

However, in one of his more recent publications, entitled 'Enforcing European Community rules', Harding makes an assessment of the procedures and sanctions adopted in contemporary competition law and points to a 'quasi-criminal' model, adding that criminal law is being introduced to the Community legal system 'by the backdoor'<sup>39</sup>. He describes this existing legal state of affairs as an 'uneasy mix of criminal and administrative enforcement'<sup>40</sup>.

The conviction that fines and infringements under competition law are criminal law stems from various sources. The thesis that competition law has an inherent 'criminal law nature' is considered to be a reflection on the nature of infringements which lead to punishment, the rules applicable to define liability for such infringements, the nature of punishments, and the nature of procedures applicable to establish such liability. A major factor in this respect is that the legal systems of some States specifically define selected particularly gross breaches of competition law as offences<sup>41</sup>.

It is also stressed in the literature that the criminal law nature of competition law and of relevant sanctions may be supported by the fact that the legal liability for infringements is often based on criminal law principles, such as the significance of wilfulness and negligence giving rise to alleged breaches, and consideration of the various degrees of involvement of undertakings in such breaches. The legal literature on Community competition law also points out the existence of various defences taken from criminal law, such as necessary self-defence or a state of necessity<sup>42</sup>.

When elaborating on the criminal law nature of fines imposed under Regulation 17/62, Wils stresses their non-compensatory character and the fact that their aim is to punish and to prevent further breaches. In his opinion, their penal nature is also supported by the setting of their ceiling amounts<sup>43</sup>.

The arguments for recognition of the criminal nature of competition law infringements should not be taken to mean that the proponents of such a position share a conviction that the power of the Commission to conduct cases and to impose fines on undertakings should be questioned. Wils stresses that the compliance of the procedures under which the Commission issues its decision to impose fines with the provisions of Article 6 of the ECHR

<sup>39</sup> C. Harding, 'Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a "Joint Action" Model', [in:] C. Harding, B. Swart (eds.), *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization*, Aldershot, Brookfield, Singapore, Sydney 1996, pp. 25–26.

<sup>40</sup> C. Harding, 'Models of Enforcement...', p. 39.

<sup>41</sup> C. Harding, 'Models of Enforcement...', p. 51 and following. On this subject see also J. Maitland-Walker, *Competition Law in Europe*, Butterworths 1995.

<sup>42</sup> See also on this subject, M. Wagemann, *Rechtsfertigungs- und Entschuldigungsgründe im Kartellrecht der Europäischen Gemeinschaften*, Heidelberg 1992, p. 87 and following.

<sup>43</sup> W.P.J. Wils, 'La compatibilité...', p. 334.

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**M Mosston**



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