Recidivism in EU antitrust enforcement

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All views expressed are strictly personal
Increasing problem?

- « awesome level of recidivism on the part of major companies ... confirmed culture of business delinquancy » (Harding & Gibbs, 2005, looking at 1995-2004 statistics)
- « recidivism appears to be increasing rapidly ... seems to justify a continuation of policies that impose brutally higher fines ... » (Connor, 2010, looking at 1990-2009 statistics)
Policy disagreements?

- EC 2006 Fining Guidelines: fine increase by up to 100% for each prior infringement
- EC practice: 50 % for 1 prior infringement, 60 % for 2, 90 % for 3, 100% for 4
- NCAs: France 15 to 50 %, Spain 5 to 15 %
- time limit? France 15 years, Spain 10
- exclusion from leniency/immunity? Greece
Overview

1) concept of recidivism
2) why increase fines for recidivists?
3) limitation period?
4) increase by how much?
5) exclude recidivists from leniency?
6) what conclusions can be drawn from the observed incidence of recidivism?
Concept of recidivism

« where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Articles 101 or 102 TFEU »

(EC 2006 Fining Guidelines)

↔ simultaneous infringements

(Connor, 2011: « severe undercounting »)
Rationale of increasing fines (specifically) for recidivists

« Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent. »

(General Court, Michelin, Danone, Shell)

but why increase only for recidivists?
Rationale of increasing fines (specifically) for recidivists

1) higher than average propensity to commit infringements
   (General Court & Court of Justice, *Danone*: reveals « a characteristic specific to the perpetrator of the infringement, namely its propensity to commit such infringements »)
   ➔ higher minimal deterrent fine

2) need to express increased moral condemnation

3) lower probability of detection

4) discovery of the profitability of infringements
Recidivism and leniency

EC decisions 2006-2010: 38 cartels:

- 255 undertakings:
  31 recidivists = 12 %

- 28 immunity recipients:
  7 recidivists = 25 %
What conclusions can be drawn from the recidivism statistics?

- not new; no increasing trend (24% (11/45) in 2006; 4% (3/71) in 2010)
- general fine level has increased significantly over past decades ➔ difficult to draw any conclusions
- increase in number of cases, or addition of other sanctions may be more effective to increase deterrence
- complete deterrence is impossible
paper

« Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis »

http://ssrn.com/paper=1957088