

A Commissioners' History of Cartel Enforcement in Europe: Multidimensional Comparison of Administrations

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KEY POINTS

- To compare cartel enforcement activity of DG-Comp's five Commissioners for Competition, we compiled a database of the 722 fines imposed by the Commissioners on 110 different cartels over a 26-year period.
- We also compared activity during each Commissioner's term on six metrics: total fine amount, total number of fines, average fine, median fine, number of cartels fined, and ratio of zero-amount fines to the number of cartels fined.
- This comparison provides a useful multidimensional assessment of cartel enforcement, indicating a recent shift towards larger fines imposed on fewer but larger companies, and robust use of an enhanced leniency program.

INTRODUCTION/OVERVIEW

Since the appointment of Karel Van Miert as Commissioner for Competition in 1994, the EU's Directorate General for Competition (DG-Comp) has gained a reputation as having more vigorous competition enforcement than most other regulatory authorities around the world, including the US Department of Justice (DOJ). This perception is even stronger when it comes to cartel enforcement under Article 101 of the European Commission Treaty. For example, one of the current author's previous analysis comparing DOJ fines to EU fines showed that the EU had imposed more than twice as many fines on cartels than the DOJ over the 1994-2014 period. Our data also showed that, over the same period,

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the EU had issued more than five times as many zero-amount fines than the DOJ (for companies that cooperate with investigations), likely due in part to the strong whistleblower policy adopted in the EU in 2004.²

In this paper, we apply a quantitative approach to assessing the EU's cartel enforcement activity over the terms of its last five Commissioners for Competition, drawing on data publicly available from the EC website starting in 1994:

- Belgium's Karel Van Miert (1994-1999)
- Italy's Mario Monti (1999-2004)
- The Netherlands' Neelie Kroes (2004-2010)
- Spain's Joaquin Almunia (2010-2014)
- Denmark's Margrethe Vestager (2014-2019)

We have compiled a database of cartel fines imposed by the EU over the 26-year period starting with Van Miert's term in 1994 and extending through the end of Vestager's initial five-year term. Over that period, the five Commissioners imposed 722 fines on 110 different cartels.

Gauging the level of enforcement activity over an extended period is a complex and nuanced exercise that must account for the evolution of regulatory policy over time and the individual agendas and focus areas of the different Commissioners. To that end, our analysis employs a multidimensional approach based on comparisons of six metrics. For each Commissioner's term, we examine:

- Total fine amount³
- Total number of fines
- Average fine
- Median fine⁴
- Ratio of zero-amount fines to the number of cartels fined (as an indication of the use of the whistleblower program)
- Number of cartels fined

² Cremieux PY, and Snyder E, "Enforcement of Anticollusion Laws against Domestic and Foreign Firms," *Journal of Law and Economics*, Volume 59, Number 4, November 2016.

³ To allow comparison between Commissioners, all euro amounts in this paper are inflated to their 2019 values using EU CPI data from the Organization for Economic Co-operation and Development.

⁴ Median is defined as the central observation of a distribution of data after it has been sorted. The median is particularly useful for describing data that contains outliers or is skewed, as the median is not subject to as much distortion by such data.

Together, these metrics provide a multidimensional assessment of cartel enforcement activity, focus, and methods for each of the five Commissioners. At a time when other types of anticompetitive behavior – particularly unilateral behavior in the rapidly growing digital economy – are drawing increased regulatory attention and enforcement resources, cartel enforcement remains an important tool for regulators to address potential consumer welfare loss from coordinated activities.

In this paper, we first discuss several overarching questions about enforcement trends over the 26-year period. We then turn to an assessment of each Commissioner’s enforcement activity during their respective terms, based on the six selected metrics.⁵ Finally, we offer concluding thoughts.

KEY QUESTIONS FOR CARTEL ENFORCEMENT IN THE EU

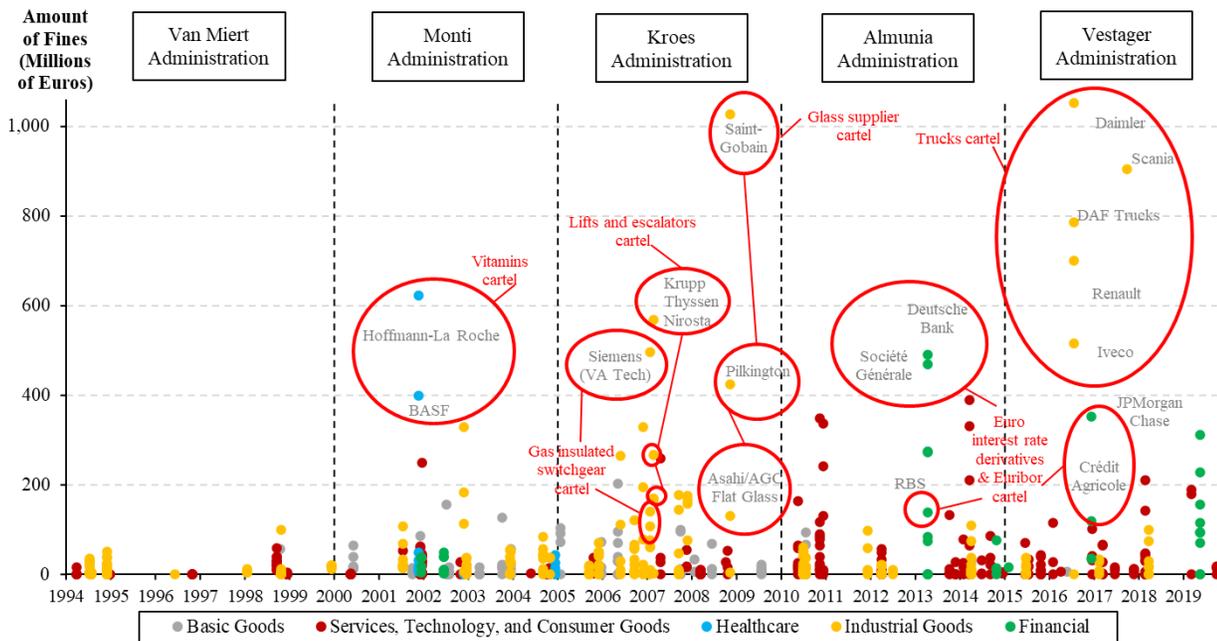
Figure 1 plots the number and size of fines by year for each Commissioner in real terms. The figure also categorizes each cartel by industry,⁶ and highlights cartels that include at least one firm with a fine greater than €400 million (i.e., the largest fines). We used these data to examine four key questions regarding cartel enforcement:

1. Are fines getting larger in the EU?
2. Are fines becoming more frequent?
3. Are specific industries disproportionately represented among those fined?
4. Has the EU’s leniency program impacted fines?

⁵ Monti's fines in 1999 are included in the statistics for Van Miert's administration because Monti's administration covered only the first three months of that year; the Monti fines assigned to Van Miert represented all fines imposed in 1999. Kroes's fines in 2004 are included in the statistics for Monti's administration because her administration covered only one month that year; the Kroes fines assigned to Monti represented less than 18% of fine amounts in 2004. Vestager's fines in 2014 are included in the statistics for Almunia's administration because her leadership only started in November 2014; the Vestager fines assigned to Almunia amounted to less than 2% of fine amounts in 2014. Kroes's tenure extended into 2010 (through February), but there were no fines issued during her administration in that year.

⁶ Product markets for each firm included in Figure 1 were assigned according to Yahoo Industry classifications. The Yahoo industry index is based on the Global Industry Classification Standard.

Figure 1
Fines Imposed by the EU (by Industry)
1994 - 2019



Notes:
 [1] Fines are levied under Article 101 (formerly Article 81, Anti-Competitive Agreements).
 [2] All euro amounts are in millions and inflated to their equivalent 2019 values using EU CPI data from the Organization for Economic Co-operation and Development.
 [3] Cartels with at least one firm fined greater than €400 million are circled in red. Only the largest fines in a cartel are circled.
 Sources:
 [A] Data assembled by authors from European Commission Competition Policy - Antitrust Case Commission Decisions, available at <http://ec.europa.eu/competition/antitrust/cases/index.html>; Annual Reports, 1994-2019, available at <http://ec.europa.eu/competition/annual_reports>; Press releases, available at <http://europa.eu/rapid/searchAction.do>.
 [B] Organization for Economic Co-operation and Development, Consumer Price Index: Harmonized Prices: Total All Items for the Euro Area [CPHPTT01EZM661N], January 22, 2019.

1. Are fines getting larger in the EU?

Since 2006 (the second full year of Kroes’s term), the method used to calculate fines has been more directly related to sales associated with the anticompetitive conduct, but with a cap of 10% of the company’s total annual revenue. A severity factor is associated with the size of sales to reflect the nature of the offending behavior.

From Van Miert’s term through Vestager’s, enforcement is increasingly concentrated through larger fines imposed on fewer companies. Due largely to the very large fines imposed on the trucks cartel, combined with fewer number of fines overall, Vestager has by far the largest average fine for her term (€81.6M), followed distantly by Kroes (€61.3M) and Almunia (€41.9M). The Van Miert and Monti administrations (which preceded the methodological change) are far behind with average fines of €9.5M and €27.1M, respectively.

Similarly, Vestager has the highest median fine of €18.2M, followed by Kroes at €16.2M. Here again, Almunia seems to have been less aggressive in his enforcement, with levels of fines closer to those of Monti 10 years earlier as indicated by median fines (€9.2M for both Commissioners).

Outlier fines also suggest that the Almunia administration was less aggressive in its enforcement. The number of large fines greater than €200M remained consistent across the Kroes, Almunia, and Vestager administrations. Each of these Commissioners imposed either 9 or 10 fines larger than €200M. However, notable outliers include Kroes's record fine (at the time) against St. Gobain in the glass cartel and the fines that Vestager, the current Commissioner, imposed against EU truck manufacturers.

In fact, Vestager's fines against the truck cartel represent five of the 10 largest fines from the five Commissioners combined. Kroes imposed three of the remaining five-largest fines, with Monti and Almunia imposing one each.

Overall, whether through average fines, median fines, or the highest single fines, the Kroes and Vestager terms represent a significant departure from the earlier administrations of Van Miert and Monti. Somewhat surprisingly, the Almunia administration, despite being nestled between Kroes and Vestager, seems to be closer to the enforcers of the prior decades. Almunia imposed fewer large fines and had lower median and average fines than either his predecessor Kroes or his successor Vestager.

2. Are fines getting more frequent in the EU?

Until Vestager's term, the Commissioners were relatively consistent in the number of fines imposed, ranging from 137 under Kroes to 179 under Monti. During Vestager's term, however, the number of fines dropped dramatically to 95, representing only 50-70% of the number of fines imposed by preceding administrations. Vestager did compile the highest average fine of any of the Commissioners, largely due to imposing record fines against the truck manufacturers.

Similarly, the number of individual cartels fined in each term dropped off from Monti's 32 to the low 20s for his three successors. This suggests either that fewer and larger firms were involved in cartel-like behaviors or, more likely, that the EU regulators learned from previous administrations and chose to focus their enforcement resources on a select group of larger offenders. The more recent periods of focused enforcement resulting in higher penalties, particularly under Vestager, may serve as warnings to other would-be cartel enthusiasts.

Whether because she considers that her deterring strategy has been effective or because she worries about new emerging forms of potential attacks on consumer welfare, Vestager has indicated her intention to focus more of her attention and resources toward allegedly unilateral or monopolistic actions of digital platform companies. This could further sharpen her selective approach to cartel enforcement in her

second term as she focuses more of her attention elsewhere and tries to maximize the impact of the resources she devotes to cartel enforcement.

3. Are specific industries disproportionately represented among those fined?

As seen in Figure 1, the healthcare sector was left untouched from the Kroes administration through Vestager's first term. The industrial manufacturing sector, on the other hand, has consistently been the target of fines through every Commissioner's term, albeit mostly with smaller fines. Saint-Gobain is a notable outlier during Kroes's administration with a fine of €1.03B (in 2019€) for its participation in the glass supplier cartel. This was by far the largest fine up to that time, and it has only been topped by the €1.05B fine on Daimler eight years later in 2017.

Overall, the Kroes administration concentrated much of its activity on several cartels in the industrial sector, including lifts and escalators and gas insulated switchgear, along with glass suppliers. In each of these cartels, the Kroes administration imposed a large fine on a single member of the cartel, and lesser fines on the other companies.

Whether because of the deterring effect of Kroes's focus on the industrial sector or because of a shift in attention by the subsequent Almunia administration, other sectors became prime targets of later enforcement, including services (air cargo), technology (LCD panels), and financial services (interest rate derivatives). Both Almunia's and Vestager's administrations continued to impose fines on industrial goods cartels, but with much less frequency and with much lower fines than seen during Kroes's term.

Almunia's targeting of the EURIBOR cartel in the financial sector carried over into Vestager's administration, when additional fines were imposed on other companies in the cartel. Vestager continued this focus on financial companies in the final year of her first term, imposing a number of moderate fines on the forex cartel. During her first term, Vestager also continued to impose relatively small but regular fines on cartels in the services, technology, and consumer goods sectors.

However, Vestager's most prominent activity was focused on the trucks cartel, where the fines imposed on five of the manufacturers in 2017 and 2018 far outstripped any other fines during her administration. In fact, these are five of the largest fines imposed by any of the five Commissioners. The truck fines represent in value more than 50% of all fines imposed during the Vestager administration.

4. Has the EU's leniency program impacted fines?

The EU's whistleblower program has been widely recognized as an unambiguous success since its strengthening in 2004, at the end of Monti's term. The five Commissioners' relative reliance on the whistleblower regulation can be compared by examining how frequently each Commissioner imposed zero-amount fines.

Prior to the whistleblower program being strengthened, relatively little use was made of it, with only 5.4% and 8.9% of all cartel fines associated with a zero fine under the Van Miert and Monti administrations, respectively. Even Kroes seems to have employed the newly strengthened whistleblower regulation unevenly, primarily only in the first year of her term. In sharp contrast, the whistleblower regulation became a central tool during the Almunia and Vestager administrations, with, respectively, 15% and 21% of all cartel enforcements associated with a zero fine.

In fact, Almunia posted the highest ratio of zero fines to number of cartels, with a zero fine imposed on every cartel fined during his term except for a single cartel in his final year. Vestager had the second-highest ratio of zero fines to number of cartels (87%), suggesting that she continued to take advantage of the whistleblower program during her first term while imposing fewer fines overall.

OBSERVATIONS BY COMMISSIONER

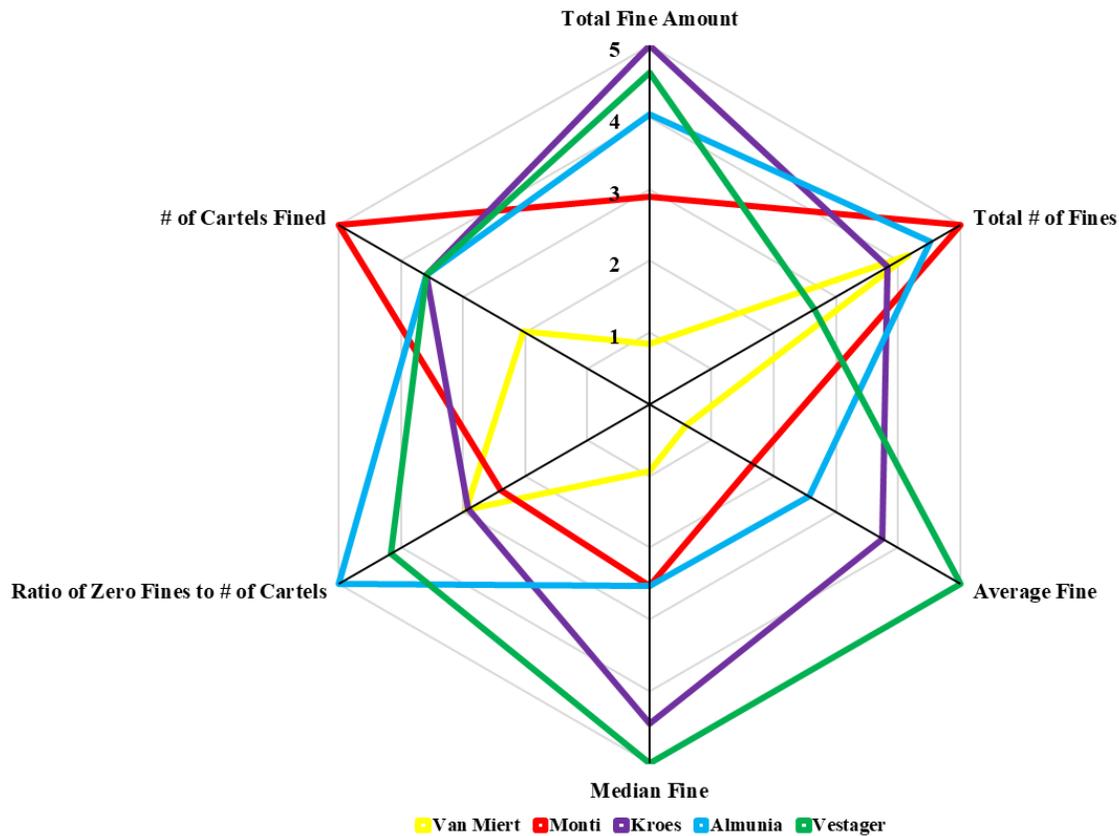
Figure 2 displays the relative position of the five Commissioners for each of six metrics adjusted to a common five-point scale for ease of comparison. No single Commissioner leads in all six metrics, and the differences in positioning on the individual axes can help characterize the activity of each Commissioner.

Karel Van Miert: Cautious beginnings

Data included for full years from 1994-1999

Van Miert's reputation for vigorous enforcement, earned during his term in the 1990s, was instrumental in establishing DG-Comp among the world's leading regulatory authorities. The data show, however, that he was most active in the first and last full years of his term for which data are available (1994 and 1998, respectively), and his administration did not impose a single cartel fine in either 1995 or 1997. He also made no use of the whistleblower provisions after imposing eight zero-amount fines in his first year.

Figure 2
Multi-Dimensional Comparison of Commissioners



Notes:

[1] Fines are levied under Article 101 (formerly Article 81, Anti-Competitive Agreements).

[2] Commissioners' values for each metric are plotted as proportions of the largest value.

Source:

[A] Data assembled by authors from European Commission Competition Policy - Antitrust Case Commission Decisions, available at <<http://ec.europa.eu/competition/antitrust/cases/index.html>>; Annual Reports, 1994-2019, available at <http://ec.europa.eu/competition/annual_reports/>; Press releases, available at <<http://europa.eu/rapid/searchAction.do>>

As a result, Van Miert ranks lowest of all five Commissioners in total amount of fines, average fine over the term, and median fine. His administration also imposed fines on the smallest number of unique cartels (13), perhaps partially due to the greater difficulty of identifying cartels absent a strong whistleblower program.

On the other hand, Van Miert showed little reluctance in pursuing complex cartels involving multiple firms. Van Miert's administration averaged nearly 11 fines per cartel, which is the largest number of fines per cartel of any Commissioner, with Almunia in a distant second place at just over 7. In his first year, Van Miert also imposed by far the most fines of any Commissioner in a single year (93). However, his activity fell sharply in later years. Overall, irrespective of the relative weight assigned to the six dimensions of enforcement, Van Miert's administration can be seen as significantly less active than those of his successors.

Mario Monti: Casting a wide net, but relatively small fish

Data included for full years from 2000-2004

Monti's activity clusters around the middle two years of his term, 2001 and 2002. In those two years, Monti imposed more fines, larger fines, and fines on more cartels than in the other years of his term combined. One result of this concentrated activity was that, over the course of his entire term, Monti imposed more fines (179), and fined more cartels (32), than did any other Commissioner.

However, the intensity of Monti's activities does not translate into unambiguously robust overall enforcement. For example, Monti is next to last in terms of the total amount for fines imposed during a term, and the average fine and median fine assessed during his administration are below those of subsequent administrations (except for median fine relative to Almunia), as shown on Figure 2.

The change in fine calculation relative to turnover in 2004 may explain, in part, the lower fines compared to later administrations. This change introduced a more explicit mechanical relationship between fine size and turnover, but it may also have incentivized Commissioners to focus on larger firms as a way to virtually guarantee large fines and associated deterring effects. This is particularly true for Vestager's first term.

In addition, there were few outliers during Monti's term, with only two fines (to Hoffman-La Roche and BASF in the vitamins cartel) comparable to the largest fines imposed during subsequent administrations.

The Monti administration also imposed relatively few zero-amount fines, and none at all during its first full year. This is consistent with a relatively weaker leniency program prior to 2004, the last full year of Monti's term.

Neelie Kroes: Steady as she goes

Data included for full years from 2005-2009

Until the last year of her term (2009), Kroes remained relatively consistent in terms of number of fines imposed each year (between 25 and 38) and number of cartels fined (between four and seven).

However, there was a steep decline in activity in her final year, with only eight fines imposed on a single cartel.

2007 was a year of unusually robust activity for Kroes, with fine levels (€3,732.8M) more than double those of either the preceding or subsequent year (€1,895.5M and €1,850.0M, respectively). It is unclear whether the methodological changes in fine calculations, introduced in 2006, influenced the level of fines imposed during these three years of Kroes's term.

Kroes had one noticeable outlier fine of €1.03B against Saint-Gobain, in the glass cartel. The next largest fines during the Kroes administration – on Krupp Thyssen Nirosta in the lifts and escalators cartel, Siemens in the switchgear cartel, and Pilkington, also in the glass cartel – are all in line with the largest fines imposed by the preceding (Monti) and subsequent (Almunia) administrations.

The moderate but steady level of activity of Kroes, up until her final year, results in the highest total amount of fines imposed over any term and the second-highest median fine (behind Vestager) of all the Commissioners.

Joaquin Almunia: Full speed ahead on whistleblowers

Data included for full years from 2010-2014

In contrast to the pattern observed in Kroes's administration, the level of fines imposed during Almunia's term was highest in his first year (2010, starting in March) and last two years (2013 and 2014). Only five fines were imposed in 2011, and even though the number of fines jumped to 29 the following year, the average fine in 2012 was only €9.9M with a median at €3.4M.

The relative inactivity in the two middle years reduced Almunia's average and median fines over the course of his term, even though he ranks second in total number of fines (162 to Monti's 179). We have included fine data for Almunia's term beginning in 2010 and extending through the end of 2014. This results in a longer period for tracking fines for Almunia than for the other Commissioners, thereby biasing total activity over Almunia's term upwards relative to others. Nevertheless, Almunia targeted the same number of cartels (23) as his predecessor Kroes and his successor Vestager.

Half of the six largest fines imposed in Almunia's administration were in the air cargo cartel (Air France) and the auto parts cartel (INA-Holding Schaeffler, AB SKF). The financial services sector also came into the crosshairs with the two largest fines imposed on Deutsche Bank and Societe Generale in the EURIBOR (financial benchmarks) cartel. These were the first fines imposed in the financial sector in a dozen years, and the investigation carried over into Vestager's term. However, even Almunia's largest

finances were relatively modest in size, compared to the largest fines imposed by Monti, Kroes, and Vestager.

Most characteristic of Almunia's term is its heavy reliance on the whistleblower statute, with Almunia posting the highest ratio of zero fines relative to the number of cartels fined of any Commissioner. Up until the final year of his term – including the relatively dormant middle years – Almunia employed at least one zero-amount fine for every cartel fined. As a result, he is the only Commissioner whose average ratio for the entire term was above 1 (due to changes in market structure, including acquisitions, during the course of some investigations that allowed more than one zero-amount fine to be imposed per cartel). This provides an indication that Almunia aggressively embraced the EU's leniency program.

Margrethe Vestager: Concentration on the big fish

Data included for full years from 2015-2019

Much of the media's attention during Vestager's first term, especially in the later years, became focused on her well-documented interest in controlling what she sees as abuses by digital platform companies. With Vestager assuming responsibility for regulating the digital sector, along with her role as the EU's competition chief for an unprecedented second term, the media's dismissive attitude toward her cartel enforcement is understandable. Indeed, during her first term Vestager imposed fewer fines on cartels (95) than any other Commissioner. Her average of 4.13 fines per cartel is also lower than her predecessors' averages. Excluding the truck cartel, her average, median, and total fine amounts are also relatively low compared to her predecessors.

Yet the outlier effect of the truck cartel results in a completely different overall story. Despite imposing fewer fines than all her predecessors, her average fine of €81.6M is about €20M more than Kroes's next-highest average of €61.3M, and nearly twice that of Almunia's average (€41.9M). She is also ahead of Kroes for highest median fine (€18.2M to Kroes's €16.2M) and close to twice the level of either Almunia's or Monti's median. Finally, she is second-highest (to Almunia) in ratio of zero fines to number of cartels fined, demonstrating the continuing central role of the whistleblower statute.

Taken together, these metrics indicate a focus on fewer but larger companies, although skewed by the truck investigation. Indeed, Vestager's fines on the European truck cartel comprise five of the 10 largest fines imposed since 1994 and fully half of her overall fine activity over her first term. Among

Vestager's next-largest fines, two were imposed on the EURIBOR cartel, following on large fines imposed by Almunia for the same cartel.

One indicator of the increasing concentration of Vestager's cartel activity can be seen in 2019, the final year of her first term. For that year, she largely closed the gap between average fine (€97.9M) and median fine (€93.7M). The difference is much smaller than in 2016, when her average fine was €229.0M (due primarily to extremely large fines on the truck cartel), while her median was only €40.6M.

Rather than ignoring cartels entirely to pursue the digital giants, then, it appears that Vestager is concentrating her attention on cartels where she can have the most effect with the fewest resources. She may also be benefiting from the cumulative deterrent effect of the significant fines levied by prior Commissioners.

POTENTIAL IMPLICATIONS FOR A SECOND VESTAGER TERM

It is always dangerous to make any predictions about future enforcement against cartels. Nevertheless, some trends seem clear. Specifically, the data through 2019 suggest three likely directions.

First, in recent years, DG-Comp's activity has appeared to shift towards larger fines imposed on fewer but larger companies. Second, with more cartel matters pursued in multiple regional and national jurisdictions, some antitrust analysts have speculated that companies may be more reluctant to avail themselves of leniency programs at the EU level. Nevertheless, both Almunia and Vestager maintained high ratios of zero-amount fines to the number of cartels fined, suggesting a robust whistleblower program. The success of the leniency program will bear watching during Vestager's second term, especially with modifications the EU made in 2018 that make it easier for individuals to report cartel activity.

Finally, despite an avowed focus on digital markets, there is no reason to expect a second Vestager administration to diminish its cartel enforcement efforts. However, an increased focus on the whistleblower statute and a refocusing of available resources on high-value targets would be consistent with recent observations.