ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

STATEMENT

Of the European Criminal Bar Association (ECBA) As to Public Consultation of the European Commission On the Functioning of Regulation 1/2003 (HT 1374 – Report on Regulation 1)

The European Criminal Bar Association (ECBA) is the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. The ECBA aims to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons. Membership is open to all lawyers, whether practicing or in academic life, who support those aims. The ECBA also acts as a platform for lawyers to meet with colleagues from all Member States and to exchange information and knowledge.

1. The ECBA supports the key objective of regulation 1/2003 to ensure a more effective enforcement of EC competition rules in the interest of consumers and businesses. However, the way this has been translated into art 23 as well as the Commission's application of this provision displays tremendous conceptual deficiencies: This regime seriously violates the principle of certainty, the principle of culpability, and the protection against self-incrimination.

2. The effective enforcement of EC competition rules cannot be achieved solely by the deterrent effect of ever larger fines. As can been seen in the United States a regime of imposing notoriously draconian penalties has not prevented undertakings and individuals from committing administrative or criminal offences. A deterrence scheme that infringes fundamental legal principles actually undermines the rule of law and the acceptance and legitimacy of the regulatory regime in the long run.

3. The Commission's scope of discretion from nil (refraining from imposing a fine) up to any sum only capped by the 10 per cent-limit must be significantly reduced. A company's turnover is suitable as a true cap and for adjusting the fine relating to the company's economic capability or

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as a criterion for the reduction of a fine on grounds of hardship, but not as a principal parameter for an adequate fine. The parameters "gravity" and "duration" are insufficient for setting an adequate fine. The legislator should add further criteria such as the nature of the infringement, the actual impact of the infringement on the market, the intensity of participation, benefits gained (not turnover but e g profits) through the infringement and damage suffered by the consumers.

4. The revised art 23 should not provide for criteria which allow the imposition of fines that exceed the level of culpability. The levying of deterrent surcharges should be ruled out.

5. The principle of culpability also prohibits attributing individuals' infringements to the company on a strict liability basis. Such an attribution requires that these individuals are statutory representatives of the undertaking or at least not sufficiently supervised by statutory representatives of the company.

6. In the above circumstances compliance efforts have to be deemed to be mitigating factors.

7. The revised art 23 has to guarantee that the precise sanctions are known in advance. The Commission's practice of running a sanctioning policy where the sanction is unforeseeable, on grounds that the deterrent effect will thereby be increased, seriously violates the principle of certainty.

8. The protection against self-incrimination must be heeded. Accordingly, the Commission should not consider the refusal to co-operate an aggravating factor.

We thank the Commission for the opportunity to comment on the functioning of regulation 1/2003.

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