



# Fines Setting by the EU Commission for Antitrust Infringements

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\*All views expressed are personal and do not bind the Commission or its services

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## Outline

1. Fines Objectives
2. Legal Basis
3. Setting the Fines
4. Judicial Review of the Fines Setting

## Fines Objectives

- Fines = the only currently foreseen sanction for breaches of competition law
- Objectives:
  - Punishment
  - Deterrence

## Legal Basis

- Articles 101 and 102 of the Treaty on the Functioning of the European Union
- Council Regulation No. 1/2003 => fines principles (gravity/duration/10% cap)
- Fines Guidelines 2006 (1998)
- Inability to pay: Almunia/Lewandowski Information Note of 2010
- General principles of law

## Setting the Fines: Outline

- Basic amount
  - Value of sales x Gravity x Duration
  - + "Entry fee"
- Adjustment factors
  - Aggravating circumstances
  - Mitigating circumstances
  - Deterrence multiplier
- Legal maximum
- Fines reductions

## Setting the Fines: Basic Amount I.

- Value of sales: Points 13 to 18 of the Fines Guidelines 2006
  - "[...] 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."
  - Usually the last full business year of the participation in the infringement

## Setting the Fines: Basic Amount II.

- Concept of undertaking: Parental liability
- Parental companies not directly involved in the infringement can be held liable for an antitrust infringement
  - Decisive influence on the direct participant (capability + use of this capability)
  - Wholly owned subsidiaries
- Avoiding artificial intra-group arrangements to reduce/escape the fines

## Setting the Fines: Basic Amount III.

- Gravity: Points 20 to 23 of the Fines Guidelines 2006
  - The nature of the infringement
    - Horizontal price-fixing
    - Market sharing
    - Output-limitation agreements
  - The combined market share of the undertakings concerned
  - The geographic scope of the infringement
  - The implementation of the infringement

## Setting the Fines: Basic Amount IV.

- Duration: Point 24 of the Fines Guidelines 2006
  - Rounding
  - Single and continuous infringement
- "Entry fee": Point 25 of the Fines Guidelines 2006
  - 15% to 25% of the value of sales
  - Deterrence from even entering into anticompetitive agreements
  - Always applied for cartels, optional for other infringements

## Setting the Fines: Adjustment Factors I.

- Aggravating circumstances: Point 28 of the Fines Guidelines 2006
  - Recidivism (same or a similar infringement) => uplift of up to 100%
  - Refusal to cooperate/obstruction
  - Role of leader in, or instigator of, the infringement



## Setting the Fines: Adjustment Factors II.

- Mitigating circumstances: Point 29 of the Fines Guidelines 2006
  - Terminating the infringement immediately upon the EU Commission's intervention
  - Infringement as a result of negligence
  - Substantially limited involvement in the infringement
  - Effective cooperation outside the Leniency Notice and beyond the legal obligation to do so
  - Anti-competitive conduct authorised/encouraged by public authorities/legislation

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## Setting the Fines: Adjustment Factors III.

- Deterrence multiplier: Points 30 to 31 of the Fines Guidelines 2006
  - Possibility to increase the fine to be imposed on undertakings with particularly large turnovers beyond the affected sales
  - Possibility to increase the fine to exceed the amount of gains resulting from the infringement where it was possible to estimate that amount

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## Setting the Fines: Legal Maximum

- Points 31 to 32 of the Fines Guidelines 2006
  - 10% of the total worldwide turnover of the undertaking
  - In the business year preceding the adoption of the decision
  - Prevention of disproportionate fines, and hence of a possible risk to the viability of the fine addressees

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## Setting the Fines: Fines Reductions

- Application after the adjustment factors and the 10% cap
- Possible reductions due to
  - Leniency
  - Settlement
  - Inability to Pay (ITP)

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## Leniency Reductions

- 100% leniency reduction (= full immunity from fines) for the first applicant
- 30% to 50% leniency reduction for the second applicant
- 20% to 30% leniency reduction for the third applicant
- Up to 20% leniency reduction for other applicants

## Settlement Reduction

- Simplified procedure => parties acknowledge their involvement in the cartel and their liability for it
- Fines reduction of 10%
- Cumulative application with leniency reduction, where applicable



## Inability to Pay (ITP): Legal Framework

- Preconditions set out in point 35 of the Fines Guidelines 2006:
  - Risk of irretrievable jeopardising the economic viability of an undertaking due to the imposition of the fine (causal link)
  - Loss of asset value
  - Specific economic context
  - Specific social context
- Further details on the ITP assessment in the Almunía/Lewandowski Information Note

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## Inability to Pay (ITP): Assessment

- Quantitative assessment
  - Z-Score
  - Capital strength
  - Profitability
  - Solvency
  - Liquidity
- Qualitative assessment of the relationship with
  - banks
  - shareholders

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## Setting the Fines: Derogation Clause

- Point 37 of the Fines Guidelines 2006
  - Purpose: to adjust the fines setting methodology for case specific elements not reflected in the standardised methodology or to achieve deterrence
- Application in cartel cases:
  - Calculation of the value of sales
  - Fine reductions due to the specific situation of undertakings

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## Judicial Review of the Fines Setting

- Unlimited jurisdiction of the Community Courts to review the fines
- Relevant factual situation at the time of the decision
- General Court judgments in 2012 on the application of the Fines Guidelines 2006 => key elements confirmed

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## Conclusions

- Fines setting principles set out in the Fines Guidelines 2006
- EU Commission keeps discretion and flexibility in applying the Fines Guidelines 2006
- Fines setting based on the gravity (% of the value of sales) and duration of the infringement
- Legal maximum of 10% of the worldwide turnover of the undertaking applied
- Possible fines reductions due to leniency, settlement and inability to pay

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## Back up

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## Fines: Statistics I.

- Cartel fines imposed (not adjusted for Court judgments) in 2009 to 2013 (as of July 2013)

Year	Amount in EUR
2009	1 540 651 400
2010	2 868 459 674
2011	614 053 000
2012	1 875 694 000
2013	141 791 000
Total	7 040 649 074

## Fines: Statistics II.

- Cartel fines imposed under the Fines Guidelines 2006 and the impact of the 10% cap (with immunity applicants, as of July 2013)

	0-0.99%	1-1.99%	2-2.99%	3-3.99%	4-4.99%	5-5.99%	6-6.99%	7-7.99%	8-8.99%	9-9.99%	total
percentage											
undertakings fined	127	25	12	5	9	9	5	7	3	23	225
	56.44%	11.11%	5.33%	2.22%	4.00%	4.00%	2.22%	3.11%	1.33%	10.22%	100.00%

## Fines: Statistics III.

- Cartel fines imposed under the Fines Guidelines 2006 and the impact of the 10% cap (without immunity applicants, as of July 2013)

percentage	0-0.99%	1-1.99%	2-2.99%	3-3.99%	4-4.99%	5-5.99%	6-6.99%	7-7.99%	8-8.99%	9-9.99%	total
undertakings fined	99	25	12	5	9	9	5	7	3	23	197
	50.25%	12.69%	6.09%	2.54%	4.57%	4.57%	2.54%	3.55%	1.52%	11.68%	100.00%

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## Inability to Pay (ITP): Statistics

- ITP claims since the introduction of the new ITP methodology in 2009 (as of August 2013)

ITP claims	pre-decision	post-decision
=> accepted	13	1
=> rejected	26	7
=> withdrawn	4	3
Total	43	11

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## Inability to Pay (ITP): Jurisprudence

- "[T]he Commission is not required, when determining the amount of the fine, to take into account the financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions." (Case C-328/05 SGL Carbon, paragraph 100)
- "[T]he fact that a measure adopted by a Community authority brings about the insolvency or liquidation of a given undertaking is not as such prohibited by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value." (Case T-62/02 Union Pigments, paragraph 177)

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## Art. 101 (1) and (2) TFEU

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

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## Art. 101 (3) TFEU

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

## Art. 102 TFEU

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.