-Werke v Commission* [2010] ECR II-86 (Summ.pub.).

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.*).

42 CJ judgment of 14 September 1999, Case C-310/97 P, *Commission v AssiDomän Kraft Products*, [1999] ECR I-5363, and CJ judgment of 29 March 2011, Joined Cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg v Commission* [2011] ECR I-2239.

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.[44] 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 in the cases *Courage & Crehan* and *Manfredi*.[45] The Commission's proposed Framework for Collective Redress is likely to boost court actions for damages.[46] 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.[47]

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'.[48]

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).

45 CJ, judgment of 20 September 2001, Case C-453/99, *Courage and Crehan* [2001] ECR I-6297; confirmed in judgment of 13 June 2006, Joined Cases C-295/04 to C-298/04, *Manfredi* [2006] ECR, I-6619.

46 See Commission Work Programme for 2012, COM(2011) 777 final, p. 6 with annexed Roadmap; available at: <http://ec.europa.eu/atwork/key-documents/index_en.htm> (accessed 3 April 2013).

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 objects) 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 anticompetitive 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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49 CJ judgment of 7 January 2004, Joined Cases C-204/00 P *et al.*, *Aalborg Portland v Commission* [2004] ECR I-123, paras 55 to 57; GC judgment of 27 September 2012, Case T-348/06, *Total Nederland NV v Commission*, not yet officially published, para. 32.

50 CJ, judgment of 17 December 1998, Case C-185/95 P, *Baustahlgewerbe v Commission* [1998] ECR I-8417.