

Antitrust and EU Competition



The EC Commission Issues New Guidelines for the Setting of Fines in Antitrust Cases

On 28 June 2006, the EC Commission adopted a long-awaited revised version of its Fining Guidelines. These will bring about major changes in the EC Commission's fining policy. They are likely to trigger significant increases in antitrust fines under both Article 81 EC (cartels and vertical restraints) and Article 82 EC (abuse of dominant positions), particularly for companies involved in long-lasting infringements in large markets. The revised Guidelines also apply to past anticompetitive conduct to which the Commission has not yet issued a Statement of Objections.

Under Regulation No. 1/2003, the EC Commission may impose a fine of up to 10% of the total sales/turnover in the preceding business year of companies that, either intentionally or negligently, have infringed Article 81 or 82 of the EC Treaty.¹ Within this 10% limit, the EC Commission enjoys wide discretion to set fines in particular cases.

The new Guidelines refine the methodology that the EC Commission has applied since 1998 and provide a revised framework for setting fines. Notwithstanding the principle of non-retroactivity, the EC Commission's new fining Guidelines will be applicable to past anticompetitive conduct for which a Statement of Objections is issued after the Guidelines are published in the Official Journal.

According to the new Guidelines, the EC Commission will use a two-step process when setting a fine:

1. It will determine a "basic amount" for each company.
2. It may adjust that basic amount upwards or downwards, depending on the existence of mitigating or aggravating circumstances, the need for deterrence and the company's ability to pay.

Calculation of the Basic Amount

The new Guidelines abandon the previous approach to setting the basic amount of the fine. Many had criticized the 1998 Guidelines for setting forth a "tariff"

of fixed starting amounts (e.g., up to €20 million for the most serious infringements, such as cartels) that, in practice, were often not applied, notably because in small cases the amounts started too high.

From now on the basic amount will be up to 30% of the value of the company's annual sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the European Economic Area (EEA). Normally, the reference year for this will be the last business year of the infringement. This starting point may reduce the opening amount in some cases, but will increase it in others. It should also lead to greater transparency. As a matter of policy, the EC Commission has stated its intention to fine heavily horizontal price-fixing, market-sharing and output-limitation agreements. For these infringements, the basic amount generally will be between 20% and 30%.

Further, the Guidelines have dramatically increased the weight given to the **infringement's duration**. Long-lasting infringements will be automatically subject to heavier sanctions; the basic starting amount of the fine will be multiplied by the number of years of the infringement. While the starting amount was increased by 10% for each year beyond year one of the infringement under the 1998 Guidelines, **each additional year will now trigger an increase of another 100% of the basic starting amount**. Thus, the increase for each additional year (after the first year) is now equivalent to the increase for a full 10 years under the 1998 Guidelines.

In addition, the new Guidelines introduce another deterrent mechanism to discourage companies from joining a cartel in the first place. Irrespective of the duration of the infringement, the EC Commission will now impose on the participants in a cartel a so-called **"entry fee,"** representing between 15% and 25% of the company's sales in the relevant product. This additional penalty, which will be included in the basic amount of the fine, will be imposed on every

company simply for entering into a cartel, regardless of its level of participation in the infringement or its duration.

Example: The EC Commission finds that a company with a turnover of €400 million in the relevant product is involved in a cartel. The basic starting amount is between €80 and €120 million (i.e., 20–30%), instead of the €20 million generally imposed by the Commission under the 1998 Guidelines. If the cartel lasted for five years, the basic starting amount is multiplied by five, increasing to between €400 and €600 million. Under the 1998 Guidelines, the increase for duration would only have been €10 million. In addition, under the new Guidelines, the EC Commission will impose an entry fee of between €60 and €100 million. Therefore, the potential exposure for the company could now be between €460 and €700 million, compared with €30 million under the 1998 Guidelines (subject to the 10% yearly turnover ceiling established by Regulation 1/2003)!

Adjustments to the Basic Amount

In the second step, the EC Commission adjusts the basic amount to take account of aggravating and/or mitigating factors. The list of aggravating circumstances is mostly the same as under the 1998 Guidelines (i.e., refusal to cooperate and adoption of retaliatory measures and role as leader or instigator of the infringement). The EC Commission has modified the list of mitigating circumstances, but these appear to be minor adjustments inspired by the recent case law of the European Courts rather than major changes to the EC Commission's fining policy.

The most important change involves tougher penalties for recidivist companies. Under the new Guidelines, each previous infringement of a similar nature of EC competition rules may trigger an increase of the basic amount by up to 100%.

Fines imposed by EU Member States' National Competition Authorities for breach of Article 81 and 82 EC are taken into account here, but those imposed in other jurisdictions (notably in the United States) are not. Similarly, fines imposed by EU National Competition Authorities for breach of their national competition rules will not be taken into account by the EC Commission.

Example: The EC Commission finds that a company has participated in a cartel. This is the second time that the EC Commission has found this company to have infringed Article 81 EC. In addition, the German Federal Cartel Office, applying Article 81 EC, has recently fined this company for participating in another cartel, and the

US Department of Justice (DOJ) has also obtained a fine from the company in connection with the same cartel. If the previous infringements are of a similar nature to the current infringement, the EC Commission can take into account both its own earlier decision and the German decision and increase the applicable fine by up to 200%. The DOJ's finding, however, is not relevant here. Using the figures in the previous example, the basic amount may now be increased by up to €1.38–2.1 billion. Under the 1998 Guidelines, the increase could have been only 50%.

Specific Increase for Deterrence

To ensure sufficient deterrence, the EC Commission also continues to reserve the right to increase the fine for companies that have a particularly large turnover to an amount beyond the company's sales of the relevant product.

Deterrence was already part of the 1998 Guidelines and a key element of the EC Commission's fining policy. The EC Commission considered that its fixed starting amount (€20 million) was insufficient to deter the largest companies, so it introduced varied multipliers for them, which it has applied often in its decisions, notably those involving both large and small companies.

Although some have criticized the EC Commission's practice of increasing fines based on the size of the company in the name of deterrence (e.g., on the basis that it is unfair to multi-product conglomerates), this practice is likely to remain a key component of the EC Commission's new fining policy. Because the new Guidelines limit the calculation of the starting amount to sales of the relevant product, it might appear at first sight to have relaxed potential penalties for large, multi-product companies that participate in cartels affecting markets in which they have relatively small sales. The EC Commission, however, retains the ability to increase the fines based on the size of the offender if such increases are considered necessary to deter wrongdoing by large, multi-product companies.

Example: Company A and Company B entered into a cartel for the manufacture of product C. Company A only manufactures product C and has a turnover of €100 million. Company B also produces a range of other products and its total turnover is €900 million. Its turnover in product C, however, is only €50 million. In this case, before considering the deterrence provisions (and always within the 10% yearly turnover ceiling), the new Guidelines would punish Company A much more severely, notwithstanding that its turnover is nine times smaller than Company B's.

The EC Commission could therefore decide to increase Company B's fine for "deterrence" purposes and set the fine higher to take into account Company B's total turnover.

Ability to Pay

The scope of the "ability to pay" defense has also been modified. The 1998 Guidelines simply stated that the EC Commission should take into account the company's real ability to pay in the specific social context. By contrast, the new Guidelines specify that a fine will be reduced only in exceptional circumstances, i.e., if the payment of the fine in accordance with the Guidelines would (i) irretrievably jeopardize the economic viability of the company concerned; and (ii) cause the company's assets to lose all their value.

Main Implications of the New Fining Guidelines

On the one hand, the new Guidelines have reduced the EC Commission's discretion to determine the starting amount of fines by accepting a link to the products concerned. This will enable companies involved in competition proceedings to predict more accurately their exposure to administrative fines for infringements of the EC competition rules. On the other hand, the new Guidelines most likely will substantially increase the penalties for antitrust infringements in Europe. Although the level of a fine depends on the specific circumstances of each case, **the penalties that the EC Commission will impose on large, multi-product companies may increase exponentially** for three main reasons:

1. The starting point for setting the fine will take into account the value of sales to which the infringement relates, rather than being a lump sum that is dependent on the degree of gravity of the infringement.
2. In cartel cases and possibly other types of infringements, the EC Commission will impose a so-called "entry

fee," irrespective of the gravity and duration of the infringements. Thus, simply entering into a cartel will cost the company 15%–25% of its annual sales of the relevant product in markets within the EEA.

3. The fines for repeat offenders can be significantly increased. In addition, the EC Commission will also take into account decisions of EU Member States' National Competition Authorities.

Further, these factors are likely to make it even more common for single-product companies to incur fines close to the 10% ceiling. This was an increasingly frequent outcome under the old rules; it may now become the general rule for single-product companies involved in serious antitrust infringements, except when these companies generate a substantial part of their product-specific turnover outside the EEA.

In addition, although these Guidelines do not apply to EU Member States' National Competition Authorities, even when they are applying Articles 81 and 82 of the EC Treaty, many authorities are expected to adopt fining guidelines that reflect similar principles to those that the EC Commission has adopted.

Companies involved in long-lasting antitrust infringements, especially those with a record of antitrust violations, now face significantly increased exposure under the new Guidelines. The Guidelines therefore create even stronger incentives for wrongdoers to seek amnesty, given that the first in the door will be immune from fines, no matter how large.

Antonio Capobianco and Stefano Fratta authored this article, with contributions from Frédéric Louis, Sven Völcker and John Ratliff.

NOTES

1. See Article 23(2) of Council Regulation 1/2003.

FOR MORE INFORMATION ON THIS OR OTHER ANTITRUST AND EU COMPETITION MATTERS, PLEASE CONTACT:

Frédéric Louis +32 2 285 49 53 frederic.louis@wilmerhale.com

Dr. Sven B. Völcker +32 2 285 49 52 sven.voelcker@wilmerhale.com

Antonio Capobianco +32 2 285 49 13 antonio.capobianco@wilmerhale.com

Stefano Fratta +32 2 285 49 23 stefano.fratta@wilmerhale.com

John Ratliff +32 2 285 49 08 john.ratliff@wilmerhale.com

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