



eSAPIENCE CENTER FOR COMPETITION POLICY

VIEWPOINT:

**THE 2006 FINING GUIDELINES: TWO STEPS FORWARD BUT
ONE STEP BACK?**

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November 2006

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By

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INTRODUCTION

On June 28, 2006, the European Commission announced that it had adopted new fining guidelines for companies found guilty of infringing Articles 81 or 82 of the EC Treaty.¹ The Guidelines will apply prospectively to any antitrust infringement to which the Commission had not already issued a statement of objections as of September 1, 2006, the date that the Guidelines were published in the *Official Journal*.² In cases where statements of objections were adopted prior to that date, the previous 1998 Guidelines³ continue to apply. The new Guidelines do not change the rules on leniency for companies that cooperate with the Commission in cartel cases.⁴

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¹ EUROPEAN COMMISSION, PRESS RELEASE IP/06/857: COMMISSION REVISES GUIDELINES FOR SETTING FINES IN ANTITRUST CASES, *available at* <http://ec.europa.eu/comm/competition/antitrust/legislation/fines.html>.

² Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 O.J. (C 210) 2 [hereinafter *Guidelines*], *available at* <http://eur-lex.europa.eu/en/index.htm>.

³ Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the Treaty Establishing the European Coal and Steel Community (ECSC), 1998 O.J. (C 9) 3.

⁴ The existing Leniency Notice will continue to apply—although the Commission is separately considering reforming the rules on leniency, *see* European Commission, Competition rules applying to undertakings, *available at* <http://ec.europa.eu/comm/competition/antitrust/legislation/leniency.html>.

SUMMARY OF THE NEW RULES

Fines will be now established based on a two-step process, first establishing a basic amount for each undertaking, then adjusting it depending on the circumstances of the individual case.

The key factor is the value of sales of the product or service to which the infringement relates. This contrasts with the previous 1998 Guidelines, which had a four-step process⁵ and where the starting point for calculating the fine was supposed to be determined by the nature of the infringement without reference to the infringer's turnover in the market concerned;⁶ although this was not always respected in practice.⁷

The Basic Amount

The first step is to determine the value of each undertaking's sales of goods or services to which the infringement relates in the relevant geographic area within the European Economic Area (EEA). This figure is normally assessed in the last full business year of its participation in the infringement.

The basic amount is then calculated as a percentage of the value of sales. The percentage that will be applied is calculated by multiplying a percentage set according to

⁵ The four-step process included: basic amount, which comprised two stages (gravity and deterrence); duration; and aggravating and mitigating factors.

⁶ The 1998 Guidelines provided that the likely fine for very serious infringements (e.g. horizontal restrictions such as price cartels and market-sharing quotas) was above ECU 20 million.

⁷ In *Zinc Phosphate*, 2003 O.J. (L 153) 1, when setting the starting point at EUR 3 million and EUR.75 million, the Commission reasoned as follows: "It is not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity. Nevertheless, without prejudice to the very serious nature of an infringement, the Commission will in this case take into consideration the limited size of the product market" (at ¶¶ 302-303). The identical language was used in *Food Flavour Enhancers*, 2004 O.J. (L 75) 1, at ¶¶ 242-243. In both cases, the Commission stated a clear principle, which it departed from in the very next sentence.

the gravity of the offense by the number of years of the infringement.⁸ The percentage set for gravity will be up to 30 percent, with the exact sum determined by factors such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement, and whether or not the infringement was implemented.⁹

The Commission will also, irrespective of the duration of the infringement, include an “entry fee” of between 15 to 25 percent of the value of sales for any undertaking that enters into a horizontal price-fixing, market-sharing, or output-limitation agreement¹⁰—the aim being to deter companies from even entering into such arrangements.

Thus, a price-fixing cartel that lasted five years might result in a basic amount of 150 percent of the value of sales, calculated as 25 percent (gravity) multiplied by 5 (duration in years) plus a 25 percent entry fee.

Adjustments to the Basic Amount

The second step is to adjust this basic amount to take account of aggravating and mitigating circumstances and to ensure deterrence.

The aggravating circumstances listed (e.g., repetition of the same or similar infringement; refusal to cooperate/obstructing the Commission’s inquiry; role of leader or instigator, in particular coercing others to participate and retaliatory measures) are very similar to those that the Commission punished under the 1998 Guidelines. However, there are two significant differences when it comes to repeat offenders. First, the

⁸ Periods of under six months are counted as half a year and periods between six months and a year are counted as a whole year. *See* Guidelines, *supra* n. 2, at ¶ 24.

⁹ *Id.* at ¶¶ 21-23.

¹⁰ *Id.* at ¶ 25.

punishment for being a repeat offender is increased to up to 100 percent for each previous, similar offense (under the old rules being a repeat offender only led to a single increase, generally 50 percent).¹¹ Second, decisions by national competition authorities count when judging if an undertaking is a repeat offender.

The list of mitigating circumstances is, again, similar to current practice (i.e. termination of the infringement as soon as the Commission intervenes—except for secret cartels; infringement committed due to negligence; effective cooperation with the Commission outside the scope of the Leniency Notice; or conduct authorized or encouraged by public authorities or legislation). There is one change—a new mitigating factor where an undertaking proves that its involvement was limited and, thus, that it avoided applying the agreement by adopting competitive conduct in the market. This replaces two separate mitigating factors under the 1998 Guidelines, when mitigation could be claimed either where the undertaking played an exclusively passive role in the infringement, or where it did not implement in practice the offending agreements. So, the new mitigating factor is significantly narrower than its predecessors under the 1998 rules, notably due to the need to prove that it adopted competitive conduct in the market.

Finally, the Commission indicates that further increases for deterrence will be contemplated in two instances:

(a) on undertakings which have a “particularly large” turnover beyond the sales to which the infringement relates, and

¹¹ See, e.g., *Michelin v. Commission*, 2002 O.J. (L 143) 1, at ¶ 363.

(b) in order to ensure that the fine exceeds the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.¹²

While the latter was an aggravating factor in the 1998 Guidelines, the scope of the former is unclear—no details are given as to the meaning of “particularly large.”

Maximum Fines and Nominal Fines

The legal maximum established by Article 23(2) of Regulation 1/2003, namely 10 percent of total turnover in the preceding business year, will continue to apply. Indeed, logic would suggest that this may be the *de facto* penalty in a significant number of cases. That is perhaps why the Commission says it will in exceptional cases and upon request take into account the “undertaking’s inability to pay in a specific social and economic context” and will grant a reduction where there is objective evidence that the full fine “would irretrievably jeopardise the economic value of the undertaking concerned and cause its assets to lose their value.”¹³ This new power to take account of the social context acknowledges the point made by some commentators that the political legitimacy of the Commission’s policy of imposing stringent fines for cartel infringements could be undermined if one of these fines led to the closure of a company and large job losses.¹⁴

The Commission indicates that it may impose a symbolic fine, but gives no indication when it will do so. The Commission has in the past imposed a token fine or no fine in cases where it has applied new theories of liability, but in other cases it imposed large fines when applying seemingly novel theories—meaning that it is difficult to know

¹² Guidelines, *supra* n. 2, at ¶¶ 30-1.

¹³ *Id.* at ¶ 35.

¹⁴ See, e.g. Alan Riley, *The Consequences of the European Cartel Busting Revolution*, IRISH J. EUR. L. 3-52 (2005).

from the Commission's recent practice whether any particular case will qualify for a symbolic fine.

Analysis

The Commission's Guidelines appear to have been largely inspired by Dutch fining guidelines.¹⁵ The Dutch Guidelines calculate the fine based on the total turnover realized by the undertaking on the relevant market over the duration of the infringement. The basic amount of the fine is set as a percentage of that turnover—with fines up to 30 percent of concerned turnover for very serious breaches.¹⁶ The Dutch Guidelines also leave open the possibility of additional deterrence above the 30 percent level in appropriate cases. So, the Commission has decided to follow a tried and tested path.

The new fining policy clearly has the potential to be severe. As noted above, a participant in a five-year, price-fixing cartel could be fined around 150 percent of the annual value of its sales of the product concerned—and a repeat offender could be fined 300 percent of its sales. Fines on this scale can put a company's continued existence at stake, so companies would be well advised to take steps to reinforce existing compliance programs. But equally, with penalties this severe, there is also a need for the Commission to conduct thorough and rigorous investigations to ensure that no company is wrongly punished.

Yet, it is interesting to note that the Guidelines will not be more severe than the 1998 Guidelines in all cases. There are some categories for which the new rules will

¹⁵ Guidelines for the Setting of Fines, Stcrt. 248 (Dec. 21 2001), *available at* http://www.nmanet.nl/nl/Images/11_3860.pdf (in Dutch only).

¹⁶ The Dutch guidelines split infringements into three categories: less serious, serious, and very serious offenses. The basic amount is set at up to 10 percent of concerned turnover for less serious breaches; up to 20 percent for serious breaches, and up to 30 percent for very serious breaches.

actually produce a less severe outcome: where the market size is relatively small and the infringement of relatively short duration—and particularly if an increase for deterrence might have been imposed under the 1998 Guidelines.¹⁷

It is interesting to note that the Guidelines could mean companies now face greater financial penalties in Europe than in the United States. Assuming that the company has identical sales in Europe and the United States, the new Guidelines could lead to a fine of up to 55 percent of sales for a cartel lasting one year.¹⁸ In contrast, the U.S. Sentencing Guidelines (USSG) currently caps the base fine at 20 percent of the “affected volume of commerce.” In addition, the Guidelines now also impose much stiffer penalties for “repeat offenders” than the United States, where § 8C2.5 of the USSG provides for an increase of between 20 to 80 percent of the base fine, depending on whether the last similar offense occurred within the last five or ten years. The “recidivist” penalties under the USSG phase out ten years after the prior antitrust infringement. The Guidelines, in contrast, do not have a “sunset” provision. This looks to be an omission.

ARE THE NEW GUIDELINES AN IMPROVEMENT OVER THE 1998 VERSION?

The weakness of the 1998 Guidelines was unpredictability—it was impossible to forecast the basic amount of a fine and there was little sense of consistency between different cases. There was also a widespread feeling in the Brussels legal market that the method of calculating fines established by the 1998 Guidelines was not followed in

¹⁷ See Cento Veljanovski’s analysis of how fines imposed under the 1998 Guidelines would differ if the 2006 Guidelines had applied, available at <http://www.casecon.com/data/pdfs/casenote43.pdf>. He concludes that a significant minority of companies would have received smaller fines under the 2006 Guidelines.

¹⁸ The percent is based on a fee of up to 30 percent for gravity for the first year plus a 25 percent “entry fee.”

practice, and that in fact fines were determined by the Commissioner's cabinet based on unannounced policy considerations, with the calculation under the Guidelines subsequently being done in such a way as to arrive at the amount that had already been chosen. These two factors gave rise to a sense of injustice and led many companies to appeal their fines.

The revised system avoids this unpredictability by setting a basic amount based on turnover of the product concerned and on a relatively easily understood system of percentages. The recipients of a fine, therefore, should be able to understand why it was set at the level it was and will be able to compare with other similar cases. This is likely to reduce the number of appeals. And, if there is an appeal, the Court will be able to quickly deal with the two issues that are likely to arise, namely: the proper market definition for determining the value of sales and whether the infringement was one that merited a basic amount to be set at (e.g., 15 or 25 percent).

However, the Guidelines do reintroduce a significant element of unpredictability in the paragraph which suggests further increases for deterrence would be merited if undertakings have a "particularly large" turnover beyond the sales to which the infringement relates. Moreover, the penultimate paragraph of the Guidelines says that although they set out a general methodology for calculating fines, "the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the [30% limit]."¹⁹ In other words, the Commission reserves the right to apply a different methodology if it is needed to achieve deterrence.

¹⁹ Guidelines, *supra* n. 2, at ¶ 37.

So, as far as transparency and predictability are concerned, it is a case of two steps forward and one step back.

Overall, the Guidelines do increase transparency and predictability, albeit that a certain degree of unpredictability may remain. They do so with a clear message to infringers that the penalties for long-running cartels are going to be very high under the new regime. There's never been a better time to invest in compliance training.