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I. INTRODUCTION

Appeals to the Court of First Instance ("CFI") from Commission cartel decisions will often focus on the level of fine imposed by the Commission. Many of these appeals allege either procedural deficiencies in the assessment of fines or the misapplication of the Fining Guidelines by the Commission. This focus on fines is not surprising given that fine levels are now so significant. It has not been uncommon in recent years for at least one party in a cartel case to be fined more than EUR 100 million.[2] It is expected that the Commission's 2006 Fining Guidelines,[3] which have only been applied in a handful of Commission infringement decisions, will have the effect of increasing fine levels even further.

While it is almost inevitable that parties will seek to appeal given the size of fines and the relatively low cost of bringing appeals, there nevertheless remains a question as to whether the current approach of the Commission of providing relatively limited information relevant to the calculation and therefore the likely level of fine in the Statement of Objections ("SO") is satisfactory and, in particular, consistent with the Commission's objection to provide parties with an opportunity to be heard in relation to the fine. Moreover, given the very serious impact of fines at their current level, consideration should be given to whether there is better way of providing parties with a hearing in relation to the level of fines.

II. THE CURRENT POSITION

The Commission may by decision impose fines on undertakings which intentionally or negligently infringe Article 81 or 82 of the EC Treaty.[4] In fixing the amount of the fine the Commission must have regard to both the gravity and duration of the infringements.[5] The Commission published guidelines in 1998[6] and 2006 on how it

[1] The views expressed in this article are strictly personal.

[2] The increasing level of fines is summarized at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

[3] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) Regulation No. 1/2003/EC (2206/C210/02).

[4] Article 23(2) of Regulation 1/2003.

[5] Article 23(3) of Regulation 1/2003.

[6] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (1998/C9/03).

will exercise its discretion in setting fines. These Guidelines are binding on the Commission—if it wishes to depart from its Guidelines it must set out reasons for doing so.

Before reaching a decision to impose a fine the Commission has to give the undertaking in question the opportunity of being heard.[7] The Commission is therefore required in the SO to give notice of its intention to impose a fine and to set out the elements of fact on law on which the fine is to be based, namely the gravity and duration of the alleged infringement and whether that infringement was committed intentionally or negligently. This disclosure is necessary to enable parties to exercise their rights of defense. However, the Commission does not explain the way in which it intends to use each of the elements of fact and law on which it proposes to base its calculation of the overall level of the fine. It has been held that to give an indication of the level of fine envisaged before the undertaking has been invited to submit its observations on the allegations against it would be to anticipate the ultimate Commission decision and therefore be inappropriate.[8]

Typically, the SO contains little information in relation to the fine: generally only a short statement as to the Commission's views as to the seriousness of the alleged infringing conduct; the duration of the alleged infringement; an indication that the Commission will take account of any aggravating and mitigating factors which may be identified in summary fashion; and that the Commission will set fines at a sufficient level to ensure deterrence.

The difficulty with this approach is that the parties have little idea of the likely level of the fine based on the content of the SO and can only estimate the possible level of fine having regard to recent Commission decisional practice. It is extremely difficult in such circumstances for parties to make submissions as to their ability to pay.[9]

III. THE IMPACT OF THE 2006 FINING GUIDELINES

The 2006 Guidelines set out a more detailed and transparent methodology for the calculation of fines by the Commission than the 1998 Guidelines.

Under the 2006 Guidelines the starting point for the calculation of the fine is the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographical area within the EEA during the last full

[7] Article 27 of Regulation 1/2003.

[8] *See generally* Cimenteries CBR v Commission [2000] ECR II – 491 at paragraph 480; SA Musique Diffusion Francaise v Commission [1983] ECR 1825 paragraphs 22-23; LR AF 1998 v Commission [2002] ECR II 1705 at ¶¶ 198-209.

[9] Under the 2006 Fining Guidelines the Commission may take account of an undertaking's inability to pay on the basis of objective evidence that imposition of the fine would irretrievably jeopardize the economic viability of the undertaking concerned and cause its assets to lose all its value (¶ 35). A similar formulation appeared in the 1998 Fining Guidelines which stated that depending on the circumstances account should be taken of, inter alia, specific characteristics of the undertakings in question and their real ability to pay in a specific social context then the fine should be adjusted accordingly (¶ 5(b))

business year of its participation in the infringement ('value of sales'). The fine is calculated in two stages. First, the basic amount of the fine is then calculated as follows: a proportion of up to 30 percent of the value of sales to reflect the gravity of the infringement; which is then multiplied by the number of years of duration of the infringement; to this amount is added an amount of between 15 percent and 25 percent of the value of sales as a deterrent 'entry fee'. Second, the basic amount of the fine is then adjusted upwards or downwards taking account of aggravating and mitigating factors and subject to the possibility of a further specific increase to ensure the fines have a sufficiently deterrent effect.

Significantly, the Guidelines make clear that the basic amount of the fine may be increased by up to 100 percent for each prior infringement of a similar nature. The fine set under the 2006 Guidelines remains subject to the requirement that it not exceed 10 percent of the total turnover in the proceeding business year of the undertaking in question.[10]

Although the 2006 Fining Guidelines caution that value of sales and duration should not be regarded as the basis for an automatic and arithmetic calculation method, that is what the Guidelines specify at least as regards the basic amount of the fine. The value of sales is now at the core of the calculation of the fine.

This approach is in contrast to the 1998 Fining Guidelines. Those Guidelines set fining bands by reference to the gravity of the infringement which were then subject to a multiplier to reflect the duration of the infringement and subject to increase or decrease for aggravating or attenuating circumstances respectively. The Guidelines did specify that the Commission could take account of the size of the undertaking when setting the fine and that it might be necessary in cartel cases to weight fines to take account of the real impact of the conduct of each infringing undertaking on competition. However, unlike the 2006 Guidelines, the 1998 Guidelines did not specify a methodology for doing so. In practice, since cartels were regarded as very serious infringements and therefore the fines could be in excess of EUR 20 million, the 1998 Guidelines left considerable margin of discretion to the Commission as to the calculation (and therefore the amount) of the fine.

Two questions therefore arise. First, whether the relatively minimalist disclosure of material relevant to the fine in the SO allows parties a sufficient opportunity to be heard in relation to the application of the 2006 Fining Guidelines?

Second, should the procedure in which the level of fines is addressed be reconsidered? For example, should the Commission disclose how it proposes to calculate the fine and, in particular, give a provisional indication as to the level of the fine?

[10] Article 23(2) of Regulation 1/2003

IV. IS GREATER DISCLOSURE REQUIRED?

As noted above, the Commission is required to set out in the SO the elements of fact and law on which the fine is to be based. By setting out a transparent methodology in the 2006 Guidelines, it is submitted that the Commission is required to disclose those elements which are relevant to the calculation of the fine under the Guidelines.

Under the 2006 Guidelines the value of sales is central to the calculation of the fine and highly influential on the overall level of the fine.[11] It is a key factual element on which the fine will be based. Parties need to be able to test and make submissions as to whether the Commission has correctly identified: (i) the products or services to which the alleged infringement relates; and (ii) the sales attributable to the relevant products or services. Without such disclosure the Commission will not have disclosed all the factual and legal elements on which the fine is to be based and parties will not have had a proper opportunity to be heard in relation to the fine to which they are entitled.

The 2006 Guidelines explicitly provide for significant increases in the fine where there have been prior infringements by a party (by up to 100 percent for each prior infringement). At present, the Commission in the SO simply notes the existence of a prior infringement. It is submitted, given the potentially enormous impact that prior infringements could have on the level of the fine, it is also necessary that the Commission indicate whether it intends to increase the fine because of prior infringements and in respect of which prior infringements and give a broad percentage range of the uplift to be applied. This would allow the parties to understand the significance which the Commission places upon the existence of the prior infringements which it has identified.

Where the Commission wishes to depart from the 2006 Guidelines then it needs to explain in the SO: that this is what it intends to do; the reasons for doing so; and, where relevant, the factual and legal elements of the methodology which it intends to follow.

V. A DIFFERENT PROCEDURE?

Is it right to say that it would be inappropriate for the Commission to give even a provisional indication of the level of fines in the light of the allegations set out in the SO?

The cases which state this principle precede the 2006 Guidelines and therefore reflect the wider discretion available to the Commission in setting fines. Moreover, a provisional indication of the range of fines which might apply in the light of the

[11] For example, based on the few Commission decisions under the 2006 Fining Guidelines, the basic amount of the fine (before any adjustments are taken into account) can exceed 100 percent of the value of sales where the infringement has lasted for more than four to five years. These effects are magnified where the basic amount of the fine is increased by a percentage amount as a result of aggravating factors. Variations in the value of sales figure can therefore have a significant effect on the level of the fine.

allegations set out in the SO would in reality be no more a pre-judgment of the outcome of the case than the SO itself is a pre-judgment of infringement. If the Commission does not consider it inappropriate to indicate in the SO the fine discount range that is available to leniency applicants then it is hard to see why a provisional indication of fines would be problematic.

Parties would prefer greater transparency in the SO as it would allow them a full opportunity to present the Commission with factual and legal arguments on each of the elements used to calculate the fine (as well as the calculation itself). In such circumstances it would then be difficult for them to argue on appeal that they did not have a proper opportunity to be heard and less likely that they could allege a misapplication of the Fining Guidelines.

In any event, the present principle that it would be inappropriate for the Commission to give an indication of the level of the fines before parties have had an opportunity to respond to the SO is not a bar to the provisional indication of a fine. The Commission could, through the issue of a supplementary SO, address in more detail its approach to the assessment of the fine and allow parties to be heard both in writing and orally on that issue. The supplementary SO could take account of the submissions that the parties made in response to the initial SO in coming to a provisional view of the level of fine.

Indeed it may not be possible to address the value of sales properly until the Commission has had the parties' responses to the SO regarding the infringement—it is only then that it may be possible to come to a view as to the products or services to which the infringement relates. The same may also be true for any adjustments to the basic level of the fine. This process would allow the parties to make submissions to the Commission to correct any factual errors which may underlie its provisional fining assessment. Such a process need not unduly delay the Commission's cartel enforcement procedure. Often there is a lengthy gap between the oral hearing on the SO and the ultimate Commission decision.

VI. CONCLUSION

The issue of fines receives fairly cursory attention in the SO. This is unfair; it denies parties the full opportunity to be heard in relation to fines which can have a severe economic impact on the company, its shareholders, and employees. The 2006 Guidelines were intended to make the fine setting process more transparent in part as a deterrent to future infringers. The Commission should give parties a full opportunity to be heard on the level of fines through full disclosure in the SO of the factual and legal elements on which the fine is to be based—this should include the value of sales (and an

explanation of how it has been calculated).

The Commission should also consider giving a provisional indication of fines possibly after the SO in a supplementary SO procedure.

The Commission and parties would both benefit: the parties would feel that they had a fairer hearing; and the Commission decision would be better tailored to the circumstances of the case and less susceptible to successful appeal.