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Fines setting by the European Commission for Antitrust Infringements

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*The views expressed are personal and do not bind the Commission

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Outline

1. EU Fines Objectives
2. EU Legal Frame for Fines
3. Development of EU Guidelines
4. Setting the Fines
5. Judicial Review of the Fines Setting
6. Collection of fines
7. Interaction between fines leniency and settlements

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EU Fines Objectives

- Fines = the only currently foreseen sanction for breaches of competition law
- Objectives:
  - Punishment
  - Deterrence
    - Specific deterrence
    - General deterrence

EU Legal Frame for Fines

- Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)
- Council Regulation No. 1/2003 > fines principles:
  - Gravity and duration of infringement
  - 10% turnover cap
- General principles of law
  - Equal treatment
  - Proportionality
- 2006 Fines Guidelines
- Inability to pay:
  - Almunía/Lewandowski Information Note of 2010

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Development of EU guidelines

1998 Guidelines =>2006 Guidelines

- Fines based on ‘value of sales’ and no longer a starting figure inspired by market size and previous precedents
- Duration increase: 100% vs 10%
- Entry fee of 1 year vs nothing
- Recidivism: up to 100% per count vs 50%

Setting the Fines: Overview

- Basic amount
  - Value of sales x
  - Gravity x
  - Duration
  - "Entry fee"
- Adjustment factors
  - Aggravating circumstances
  - Mitigating circumstances
  - Deterrence multiplier
- Legal maximum
- Fines reductions
  - Leniency
  - Ability to pay

Setting the Fines: Starting point - cartelised sales

- Value of sales per participant
- Gravity multiplier of 15-30%
- Duration fully counts

-> proxy to reflect economic importance of infringement per participant

-> focus on potential effect on market and potential illegal profit of participant

Setting the Fines: The Basic Amount I.

Value of sales (per cartel participant):

- Points 13 to 18 of the 2006 Fines Guidelines:
  - "[…] value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA."
  - Usually the last full business year of the participation in the infringement

Setting the Fines: Basic Amount II.

Concept of undertaking: Parental liability

Parental companies not directly involved in the infringement can be held liable for an antitrust infringement:

- Decisive influence on the direct participant (capability + use of this capability)
- Wholly owned subsidiaries

Avoiding artificial intra-group arrangements to reduce /escape the fines

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Setting the Fines: The Basic Amount III.

Gravity (multiplier of 15-30%) :

- Points 20 to 23 of the 2006 Fines Guidelines:
  - Assessment in light of numerous factors:
    - The nature of the infringement (horizontal price-fixing, market sharing, output-limitation agreements)
    - The undertakings combined market share
    - The geographic scope of the infringement
    - The implementation of the infringement

Setting the Fines: Basic Amount IV.

Duration:

- Point 24 of the 2006 Fines Guidelines: Counting
  - Single and continuous infringement
  - Rounding of periods

Entry fee:

- Point 25 of the 2006 Fines Guidelines:
  - 15% to 25% of the value of sales
  - Purpose to deter from even entering into anti-competitive agreements
  - Always applied for cartels, optional for other infringements

Setting the Fines: Adjustment Factors I.

Aggravating circumstances:

- Point 28 of the 2006 Fines Guidelines
- Recidivism (same or a similar infringement) => uplift of up to 100%
- Refusal to cooperate/obstruction
- Role of leader in, or instigator of, the infringement

Setting the Fines: Adjustment Factors II.

Mitigating circumstances:

- Point 29 of the Fines Guidelines 2006
  - Terminating the infringement immediately upon the European Commission's intervention
  - Infringement as a result of negligence
  - Substantially limited involvement in the infringement
  - Effective cooperation outside the Leniency Notice and beyond the legal obligation to do so
  - Anti-competitive conduct authorised/encouraged by public authorities/legislation

Setting the Fines: Adjustment Factors III.

Deterrence multiplier:

- Points 30 to 31 of the 2006 Fines Guidelines
  - Possibility to increase the fine to be imposed on undertakings with particularly large turnovers beyond the affected sales
  - Possibility to increase the fine to exceed the amount of gains resulting from the infringement where it was possible to estimate that amount

Setting the Fines: Legal Maximum

Points 31 to 32 of the Fines Guidelines 2006

- 10% of the total worldwide turnover of the undertaking
- In the business year preceding the adoption of the decision
- Prevention of disproportionate fines, and hence of a possible risk to the viability of the fine addressees

Setting the Fines: Fines Reductions

Application after the adjustment factors and the 10% cap

- Possible reductions due to
  - Leniency
  - Settlement
  - Inability to Pay (ITP)

Leniency Reductions

100% leniency reduction (= full immunity from fines) for the first applicant

• 30% to 50% leniency reduction for the second applicant

• 20% to 30% leniency reduction for the third applicant

• Up to 20% leniency reduction for other applicants

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Settlement Reduction

- Reduction of 10% for cooperation in procedure and acknoledgement of liability
- Cumulative application with leniency reduction, where applicable
- Purpose:
  - Shorter and more efficient procedure
  - Free up resources for other investigations
- Since 2010, 17 decisions adopted following the settlement procedure

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Collection of fines I.

- The Commission Decision offers a 3 months' time limit to pay the fine to be counted from the date of its notification
  - Thereafter interest is automatically due at a rate applied by the European Central Bank to its main refinancing operations plus 3.5 percentage points ;
  - If an undertaking appeals the decision, the fine shall be covered by the due date by either a financial guarantee or a provisional payment of the fine.

- Competition Decisions are enforceable in the Member States concerned pursuant to Article 299 TFEU (and Article 110 of the EEA Agreement)
  - Acts of the Commission which impose a pecuniary obligation on persons other than States shall be enforceable ;
  - The order for its enforcement shall be appended on the Commission fine decision ;
  - After authentication by national competent administration, the Commission can directly charge a bailiff or its equivalent to execute the enforcement ;
  - The MS concerned is the MS where the company has seizable assets.

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Collection of fines II.

- DG Budget (the Accounting Officer) is charged with fine collection. Money collected eventually goes to EU's general budget as fine becomes definitive
- DG Budget's follow-up procedure:
  - Pre-reminder letter ± one month before payment deadline
  - If no reaction, at least 2 formal reminders after payment deadline
  - If finally no reaction, enforcement (Article 299 TFEU)
    → Commission Legal Service acts through local lawyer and e.g. blocks accounts or seizes goods.
- Possible deviation of standard recovery procedure
  - "Inability to Pay"-claim by company;
  - Company applies for Interim Measures at European Court of Justice;
  - Accounting Officer may grant payment plan which, as a rule, is covered by a financial guarantee, or for companies in serious financial distress without guarantee;
  - Company in bankrupcy proceedings: recovery trough liquidator.

Inability to Pay (ITP): Legal Framework

Exceptional following careful scrutiny and only if fulfilling conditions of point 35 of the Fines Guidelines

- Purpose
  - Avoid that fine drives financially distressed but competitive companies out of the market
  - And that this causes adverse social and economic consequences
  - Further details on the ITP assessment in the Almunía/Lewandowski Information Note

  - Note: risk that fine causes insolvency does not as such render the fine disproportionate

Inability to Pay (ITP): Assessment

Quantitative assessment

- Z-Score
- Capital strength
- Profitability
- Solvency
- Liquidity

Qualitative assessment of the relationship with

- banks
- shareholders

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Inability to Pay – statistics since 2007

- 43 pre-decision applications
- 13 granted
- 26 rejected
- 4 withdrawn

- Reductions between 25% and 95%
- Usually, only one party received a reduction

Setting the Fines: Derogation Clause

Point 37 of the Fines Guidelines 2006

- Purpose: to adjust the fines setting methodology for case specific elements not reflected in the standardised methodology or to achieve deterrence
- Used only rarely

Inability to Pay (ITP): Jurisprudence

- "[T]he Commission is not required, when determining the amount of the fine, to take into account the financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions." Case C-328/05 SGL Carbon, paragraph 100)
- "[T]he fact that a measure adopted by a Community authority brings about the insolvency or liquidation of a given undertaking is not as such prohibited by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value." (Case T-62/02 Union Pigments, paragraph 177)

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Judicial Review of the Fines Setting

- Unlimited jurisdiction of the Community Courts to review the fines
- Relevant factual situation at the time of the decision
- General Court judgments in 2012 on the application of the Fines Guidelines 2006 => key elements confirmed

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Fines: Statistics I.

Cartel fines imposed (not adjusted for Court judgments) in 2009 to 2013

Year	Amount in €
2009	1 540 651 400
2010	2 868 459 674
2011	614 053 000
2012	1 875 694 000
2013	141 791 000
Total	7 040 649 074

Fines: Statistics II.

- Cartel fines imposed under the 2006 Fines Guidelines and the impact of the 10% cap (with immunity applicants, as of July 2013)

Fines Guidelines 2006 – fines imposed on undertakings as percentage of global turnover (incl. immunity applicants)											
percentage	0-0.99%	1-1.99%	2-2.99%	3-3.99%	4-4.99%	5-5.99%	6-6.99%	7-7.99%	8-8.99%	9-9.99%	total
undertakings fined	127	25	12	5	9	9	5	7	3	23	225
	56.44%	11.11%	5.33%	2.22%	4.00%	4.00%	2.22%	3.11%	1.33%	10.22%	100.00%

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Fines: Statistics III.

Fines Guidelines 2006 – fines imposed on undertakings as percentage of global turnover (excl. immunity applicants)											
percentage	0-0.99%	1-1.99%	2-2.99%	3-3.99%	4-4.99%	5-5.99%	6-6.99%	7-7.99%	8-8.99%	9-9.99%	total
undertakings fined	99	25	12	5	9	9	5	7	3	23	197
	50.25%	12.69%	6.09%	2.54%	4.57%	4.57%	2.54%	3.55%	1.52%	11.68%	100.00%

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Conclusions

- Appropriate balance between sufficiently deterrent and proportionate fines
- Evidenced by successful leniency program and increased compliance efforts
- Cartel decisions are basis for private damage actions

  =further increase of costs of cartelists