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By Francesca Gentile, Raphael Reims & Petar Petrov

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Introduction

According to Article 23(2)(a) Regulation No. 1/2003, the Commission may impose fines on undertakings and associations of undertakings where they either intentionally or negligently infringe Article 101 or 102. In its calculation, the Commission must take into account both the gravity and the duration of the infringement, and may not exceed 10 percent of the revenues of the addressee in the preceding business year. Beyond that, the Commission has a wide discretion in the calculation of the fine.

Following its general aim of increasing the transparency and objectivity of its decisions, throughout the years the Commission has published a series of guidelines on the method for setting fines, most recently on September 1, 2006. This article provides an overview of the application of the 2006 Guidelines to antitrust cases until the mid of 2020, focusing in particular on the violation of Article 101 TFEU. The review follows the structure of the guidelines, considering the setting of the fine on an element-by-element basis. Each section includes examples of Commission decisions and court cases (where relevant) which help to provide a clear picture of how the fining method applies in practice.

I. The Setting of the Fine

In order to determine the fine to be imposed on an undertaking, the 2006 Guidelines provide for a two-step methodology. In the first step, the Commission determines the basic amount of the fine, which is based on gravity, duration, and a sum of between 15 and 25 percent of the value of sales (so called "entry fee" or "additional amount") which is added to the basic amount. Once the basic amount determined, the Commission analyzes the application of possible adjustment factors, such as aggravating or mitigating circumstances and deterrence. While the first step focuses on the assessment of the infringement as a whole, the second rather reflects all possible elements which are specific to each undertaking in order to better adapt the fine on a case-by-case basis. That said, the Commission often adapts its fine calculation methodology to take into account specific circumstances of certain cases. This was the case, for example, in *Water management products*, where the Commission decided not to take into account periods of limited activity of the cartel.[2]

A. The Basic Amount

As mentioned above, the first element determined by the Commission is the basic amount. In determining the basic amount, the Commission takes into account the value of sales of the undertaking and the duration of the infringement, adding to them the so-called "entry fee," i.e. a sum of between 15 and 25 percent of the value of sales. This additional amount is added irrespective of the duration of the infringement. The setting of the basic amount represents the main change in the fining method compared to the 1998 Guidelines, which provided that once the value of sales are defined, these have to be increased by 10 percent rather than multiplied by the number of years as under the 2006 Guidelines.

1. The Value of Sales

The value of sales represents the first and most important element to be assessed when determining the basic amount. Indeed, it represents the basis for both the value of sales

[1] Francesca Gentile is a legal counsel at Thalys in Brussels, Dr. Raphael Reims is an associate at Willkie Farr & Gallagher in London and Petar Petrov is a university assistant at the University of Economics and Business in Vienna. We thank Susanne Zuehlke, partner at PwC Legal in Berlin, for the idea of this article.

[2] Case AT.39611 - *Water management products*, paras. 21, 25, 54, and 71.

itself as well as for the determination of the so-called "entry fee."

Pursuant to point 13 of the 2006 Guidelines, the Commission considers "the 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." The Commission normally takes into account the sales made by the undertaking during the last full business year of its participation in the infringement, using the best available figures provided by the undertaking i.e. official or audited. However, this will not be the case where sales during the last year are clearly not representative of the undertaking's size or activity (e.g. substantial sale or acquisition, relevant change of geographic scope, significant fluctuations of revenues, etc.)[3] Further, should these figures appear to be incomplete or unreliable, the Commission may recur to partial figures obtained or any other relevant information (e.g. data collected during inspections or publicly available general market information). Also, where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set an identical basic amount for each of them. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.[4]

The value of sales will be assessed before VAT and other taxes directly related to the sales. Eventually, where the infringement of an association relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.[5]

As for geographic scope, the Commission will consider sales based on the territory in which the infringement took place i.e. the whole EEA or one or more Member States. That said, should the infringement extend beyond the territory of the EEA, the Commission may apply the worldwide market shares of each player to the total EEA sales. These sales will in fact better reflect the weight of each undertaking in the overall infringement.[6]

2. The Variable Amount

Once the value of sales established, the Commission determines the variable amount, that is a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.[7]

As for the proportion of the value of sales, the Commission sets a percentage ranging from 0 to 30 percent depending on the gravity of the infringement. In order to assess this, the authority considers a series of elements including the nature of the infringement, its geographic scope, the combined market share of all the undertakings concerned, and whether or not the infringement has been implemented (the latter two points representing novelties to the 1998 Guidelines). To help set the percentage, the Commission provides (in point 23) some examples of conducts where the higher range generally applies, such as horizontal price-fixing, market-sharing, and output-limitation agreements. The broad range of percentages available to the Commission represents a novelty to the 1998 Guidelines, where infringements were simply classified as minor, serious, and very serious. The absence of categorization in the 2006 Guidelines may explain such a broad range of percentages, which allows the Commission to capture different degrees of infringement.[8] Being based on the assessment of the overall infringement,

[3] Cf. e.g. Case AT.40481 - *Occupant safety systems II*, para. 99.

[4] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003, OJ C210/2, 2006, point 26.

[5] Ibid. point 14.

[6] Cf. e.g. Case AT.39881 - *Occupant safety systems*, para. 112; conversely in Case AT.40009 - *Maritime car carriers*, para. 105 the Commission reduced the basic amount by 50% considering that a part of the services were performed outside of the EEA and, thus, a certain part of the harm fell outside the EEA.

[7] 2006 Guidelines (n 4), points 19-26.

[8] 2006 Guidelines (n 4), point 3.

the percentage chosen applies to all parties, in contrast to elements peculiar to a single undertaking which are assessed at the level of "adjustment factors."

In practice, the Commission has generally applied a gravity percentage of between 15 and 17 percent for most cases, with 15% being the lowest ever applied. Conversely, non-cartel cases have benefitted from importantly lower percentages, i.e. between 2 and 11 percent.[9] The gravity percentage has generally been applied to all participants in the infringement, unless the infringements were multiple.[10] That said, on three occasions the Commission justified a different application of gravity percentages to participants in the same cartel. In *Prestressing steel* for example, the Commission applied three different percentages (16, 18, and 19 percent) taking into account the differences in geographic scope of the infringement between companies.[11] Further, in *Mounting for windows and window-doors*, the Commission applied a 1 percent lower gravity percentage to AGB, considering that the company did not participate in the full extension of the cartel at an EEA-level – but only in Italy – so that the surcharge to the basic amount applied to all other participants was not justified.[12] Eventually, in *Power cables*, the Commission considered that six undertakings deserved a 2 percent increase to the 17 percent gravity factor applied to the others because of their participation in a further allocation mechanism linked to the main cartel. According to the authority in fact, this part of the cartel "*increased the harm to competition already caused by the market sharing agreement between the European, Japanese and Korean producers, and therefore the gravity of the infringement."* As a consequence, the further distortion caused by the European cartel configuration justified an increase in the gravity percentage of 2 percent for those undertakings that participated in that aspect of the cartel.[13]

The highest gravity percentage ever applied was in the *Marine Hoses* cartel, where the Commission set a 25 percent gravity percentage based on the fact that the cartel was a "*multi-faceted cartel involving the allocation of tenders (bid rigging), fixing prices, fixing quotas, fixing sales conditions geographic market sharing and the exchange of sensitive information on prices, sales volumes and procurement tenders.*" The Commission underlined that horizontal price and quota fixing, tender allocation and geographic market sharing are by their very nature among the most harmful restrictions of competition, as these practices distort competition with regard to its main parameters. In addition, in this case the combined market share of the parties was 90% and the geographic scope practically worldwide.[14]

Given the importance of gravity percentages in the calculation of the fine, undertakings have often challenged them before EU courts with the aim of obtaining reductions, however with no success so far.[15]

As a second step, the Commission determines the duration i.e. the period from beginning of the infringement to its termination, for each company separately.[16] This number will then be multiplied by the amount resulting from the percentage of the value of sales.

Compared to the 1998 Guidelines, the calculation of the duration has become more disadvantaging for companies. Indeed, periods of less than six months are counted as half years, and periods longer than six months but

[9] Cf. e.g. Case AT.40049 - *Mastercard II*, para. 105 (11%).

[10] Cf. e.g. Case AT.39924 - *Swiss Franc Interest Rate derivatives*.

[11] Case AT.38344 - *Prestressing Steel*, paras. 949, 953.

[12] Case AT.39452 - *Mounting for windows and window-doors*, para. 479.

[13] Case AT.39610 - *Power cables*, paras. 999, 1010.

[14] Case AT. 39406 - *Marine hoses*, paras. 438-445.

[15] Cf. e.g. Case T-370/09 *GDF Suez v. Commission*, para. 422.

[16] Case T-213/00, *CMA CGM and Others v. Commission*, para. 280.

shorter than a year are counted as a full year, which was not the case in the past. As a consequence, every year of participation is fully reflected in the basic amount of the fine in line with the Commission's wish that duration should play as big a role as possible in the assessment of fines.[17]

As for practice, the Commission generally applies a single multiplier for each participant in an infringement. That said, multipliers are often different as they depend on the duration of the participation of the single company involved. The Commission has also applied various multipliers where a company participated in a plurality of infringements in the same cartel.[18] The same rules apply to non-cartel cases.[19]

Differently from gravity percentages, the General Court has often upheld applicant's requests to annul the Commission's decisions regarding duration. Most cases were based on the failure to prove the applicant's participation in the relevant period.[20] Interestingly, in two cases this was based on incorrect assessment of the relationship between parent company and subsidiary. In particular, in *Parker Hannifin Manufacturing Srl v. Commission*, the General Court held that a company cannot be held responsible for infringements committed independently by its subsidiaries before the date of their acquisition. The Commission had attributed to ITR's subsidiary ITR Rubber (later Parker ITR) the responsibility for the entire duration of the cartel even though it had been transferred to Parker Hannifin. Along the same lines, the Commission had also increased the basic amount of the fine by 30 percent on the basis of the aggravating circumstance of the leading role played by ITR over the same period despite Parker-Hannifin having had no economic or structural links with ITR or its subsidiaries. The General Court rejected the Commission's arguments and reduced the fine accordingly.[21] Further, in *UTi Worldwide, Inc. and Others v. Commission*, the General Court upheld the applicant's request to reduce the duration multiplier considering that the rounding down of the duration of the subsidiaries' participation had resulted in a combined reduction of about one month in their favor but had not been accorded to the parent company. The General Court observed that in a situation where the liability of a parent company is purely derivative of that of its subsidiary, the liability of said parent company cannot exceed that of its subsidiary.[22]

3. The Entry Fee

Absent from previous guidelines, the entry fee represents one of the new introductions to the 2006 Guidelines. The aim of such a fee is to discourage undertakings from entering into horizontal price-fixing, market-sharing and output limitation agreements or other illegal behavior by adding, irrespective of the duration of the undertaking's participation in the infringement, a percentage of between 15 and 25 percent of the value of sales to the basic amount. In order to set this percentage, the Commission considers several factors, but mainly the same used to determine the proportion of the value of sales.[23] The percentage applied reflects – as for the variable amount – the gravity of the infringement. Further, the percentage chosen applies only once and equally to all parties to the infringement. That said, the entry fee does not apply for infringements of less than six months. Another important difference relates to the application of the entry fee to cartels compared to other infringements. Indeed, while the entry fee always applies to cartel cases, it may only apply to other illegal conduct depending on its effects on the market. That said, the

[17] 2006 Guidelines (n 4), point 5 of the preamble.

[18] Cf. e.g. Case AT.39960 - *Thermal systems*.

[19] Cf. e.g. Case AT.39226 - *Lundbeck*, para. 1337.

[20] Cf. e.g. Case T-208/08, *Gosselin Group*, paras. 152-169.

[21] Case T□146/09 RENV, *Parker Hannifin Manufacturing Srl v. Commission*, paras. 140-156.

[22] Case T□264/12, *UTi Worldwide, Inc. and Others v. Commission*, paras. 325-336.

[23] 2006 Guidelines (n 4), point 25.

Commission's practice seems to arise no objections so far in this regard, probably explained by the systematic alignment of the entry fee to the gravity percentage.[24]

As mentioned above, the Commission has in practice systematically applied the same percentage to both gravity and entry fee, except in the very first three cartel cases to which the 2006 Guidelines were applied, notably *Professional videotape,*[25] *Flat glass,*[26] and *Chloroprene rubber.*[27] That said, the Commission unfortunately does not explain the reasons behind the application of such different percentages. As for non-cartel cases, the Commission has rarely applied an entry fee. The only examples so far, are the 10 and 16 percent entry fees applied in *Lundbeck*[28] and *Fentanyl*[29] respectively. In both cases the Commission considered the application of the entry fee to be justified on the basis of the gravity of the infringement (i.e. horizontal market-exclusion agreements which are "by object" restrictions of competition).

As with gravity percentages, entry fees were often the subject of disputes before EU courts, with no success so far.[30]

B. The Adjustment Factors

Once the basic amount is set, the Commission will consider circumstances that result in an increase or decrease of the basic amount.[31] These adjustment factors were not subject to major changes compared to the 1998 Guidelines (except for the inclusion of improper gains into aggravating circumstances rather than deterrence). Indeed, the 2006 Guidelines mainly continue to reflect the developments of both case-law and the Commission's practice over the years.

1. Aggravating Circumstances

Pursuant to point 28 of the 2006 Guidelines, the basic amount of the fine may be increased where the Commission finds the existence of aggravating circumstances.[32] The text contains a non-exhaustive list of potential aggravating circumstances, thus implying that circumstances mentioned in the 1998 Guidelines and absent from the 2006 Guidelines, including retaliatory measures taken against other undertakings, continue to be relevant when determining the fines.

> (i) An increase of the basic amount up to 100 percent for each infringement where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made the finding.

This point represents a novelty compared to the old guidelines. Indeed, the increase has been amended to reach up to 100 percent (compared to the previous 50 percent increase), underlining the seriousness and thus the increased impact of the fine on repeated offenders. In addition, every previous infringement now justifies an increase of the fine, that is, "multi-recidivists" will face even heavier fines. Further, the Commission will base its assessment not only on its own past decisions, but also on decisions by national competition authorities, in line with the increased harmonization of EU and national antitrust rules introduced by Council Regulation No 1/2003.

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[24] Cf. e.g. Case AT.39462, *Freight forwarding*, summary decision, para. 17.

[25] Case AT.38432 - *Professional videotape*, para. 217.

[26] Case AT.39165 - *Flat glass*, para. 486.

[27] Case AT.38629 - *Chloroprene rubber*, para. 537.

[28] Case AT.39226 - *Lundbeck*, paras. 1338-1340.

[29] Case AT.39685 - *Fentanyl*, para. 490.

[30] Cf. e.g. Case T-679/14, *Teva UK and Others v. Commission*, paras. 454-457.

[31] 2006 Guidelines (n 4), point 27 et seq.

[32] *Ibid*. point 28.

This aggravating circumstance has been the most applied by the Commission so far, with increases of 50 or 60 percent,[33] with 50 percent the minimum ever applied. That said, only on two occasions did the Commission go beyond the 60 percent increase, applying an increase of 90 percent,[34] and only once of 100 percent, which represents the maximum as of today. In the latter case, the 100 percent exceptional increase on Akzo Nobel was justified on the basis of numerous and repeated cartel infringements - in different sectors - which clearly showed that the first penalties did not sufficiently prompt the undertaking to change its conduct.[35] As for non-cartel cases, the Commission has never made use of any aggravating circumstances with the exception of *Mastercard II*, where the basic amount of the fine was increased by 50 percent considering the existence of a previous infringement of a similar nature.[36] In this case, the Commission further underlined that the fact that it did not impose any fine on Mastercard in 2007 did not prevent it from increasing the basic amount of the fine with regard to the previous infringement.

As for court cases, only on three occasions did the General Court annulled or modify the increases applied to undertakings on the basis of "repeated infringement." In *Versalis & Eni v. Commission*, for example, the fine on Eni was reduced from 60 to 50 percent based on the principle of equal treatment, which imposes the application of the same percentage to companies which both have one previous infringement (i.e. Bayer).[37] Further, in *Eni v. Commission*, the General Court upheld the applicant's request not to increase the fine based on repeated infringement. In particular, the General Court observed that as Eni was not an addressee of the Polypropylene decision or of the PVC II decision, it was given no opportunity, in the administrative procedures leading to the adoption of those decisions, to adduce evidence capable of rebutting the presumption that the parent company did in fact exercise a decisive influence over its subsidiary, on the basis of which the Commission had established repeated infringement on its part. As a consequence, the fine was recalculated without the 60 percent increase for repeated infringement.[38] Eventually, in *Saint-Gobain Glass France and Others v. Commission*, the General Court found that the repetition of unlawful infringement by Saint-Gobain and Compagnie de Saint-Gobain was less serious than stated by the Commission, considering that the basic amount of the fine was justified in light of both the *Flat glass (Benelux)* decision and the *Flat glass (Italy)* decision. Since only the first of those decisions could be applied for the purpose of establishing repeated infringement and since, in addition, that decision was further removed in time from the beginning of the infringement referred to in the contested decision, the percentage of the increase on grounds of repeated infringement was reduced from 60 to 30 percent.[39]

(ii) Refusal to cooperate with or obstruction of the Commission in carrying out its investigations.

This aggravating circumstance is extremely rare and has only been applied once in practice, notably in *Professional videotape,* the first cartel case to which the 2006 Guidelines have been applied. In this occasion the Commission applied a 30% increase on Sony, considering that during the inspections carried out on May 28 and 29, 2002, the undertaking refused to answer oral questions while an employee shredded documents from a file labelled "Competitors Pricing." According to the Commission, Sony's behavior clearly and

[33] Cf. e.g. Case AT.39920 - *Braking systems* (50%).

[34] Cf. e.g. Case AT.38589 - *Heat stabilizers*.

[35] Case AT.39396 - *Calcium carbide and magnesium based reagents*, para. 310.

[36] Case AT.40049 - *Mastercard II*, paras. 109-110.

[37] Case T-103/08, *Versalis & Eni v. Commission*, paras. 367-369.

[38] Case T-558/08, *Eni v. Commission*, paras. 273-308.

[39] Cases T-56/09 and T 73/09, *Saint-Gobain Glass France and Others v. Commission*, paras. 482-486.

necessarily disrupted the proper conduct of the investigation and hindered the Commission's inspectors in the exercise of their investigative powers.[40] As for court cases, no cases concerning the refusal to cooperate or obstruction have been challenged before EU courts so far.

> (iii) Role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

This aggravating circumstance has only been applied twice by the Commission so far. In *Candle waxes,* the Commission justified a 50 percent increase on Sasol for one (out of two) infringements based on its leading role in the cartel activity (e.g. chairman and spokesman at meetings, responsible for sending cartel-related invitations and follow-up with other members, etc.)[41] Similarly, in *Marine hoses,* the Commission applied a 30 percent increase on Bridgestone and Parker ITR considering their leading role in the cartel meetings.[42]

As for court cases, in only one occasion, the Commission upheld the applicant's request to decrease the fine applied on the basis of this aggravating circumstance. Indeed, in *Parker Hannifin Manufacturing Srl v. Commission*, the Commission had increased the basic amount of the fine by 30 percent on the basis of the role of leader played by ITR in the cartel. However, the General Court held that a company cannot be held responsible for infringements committed independently by its subsidiaries before the date of their acquisition, which was the case here as Parker-Hannifin had no economic or structural links with ITR or its subsidiaries at the time of the infringement. As a consequence, the General Court rejected the Commission's arguments and reduced the fine.[43]

Despite the open nature of the aggravating circumstances listed in the 2006 Guidelines, the Commission has – so far – never made use of any other aggravating circumstances to justify basic amount increases in antitrust infringements.

2. Mitigating Circumstances

Similarly, to aggravating circumstances, the Commission provides a non-exhaustive list of examples of scenarios in which it may reduce the basic amount on the basis of mitigating circumstances. In order to benefit from these reductions, the undertaking concerned has to prove the existence of such circumstances to the Commission, which means the burden on proof will rely on the author of the infringement. Practice shows that the Commission has often – or more often, in any case – applied mitigating circumstances in antitrust infringements when compared to aggravating circumstances.

> (i) Where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened.

As underlined by the 2006 Guidelines, this mitigating factor does not apply to secret agreements such as cartels, considering the counterproductive effect this would create on undertakings. Undertakings would indeed be encouraged to infringe the law knowing they might always benefit from this mitigating circumstance by stopping their conduct as soon as – and only if – their infringement is discovered. As a consequence, this attenuating circumstance has never been used by the Commission. The Commission applied it only once in non-cartel cases, granting a 20 percent reduction to both participants in *Telefonica/Portugal Telecom* after considering

[40] Case AT.38432 - *Professional videotape*, paras. 219-227.

[41] Case AT.39181 - *Candle waxes*, paras. 681-686.

[42] Case AT. 39406 - *Marine hoses*, paras. 461-463.

[43] Case T□146/09 RENV, *Parker Hannifin Manufacturing Srl v. Commission*.

that the termination of the contested clause took place only 16 days after the Commission initiated proceedings (30 days after the Commission sent its first request for information to the parties) and that the clause in question was not secret.[44] As for court cases, no cases concerning this mitigating circumstance have been challenged before EU courts so far.

(ii) Where the undertaking provides evidence that the infringement has been committed as a result of negligence.

As under the previous guidelines, this mitigating circumstance plays a very marginal role in the Commission's practice. Indeed, it has been recognized in only three cases where the percentages granted were 1 and 10 percent.[45] In both *Yen Interest Rate derivatives* and *Power cables,* the reduction was granted based on the Commission's consideration of the lack of awareness of the undertakings' participation in the cartel. As for court cases, no cases concerning this mitigating circumstance have been upheld before EU courts so far.[46]

(iii) Where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market

A reduction of the fine might also be recognized if the undertaking can prove its limited role in the infringement. In particular, the undertaking will have to provide evidence that it did not actually implement the illegal conduct agreed upon in the market. That said, proving its limited participation in terms of duration will not be sufficient to benefit from the reduction, as this will already be reflected in the basic amount of the fine, duration being one of the elements considered when determining each party's participation in the infringement. Still, the General Court found in *Novacke chemicke za vody* that since the list of mitigating circumstances in the 2006 Guidelines is not exhaustive, the fact that this list does not mention the passive role of an undertaking does not exclude that aspect from being taken into consideration as a mitigating circumstance. However, the undertakings have to prove that the relative gravity of their participation in the infringement is less significant.[47]

This mitigating circumstance is by far the most applied by the Commission, with percentages ranging between 5 and 20 percent. That said, the 10 percent range appears to be the most common, with application to approximately 15 undertakings in several cartels.[48]

As for court cases, in a few occasions the EU courts reduced the fine on the basis of the undertaking's limited involvement in a cartel. In *Fresh Del Monte Produce v. Commission*, for example, the General Court increased the reduction from 10 to 20 percent on account of the fact that the applicant participated in only one aspect of the overall cartel.[49] Further, in *Campine v. Commission*, where the General Court did not agree with the Commission which, in order not to grant Campine a reduction of more than 5 percent, wanted to rely on the fact that Campine's limited presence on the market was already taken into account when determining the basic amount of its fine. The latter was indeed based on the value of the purchases made by each of the cartel participants and would thus - if such a reduction were applied - no longer have a sufficient deterrent effect. According to the General Court such approach could not be accepted, since it amounted to treating a small market operator more severely than a larger market operator. As

[44] Case AT.39839 - *Telefonica/Portugal*, paras. 500-508.

[45] Cf. e.g. Case AT.39861 - *Yen Interest Rate derivatives*, paras. 144-146 (10%).

[46] Cf. e.g. Case T□439/14, *LS Cable & System Ltd*, paras. 39-54.

[47] Case T-352/09, *Novacke chemicke zavody v. Commission*, para. 92.

[48] Cf. e.g. Case AT.39780 – *Paper envelopes*.

[49] Case T-587/08, *Fresh Del Monte Produce v. Commission*, para. 880.

a consequence, the reduction was increased from 5 to 8 percent.[50]

> (iv) where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so

Another element that might be considered by the Commission in relation to the fine reduction is the effective cooperation of the undertaking. However, as pointed out by the Commission in the 2006 Guidelines, the reduction does not apply to all cooperation but only to cooperation that is relevant, plays outside the scope of the Leniency notice, and goes beyond the undertaking's legal obligation to cooperate. The Commission will evaluate the existence of these elements on a case-by-case basis.

As for the mitigating circumstance mentioned under (ii), this mitigating circumstance plays a rather limited role in the Commission's practice. Indeed, it has been recognized in only six cases, where the percentages granted were 5, 15, and 18 percent.[51] As for non-cartel cases, this circumstance does obviously not apply.

The General Court has set very demanding standards in this regard. In *Ecka*, for example, the General Court refused to reduce the fine on the grounds put forward by the applicant that it had not contested the facts. The General Court pointed out that this circumstance was not listed in the 2006 Guidelines and held that the Commission was not required to grant a reduction.[52] The General Court read this provision restrictively by limiting its scope to the circumstances expressly listed. It found that the lack of contestation had not facilitated the establishment of the infringement by the Commission.[53]

Indeed, no cases concerning this mitigating circumstance have been upheld before EU courts so far. That said, in *Fresh Del Monte Produce v. Commission*, the General Court granted a 10 percent reduction to Weichert for cooperation during the administrative procedure.[54] However, this reduction was reversed by the Court of Justice in the appeal by finding that the response to the request for information did not justify a reduction of the fine as the applicant merely replied to a simple request for information and did not provide information to the Commission without having been requested to do so.[55]

> (v)Where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation.

Finally, the fact that the illegal conduct of the undertaking has been authorized or encouraged by public authorities or by legislation may also represent an element to justify decreasing the level of the fine. The Commission underlines that this applies without prejudice to any action that may be taken against the Member State concerned.[56]

In practice, the Commission granted this reduction in only one case so far. Indeed, in *Airfreigh*t, the Commission applied a 10 percent reduction on all participants recognizing that some regulatory regimes had encouraged certain elements of the anticompetitive conduct.[57]

As for court cases, the General Court upheld the applicant's request for reduction of the fine based on this mitigating circumstance in only

[50] Case T-240/17, *Campine v. Commission*, paras. 408, 413.

[51] Cf. e.g. Case AT.39563 – *Retail food packaging* (5%).

[52] Case T-400/09 *Ecka v. Commission*, paras 59 and 62.

[53] *Ibid*. paras 62-66.

[54] Case T-587/08, *Fresh Del Monte Produce v. Commission*.

[55] Joined cases C-293/13 P and C-294/13 P, *Fresh Del Monte Produce Inc. v. Commission* and *Commission v. Fresh Del Monte Produce Inc.*, para. 202.

[56] 2006 Guidelines (n 4), point 29.

[57] Case AT.39258 - *Airfreight*, paras. 1236-1241.

one non-cartel case. Specifically, in *Ordre National des Pharmaciens en France (ONP),* the applicant claimed that the Commission did not take into account the fact that its conducts were authorized or encouraged by a French decree. The Commission had found that the ONP had, first, applied a minimum price policy and, second, systematically chosen to interpret the law in the manner most unfavorable to opening the market to groups of laboratories and opposed legal arrangements that were consistent with the law. As regards this second finding, the General Court held that the Commission had been wrong not to acknowledge that there was a circular that would have had an impact on ONP's conduct. The Commission's error concerned only one of the four series of acts designed to prevent the development of groups of laboratories for a certain period. In consequence, the General Court granted a minor reduction of the fine.[58]

Differently from the aggravating circumstances, the Commission has often relied on additional motivations - to the ones listed in the 2006 Guidelines - to justify a decrease of the fine. In *Car battery recycling* and *Spark plugs,* for example, the Commission granted a 10 percent reduction on the basis of lack of evidence.[59] In two other instances the reduction was granted on the basis of the specific regulatory regime of a certain market sector. This was the case in *Bananas* and *Exotic fruit (bananas)* where the Commission applied a 60 and 20 percent reduction respectively considering the very specific characteristics of the sector involved.[60] As for non-cartel cases, these exceptional mitigating circumstances have only been used once in *Lundbeck* where the long duration of the Commission's investigation justified a 10 percent reduction for all participants.[61] As for court cases, no cases concerning exceptional mitigating circumstances have been upheld before EU courts so far.[62]

3. Increase for Deterrence

In setting the fine, the Commission will also have to ensure that it has a sufficient deterrent effect on the undertakings, which may not be the case, for instance, if the undertaking is a big player on the market. In order to prevent an insufficient impact, the Commission has the possibility of increasing the fine: (i) on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates (a so called "multiplier"); or (ii) in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.[63]

With regard to the multiplier, already developed under the previous guidelines (even if part of the assessment of gravity), its function is meant to correct the effects of the basic amount calculation for large multi-product undertakings. Indeed, by only considering the value of sales in relation to the infringement, the fine might feel insignificant compared to the undertaking's overall ability to pay and thus not be discouraging enough.

The Commission has often made use of deterrence multipliers to discourage and condemn illegal conduct by undertakings. In the vast majority of cases (including non-cartel cases) it used a 1.1 or 1.2 multiplier,[64] while only rarely was the multiplier between 1.4 and 2.[65] Exceptionally in two cases, the Commission

[58] Case T-90/11, *ONP v. Commission*, paras 375-382.

[59] Case AT.40018 - *Car battery recycling*.

[60] Cf. e.g. Case AT.39482 - *Exotic fruit (bananas)*, para. 336.

[61] Case AT.39226 - *Lundbeck*, para. 1349.

[62] Cf. e.g. Case T□472/13, *Lundbeck v. Commission*, paras. 842-844.

[63] 2006 Guidelines (n 4), points 30-31.

[64] Cf. e.g. Case AT.40098 - *Blocktrains*.

[65] Cf. e.g. Case AT.39574 - *Smart card chips (1.4)*.

applied a percentage instead of a multiplier, i.e. 10 and 70 percent.[66]

As for improper gains, already developed under the previous guidelines (even if part of the assessment of aggravating circumstances), this clause aims to prevent a scenario where the fine set by the Commission would not even correspond to the infringing undertaking's gains, and thus not be sufficiently deterrent. That said, this element should be considered by the Commission only where possible or relevant. In practice, the Commission does not seem to have ever justified an increase of an antitrust infringement sanction based specifically on improper gains.

As for court cases, no cases concerning deterrence – i.e. with regard to both multiplier and improper gains - have been upheld before EU courts so far.[67]

4. Legal Maximum, Leniency, and Settlement

Despite several amendments which followed the introduction of the 2006 Guidelines, some of the elements such as legal maximum, leniency, and settlement were not affected as deriving either from Article 23 of Regulation No 1/2003 or other specific legislation.

With regard to the legal maximum, points 32 and 33 of the 2006 Guidelines set a limit to the overall fine to be applied to undertakings, which should not exceed 10 percent of their total turnover in the preceding business year. It further underlines that for infringements by an association of undertakings, the 10 percent should be calculated based on the sum of the total turnover of each member active on the market affected by that infringement.

In practice, the Commission has so far applied this reduction to 40 companies in several cartels, but never to non-cartel cases.[68] As for court cases, in only a few occasions has the General Court upheld instances relating to the legal maximum. In particular, in *Sasol and Others v. Commission*, the General Court upheld the applicant's request to reduce the amount of the fine to 10 percent of the applicant's sales, considering that the Commission incorrectly determined the relevant undertaking. The General Court found it appropriate to limit the part of the fine imposed on Sasol Wax and Schümann Sasol International on account of the infringement committed during the joint venture period to 10 percent of the turnover of Schümann Sasol International, and reduced the fine.[69] Similarly, in *Ori & SLM*, the General Court found that the amount of the fine would go beyond the legal maximum and reduced the fine on SLM to EUR 1.956 million.[70]

As for leniency, the 2006 Guidelines simply refer back to the 2006 Leniency Notice which foresees further reductions of the fine up to 100 percent depending on the role and on the significance of the evidence provided by each undertaking involved in the infringement.[71] The reductions will apply every time after the 10 percent legal maximum assessment, in order to ensure that cooperation under the Leniency Notice is always rewarded.

In practice, the Commission has applied leniency reductions ranging from 7 to 100 percent.[72] Full immunity has been granted to whistleblowers in 52 cartels, which suggests the existence of a rather consolidated cooperative approach between companies and the Commission and thus a successful application of the Leniency Notice tool. Along these lines, it is interesting to note that only a minority of cartel cases were not reported to the Commission and among them, in only one, was leniency not

[66] Cf. e.g. Case AT.38695 - *Sodium chlorate*.

[67] Cf. e.g. Case T-540/08, *Esso and Others v. Commission*, para. 137.

[68] Cf. e.g. Case AT.40136 - *Capacitators*.

[69] Case T-541/08, *Sasol and Others v. Commission*, paras. 440-463.

[70] Case T-389/10 and T-419/10, *Ori & SLM*, paras. 451-455.

[71] Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ C 298, 8.12.2006, p. 17–22, points 23-26.*

[72] The 7% leniency reduction was granted to Esso and ExxonMobil in Case AT.39181 - *Candle waxes*.

granted to any member.[73] As for non-cartel cases, the Leniency Notice and the related reductions do not apply.

As for court cases, the General Court upheld the applicant's request to amend the leniency percentage granted in only a few occasions. In *Evonik Degussa and AlzChem v. Commission*, for example, the General Court partially upheld the applicant's request to increase the reduction granted under the Leniency Notice from 20 to 30 percent by granting a reduction of 28 percent considering that the evidence submitted to the Commission by the applicants did not provide significant added value in relation to calcium carbide, for which the Commission already had evidence at its disposal. Nevertheless, the General Court concluded that it was right to choose a high level of reduction.[74] Further, in *Donau Chemie v. Commission*, the General Court found that the Commission was wrong to apply the leniency reduction solely to the part of the fine relating to the part of the infringement in relation to which the applicant had provided evidence of significant added value. The General Court therefore annulled the 35 percent reduction of the fine and applied a reduction of 43.5 percent.[75] Lastly, in *Wabco Europe and Others v. Commission*, the General Court upheld the applicant's request to take partial immunity into account at the final stage of calculating the fine, rather than before it applied the 10 percent of turnover ceiling, considering that the grant of partial immunity is intended to encourage undertakings to provide the Commission with all the information and evidence in their possession concerning the infringement.[76]

Finally, the undertaking will benefit from a 10 percent reduction in case of settlement. This provision is not part of the 2006 Guidelines, but still represents a further reduction consideration for undertakings facing antitrust fines. In particular, pursuant to the Settlement Notice, where a company acknowledges its liability for the infringement, indicates its willingness to accept a maximum fine, and agrees to waive certain procedural rights, (i.e. full access to the file and oral hearing,) it is eligible to receive a 10 percent reduction of its fine.[77]

In practice, the Commission has granted the 10 percent settlement reduction in 30 cartel cases, the first being the *DRAMS* cartel in 2010.[78] The decisional practice of the Commission shows a rather increasing trend in this regard, with undertakings taking more and more advantage of this tool.[79] Similarly to leniency, settlement reductions do not apply to non-cartel cases. As for court cases, no cases concerning settlement have been upheld before EU courts so far.[80]

5. Inability to Pay

Another element which may be considered to justify a fine reduction - even if rather exceptional - is the inability to pay. The Commission may in fact, under certain social and economic circumstances and upon request of the undertaking concerned, grant a reduction where the amount of the fine would "*irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.*"[81] Such findings will need to be rooted on objective evidence and not merely on a difficult financial situation, as this would entail an unjustified discrimination between undertakings.

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[73] Case AT.39165 - *Flat glass*.

[74] Case T-391/09, *Evonik Degussa and AlzChem v. Commission*, paras. 189-212, 288.

[75] Case T-406/09, *Donau Chemie v. Commission*, paras.220-231.

[76] Case T-380/10, *Wabco Europe and Others v. Commission*, paras. 131-140.

[77] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) 1/2003 in cartel cases, OJ 2008, C 167, p. 1.

[78] Case AT.38511 - *DRAMS*.

[79] Cf. e.g. Case AT.40127 - *Canned vegetables*.

[80] Cf. e.g. Case C-411/15P *Timab Industries and Others v. Commission*, paras. 135-139.

[81] 2006 Guidelines (n 4), point 35.

In practice, the Commission has rarely applied reductions due to inability to pay, and the few cases where the reduction was granted have not published any information in this regard.[82] In *International removal services,* for example, the Commission granted a 70 percent reduction to Interdean on the basis of comprehensive evidence provided by the undertaking, which demonstrated the special circumstances concerning the individual situation of Interdean and its parent companies.[83] Further, in *Refrigeration compressors,* ACC's fine was reduced to EUR 9 million (i.e. by approx. 67 percent) considering that the company had shown that application of the fine in the full amount would irretrievably jeopardize its economic viability and cause its assets to lose their value. Indeed, the company's distressed financial situation had brought it under the insolvency scheme of Italian bankruptcy law and the fine would have frustrated the ongoing financial restructuring of the group, hence leading to its insolvency.[84]

Along these lines, in *1.garantovana* the General Court held that an applicant was barred from relying on these grounds when it had decided to terminate its activity and sell its assets.[85] In addition, the mere fact that the imposition of a fine might give rise to the undertaking's bankruptcy is not sufficient to apply paragraph 35 of the 2006 Guidelines. The undertaking must in fact fulfil the cumulative conditions set out in this provision and establish: (i) that the fine would cause its assets to lose their value (an acquisition by another undertaking is unlikely and its assets would be unlikely to find a buyer if sold separately) and (ii) the particular economic and social context, which could lead to an increase in unemployment or to a deterioration of the economic sectors upstream or downstream.[86]

Reductions due to inability to pay are thus to be interpreted in a strict sense. Accordingly, the General Court has increased the Commission's duty to state reasons when undertakings submit detailed information that specifically aims at proving that these conditions are met. Accordingly, where the Commission intends to reach a different conclusion, it is required to provide at least a brief summary of the evidence and findings substantiating its conclusion if the information submitted is sufficiently focused on the conditions of paragraph 35. The Commission is obligated to explain why a declaration of bankruptcy would jeopardize the undertaking's economic viability and cause its assets to lose all their value.[87]

As for non-cartel cases, reductions due to inability to pay have never been applied so far. Similarly, to this day, no cases concerning inability to pay have been upheld before EU courts.[88]

6. The Commission's Discretion Under Point 37

Despite the development of a step-by-step methodology for setting antitrust fines, the 2006 Guidelines foresee a "safety clause" which allows the Commission to depart from the given guidance (including the limits specified under point 21) where this is justified by the "*particularities of a given case or the need to achieve deterrence*."

This possibility has been upheld by EU courts, allowing the Commission to adjust the fines to the individual circumstances of each undertaking in line with paragraph 37 of the 2006 Guidelines. Indeed, a lack of flexibility could lead to disproportionate fines.

In its practice, the Commission has in several instances made use of its discretion to grant

[82] Cf. e.g. Case AT.38866 - *Animal feed phosphates*.

[83] Case AT.38543 - *International removal services*, paras. 642-662.

[84] Case AT.39600 – *Refrigeration compressors*, paras. 96-98.

[85] Case T-392/09, *1. garantovana v. Commission*, para. 144.

[86] Case T-400/09 *Ecka v. Commission*, paras 50-51, 96-99, and 112-115.

[87] Case T-352/09, *Novacke chemicke zavody v. Commission*, paras 205-210.

[88] Cf. e.g. Case C-454/16P, *Global Steel Wire v. Commission*, paras 34-35 and 52–55.

increases or decreases of the fine on the basis of point 37. These were generally recognized for all participants (e.g. reduction due to length of the Commission investigation) unless justified by the existence of certain circumstances specific to a single undertaking.[89] The percentages applied were always between 1 and 20 percent, and only on one occasion was the fine increased due to the economic significance of the infringement.[90] As for reductions, on one occasion the fine was reduced by 20 percent,[91] in three occasions by 10 percent,[92] once by 5 percent,[93] and once by 1 percent.[94] In a number of cases, the motivation and/or the percentage of reduction applied was not published.[95] As for non-cartel cases, the Commission has always granted reductions of between 10% and 50% for cooperative behavior, except in one case.[96] Interestingly, in *Fentanyl*, the Commission recurred to point 37 to adapt the value of sales in the basic amount for Novartis/Sandoz, taking into account the absence of sales by the undertaking in the geographic area concerned during the period of the infringement, and the need to ensure deterrence.[97]

As for court cases, the Commission's decision concerning the application of point 37 has been annulled in only two occasions. In both instances the General Court considered that, as the application of point 37 leaves a wide margin of appreciation to the Commission, respecting the obligation to state reasons is of exceptional importance. In particular, in *Stührk Delikatessen Import v. Commission*¸ the applicant claimed that the adjustment of the fine under point 37 of the Guidelines had been carried out by the Commission in a purely arbitrary manner. The Commission infringed the principle of equal treatment as it failed to take sufficient account of the actual participation of other undertakings in the calculation of their fines. Despite their major role in the cartel, the other cartelists were granted a greater reduction than the applicant (80 percent). The applicant claimed that it should be granted a reduction of 90-95 percent. The General Court concluded that the grounds provided by the Commission didn't allow the applicant to challenge this approach as regards the principle of equal treatment, and partially annulled the Commission decision.[98] Similarly, in *Pometon v. Commission*, the Commission's decision was annulled for failure to state reasons.[99]

II. Conclusion

Under the current 2006 Guidelines, a total of approximately 70 Article 101 decisions have been issued by the Commission. As seen throughout our review, these guidelines allow companies to easily calculate, and thus rather precisely predict, the potential fines they could face in case of antitrust infringements. Indeed, thanks to the Commission's practice and EU case-law, companies are able to foresee and estimate how often, to what extent and when a certain element has been considered relevant or not by the authority or legislator. This foreseeability certainly represents a powerful tool for undertakings, helping them avoid – or at least limit – the risks of heavy fines.

[89] Cf. e.g. Case AT.39965 - *Mushrooms*, para. 73 (reduction of 10% to Prochamp as very small independent company).

[90] Case AT.40018 - *Car battery recycling*, para. 380.

[91] Case AT.39396 - *Calcium carbide and magnesium based reagents*, paras. 369-372 (very small independent trader).

[92] Cf. e.g. in Case AT.39574 - *Smart card chips*, para. 428 (length of procedure).

[93] Case AT.40481 - *Occupant safety systems II*, paras. 128-129 (for the increased length of the Commission investigation due to its decision to separate its investigations of the OSS-related infringements into two separate proceedings).

[94] Case AT.38589 - *Heat stabilizers*, paras. 744-753 (for duration of proceedings).

[95] Cf. e.g. Case AT.39633 - *Shrimps*.

[96] Case AT.39839 - *Telefonica/Portugal Telecom*.

[97] Case AT.39685 - *Fentanyl*, para. 57.

[98] Case T-58/14, *Stührk Delikatessen Import v. Commission*, paras. 288-334.

[99] Case T-433/16, *Pometon v. Commission*, paras. 345-364.

The existence of a rather numerous set of precedent cases, provides today a useful framework for companies contemplating about antitrust infringements and fines. At the same time, the European Commission constantly adapts its practice to the standards applied by the EU courts, with the goal to avoiding the annulment of its decisions. Thus, additional scrutiny applied by the courts may lead to better quality decisions from the Commission. In this sense, it will be interesting for companies to closely follow future developments.