

Penalties for Price-fixers

A survey of fines imposed in 43 cartels by the EC Commission

The EC *Penalty Guidelines 1998* was designed to make the calculation of fines more systematic and transparent. Here an overview of the fining principles and practice of the EC Commission is drawn from the experience to date in prosecuting cartels.

The Penalty System in Law

The fining of price-fixers has six sequential steps. Under the penalty guidelines there are four steps in calculating the fine:

1. Basic Amount (' $x + y$ ') is made up of made up of two elements – the gravity of the offence (x) which is categorised as 'minor' (€1000 to €1 million); 'serious' (over €1 million to €20 million) or 'very serious' (above €20 million) and which may be increased to ensure 'sufficient deterrent' to take account of '*the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers*'; and duration (y) which adds 10% for every year the cartel has been in operation for a year or more.

2. Aggravating & Attenuating Circumstances are then considered to increase and reduce the basic amount respectively. Aggravating circumstances include recidivism, leading role, retaliatory measures against other undertakings, refusal to co-operate with or attempts to obstruct the EC mission in carrying out its investigations and 'other'. Attenuating circumstances include passive role, non-implementation of offending agreement, termination of the infringement as soon as the EC mission intervenes, existence of reasonable doubt on the part of the undertaking as to whether restrictive conduct does indeed constitute an infringement, effective co-operation outside the scope of the leniency notice and 'other'.

3. Other Adjustments can be made to take account '*of certain objective factors such as a specific economic context, any economic or financial benefits derived by the offenders, the specific characteristics of the undertaking in questions, and their real ability to pay.*'

4. 10% cap based on the offenders previous year's world-wide turnover is then applied to the aggregate fine.

The *Leniency Notice 2002* provides for complete immunity from fines for the 'whistleblower' who is not

the 'ringleader' of the cartel, and reductions of between 20% to 50% for parties who provide '*value added*' evidence '*which strengthens ... the Commission's ability to prove the facts in question.*' The earlier *1996 Leniency Notice* was not so generous.

Finally, an offender can appeal the EC Commission's fines before the European Court of First Instance (CFI).

The Penalty System in Practice

Over the period 1999 to 2004 there have been 30 fully reported cartel decisions involving 43 cartels (12 separate cartels in *Vitamins* 4 of which were time-barred (and are excluded from the analysis below); and 2 each in *Belgian Brewers* and *Speciality Graphite*) implicating 207 firms. On average a cartel had 5.3 participating firms and operated for 6.2 years. The largest cartel had 16 members (*FETTCSA*), and longest operated for nearly 25 years undetected (*Organic Peroxides*). The cartels come from a wide range of industries/sectors but the chemical industry had the greatest number (17 separate cartels).

The EC Commission imposed fines of €6.3 billion before leniency. The average overall fine imposed on a cartel was €161.4 million reduced to an average of €96.2 million under the leniency programme. The average fine for a firm participating in a cartel was €30.4 million reduced to €18.1 million after leniency.

Basic Amount

The gravity of the offence was referred to in 28 decisions with the majority of offences treated as 'serious' (78%) or 'very serious' (19%). In 19 decisions the EC Commission referred to 'sufficient deterrence' and applied a multiplier of between 1.25 and 5, although the multiplier was not uniformly imposed on all firms in any individual cartel. The largest multiplier was 5 imposed on Interbrew in *Belgian Brewers* to €0.3 million gravity. In 11 decisions no deterrence multiplier was applied to any cartelists.

Aggravating & Attenuating Adjustments

21% increased for aggravating circumstances only, 24% of firms had the basic amount reduced for attenuating circumstances only, 4% for both, and 52% had no adjustment for either. The average reduction to the basic amount for attenuating circumstances was 23.3%, whilst aggravating circumstances increased fines by 43.9%.

Caps on Fines

Fines for 6 firms in 4 cartels were reduced because they exceeded the 10% cap. These led to reductions in the total fine from between 18% (Sotheby's in *Fine Art Auctions*) to 89.5% (Perosa in *Organic Peroxides*).

In a few cases a firm's ability to pay was taken into account. SGL's fine (*Specialty Graphite*) was reduced by 33% due to financial constraints and previous fines. However, the Commission rejected ability to pay in *FETTCSA*, *Belgian Brewers*, *Graphite Electrodes*, and *Austrian Banks*. It however allowed payment by instalments (Sewon in *Lysine*), and the CFI granted suspension of payments in *French Beef* to allow three firms (FNCBV, FNICGV and FNSEA) time to raise the money necessary to pay the fines.

The Commission's Leniency Programme

Fines were reduced in 35 of the 39 cartels (90%) under the EC leniency programme. The reductions ranged from 10% to 100% with full leniency granted to one or more firms in 12 cartels (*Vitamins A & E*, *Carbonless Paper*, *Methionine*, *Specialty Graphite Isostatic & Extruded*, *Food Flavour Enhancers*, *Fine Arts Auctions*, *Sorbates*, *Organic Peroxides*, *Copper Plumbing Tubes and Needles & Haberdashery*). No leniency reductions were given in 4 cartels (*German Bank Charges*, *French Beef*, *FETTCSA* and *French Brewers*).

Appeals

Fines were appealed in 34 out of the 39 cartels by one or more firms. Decisions in 13 appeals are pending. Of the 21 decided appeals, 5 were dismissed (*Private Label Belgian Brewers*, *Luxembourg Brewers*, *SAS/Maersk Air*, *French Beef* and *Zinc Phosphate*), 3 were not adjusted by the CFI (*Vitamins A, E & B2*), and fines reduced in 13 by between 2% (*Belgian Brewers*) to the annulment of the entire €100 million fines in *German Banks* because the EC Commission failed to get its paperwork to the Court on time and in *FETTCSA* because the Commission was time-barred. In *Specialty Graphite* the CFI did not adjust the €1.1 million fine imposed on Intech for isostatic speciality graphite but reduced the portion for which EDM AG was jointly and severally liable to €0.4 million, and reduced SGL's fine by 49%.

Highlights

The Commission imposed €5.4 billion as the 'basic amount' which rose to total final fines of €6.3 billion when the other elements were taken into account. The EC's leniency programme reduced fines by 40% to €3.76 billion.

Fines for minor and serious offences fell within the upper limit of the bands set in the *Penalty Guidelines* even though these relate to setting the initial amount for the gravity of the offence. For 'very serious' offences the average fine (€97.1 million) was nearly four times the minimum €20 million. Thus with the exception of 'very serious' offences, the initial tariff sets the upper limit to actual fines.

Ability to pay was not a consideration. Only one out of 207 firms had its fine reduced because of financial constraints.

The EC leniency programme significantly reduced fines. For 'minor', 'serious' and 'very serious' offences, fines were reduced by 48%, 39%, and 42% respectively. In total the leniency programme reduced total fines by €2.5 billion with 10 'whistle blowers' receiving full immunity totalling €476.5 million in forgone fines. Over €2 billion was given to other offenders who 'co-operated' with the Commission during its investigations!

The appeal rate for fines was extraordinarily high – fines have been appealed in 87% of reported cartels. In decided appeals, the CFI has reduced the fine imposed on a firm litigating the Commission's decision by a further 18% on average.

Observations

First, it pays for an offender to co-operate with the EC Commission, and then to challenge its decision in the courts. To illustrate, firms found guilty of a 'very serious' price-fixing offence fined, say, €100 million can expect an average reduction of 42% through the leniency programme and a further 18% by disputing the fine in court (the latter assuming that the CFI continues as it has). Thus a firm fined €100 million can expect to pay on average only €48 million.

Second, the leniency programme appears overly generous. Over €2.5 billion in foregone fines were purportedly needed to secure the prosecution of 26 cartels and 178 firms. However, since 12 of these cartels had already been detected by the US authorities and a further 7 were under parallel investigations, one may question whether leniency was central. Indeed, the Commission granted full leniency in 4 cartels previously detected (*Vitamins A & E*, *Organic Peroxides* and *Methionine*). In any event, I am sure several law firms assisted by economists would be prepared to detect and prosecute cartels for a fraction of the €2.5 billion 'cost' of the leniency programme!

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