



European Commission Fining Policy and Practice

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Introduction

Commission's Legal Basis

- Council Regulation 1/2003: sets out principle that fines should be based on gravity + duration of the infringement and caps the maximum fine at 10% of the undertaking's turnovers
- Commission Guidelines on Fines 2006: Introduced in the interest of transparency, provide more detailed explanation of Commission's fining policy, binding on Commission

Scope

- Fines on undertakings not individuals
- Imposition of fines is discretionary
- Symbolic fines can be imposed
- Main application is for substantive infringements of Articles 101 (illegal agreements) + 102 (abuse of dominance)
- Procedural infringements can be sanctioned (e.g. obstruction, provision of false information)
- Facilitators of cartels can be sanctioned (see AC Treuhand case example)
- Subject to limitation periods: maximum of 10 years from end of infringement

Policy: The Commission Guidelines on Fines

Guidelines on Fines

Determination of fines made by 2 steps: the basic amount + adjustments to the basic amount

- Basic amount
 - Percentage of value of sales multiplied by duration (variable amount)
 - Plus additional amount (entry fee)
- Adjustments to the basic amount
 - Aggravating & mitigating factors
 - Deterrence increase
 - Application of the legal maximum
 - Other reductions (leniency, settlement, inability to pay)

Value of sales

- Sales of goods or services to which the infringement directly or indirectly relates (see LCD case example)
- Within the EEA
- Last full business year of the infringement
- No sales in worldwide market sharing cartels? (see Power Cables case example)

Gravity percentage

- A percentage or gravity factor is applied to the value of sales up to 30%, depending on the seriousness of the infringement (cartels at 'higher end')
- The seriousness depends on a number of non-exhaustive factors
 - nature of infringement
 - geographic scope
 - implementation
 - combined market share
- In multiparty cases the gravity factor is usually the same for all parties

Duration

- The percentage of value of sales is multiplied by the number of years of the infringement (i.e. 100% increase per year)
- Calculated in full years and months (contrary to the Guidelines which indicate rounding up to the nearest 6 months)
- Periods added up where necessary (e.g. if breaks in infringement)
- Standard example
 - 3 April 2003 to 20 July 2006
 - = 3 years 3 months +18 days
 - = 3 years = 3 months

Entry fee

- In cartel cases an "entry fee" of a percentage of one year's sales is added irrespective of duration
- Gravity percentage of 15-25% of value of sales applied
- Purpose is to dissuade undertakings from even entering into a cartel
- For other infringements the entry fee is imposed at the discretion of the Commission

Aggravating Circumstances

- Recidivism/repeated infringement
 - Undertaking commits same or similar infringement as in earlier case
 - Based on prior infringement decision by Commission or National Competition Authority
 - Up to 100% increase per prior infringement (but in cases so far : 50% for 1 prior infringement, 60% for 2; 90% for 3; 100% for 4)
- Leader/instigator/coercion
- Obstruction/non cooperation

Mitigating Circumstances

- Termination as soon as Commission intervenes
- Substantially limited involvement
- Cooperation outside the leniency notice
- Influence of public authorities or legislation
- Examples of rejected grounds: absence of effects, compliance programme, already sanctioned by other authorities

Deterrence : multiplier

- Rationale: increase fines on undertakings with large turnover beyond relevant sales to ensure deterrence
- Discretionary application: no obligation to use if fines sufficiently deterrence (e.g. Yen+Euro interest rate derivative cases: Eur 1.7 billion fines)
- Conditions
 - Relevant sales represent less than 5% of undertaking's total turnover
 - Turnover above Eur 30 billion
- Level of increases: 10% increase above Eur 30 billion + roughly further 10% for each additional Eur 20 million turnover

Deterrence : Improper gains

- Commission can also increase the fine to take into account the amount of gains improperly made as a result of the infringement where it is possible to do so
- So far not used since introduction of 2006 Fining Guidelines
- Many cases including all cartels cases are run on an object only basis (i.e. no analysis of effects)
- Perceived difficulties in calculation and resource implications
- Our system of fine calculation is considered a proxy to exceed the expected amount of the improper gain and take into account the risk of detection

Maximum Amount

- The fine is capped at 10% of total turnover in year preceding decision
- Applies to turnover of all entities comprising the 'undertaking'
- Applied before leniency and settlement reductions
- Issues with mono-product companies which easily hit the cap

Additional reductions

- Leniency reduction for cooperation (100% first applicant; 30-50% second applicant; 20-30% third applicant, up to 20%)
- Settlement reduction of 10% for admitting the infringement
- Inability to pay reductions for undertakings in financial difficulty

Departing from general methodology (point 37)

- Application according to 'particulars of case or the need to achieve deterrence'
- Departures from methodology
 - For determination of fine as a whole (see AC Treuhand case example)
 - Or on individual elements of the fine calculation

Practice: Commission Case Examples

Case Example 1 : The Treuhand Story - Facilitation

- 2 separate Commission cartel decisions + various appeals involving AC Treuhand which facilitated the cartels by offering secretariat functions although was not a producer on the cartelised markets
- 2003: Commission decision in the *Organic Peroxide* cartel imposing a symbolic fine of Eur 1000 on AC Treuhand
- 2008: Court of First Instance upholds Commission decision

Case 1 Example: The Treuhand Story - Facilitation

- 2009: Commission decision in *Heat Stabilisers* cartel imposing a lump sum fine of Eur 174.000 on AC Treuhand as a facilitator
- 2015: Case reaches Court of Justice
 - Advocate General opinion – no infringement by AC Treuhand as not operating on the market
 - Court of Justice upheld Commission decision + found facilitators can be held liable otherwise effectiveness of Article 101 undermined

Case Example 2 : Liquid Crystal Display Decision

- Liquid Crystal Display (LCD) screens are component parts of television, computers and other products
- Korean + Taiwanese manufacturers of LCD screens agreed prices in contracts outside the EU but were fined Eur 648 million for the impact on European market

Case Example 2: Liquid Crystal Display Decision

- Commission approach on sales
 - Direct sales included (i.e. sales of LCD screens to customers within the EU)
 - Direct sales through transformed products included: (sales of LCD screens outside the EU to an entity within the cartelists' group which incorporated them into finished products (TV's, computers) and sold them to customers within the EU)
 - Indirect sales could have been included but were not as the fines were already sufficiently deterred (i.e. sales of LCD screens to independent third parties outside the EU which incorporated them into finished products and sold them in the EU)
- The General Court and Court of Justice confirmed direct sales and direct sales through transformed products could be taken into account but were silent on indirect sales

Case Example 3 – Power Cables - Value of sales in worldwide market sharing cartels

- Issue: in worldwide market sharing cartels certain overseas producers will have no sales
- The Power Cables cartel was based on a 'home markets' principle : European producers of power cables agreed to stay out of Japan/Korea and Japanese/Korean producers agreed to stay out of Europe (i.e. no EU sales for Japanese/Korean producers on which to calculate EU fine)
- Two step approach in accordance with point 18 of the Guidelines on fines
 - Commission took aggregate cartelised sales of power cables in the EU
 - Allocated sales according to the worldwide market shares of the parties to the cartel
- Once a value of sales was established for each party the normal application of the Guidelines followed



Thank you for your attention