

New EU Penalty Guidelines

Will the 2006 penalty guidelines decrease fines?

The European Commission's new 2006 *Penalty Guidelines*, which will come into force in September 2006, alter the way fines are to be set for infringements of EU competition rules. The major difference is a move away from arbitrary tariffs based on the gravity of the offence, to fines based on sales and duration.

Major changes

Under the new guidelines, the basic amount of the fine is calculated as a proportion of sales and the duration of the offence. The fine can be up to 30% of the value of sales in the last full business year of the offence for each year of the infringement. In addition between 15% and 25% of the value of sales will be imposed as a deterrent to cartels, and may be imposed for other offences. Thus the basic amount (B) equals a proportion (a) of sales (S) multiplied by the number of years of the infringement (T), and an uplift for deterrence (b) i.e.

$$B = aST + bS = (aT + b)S.$$

Like the earlier guidelines uplifts and discounts are given for aggravating and mitigating factors respectively. Aggravating circumstances include (a) recidivism (the basic amount will be increased by up to 100% for each prior offence); (b) refusal to co-operate with or attempts to obstruct investigations; and (c) retaliatory or coercive measures on other undertakings to participate in the infringement. Mitigating circumstances include (a) termination of the infringement as soon as the Commission intervenes; (b) where there is evidence that the infringement was committed negligently; (c) evidence of substantially limited involvement; (d) effective co-operation outside the scope of the leniency notice; and (e) where the anti-competitive action was authorised or encouraged by public authorities or legislation. The Commission may also increase a fine so that it exceeds any gains to the offender, and based on the undertaking's turnover, the latter presumably as a measure of likely gain or harm. These considerations can be gathered together as a further adjustment factor (α), where $\alpha = 1 - (i - j - g)$, and i is discount for mitigating factors, j the uplift for aggravating factors, g an adjustment to mop up any deficit based on estimates of the offender's likely gains. Thus the fine is calculated as:

$$F = \alpha B = [(aT + b)S]^* [1 - (i - j - g)] \leq 0.1WT.$$

and cannot exceed 10% of worldwide turnover (WT) in the preceding year.

Impact on fines

What impact will these changes have on the level of fines? To answer this question fines imposed on 57 firms in 14 cartels where the Commission's decision reported sales for the penultimate year have been recalculated using the 2006 guidelines and some simplifying assumptions. The basic amount was calculated assuming the following percentages using the Commission's assessment of the gravity of the offence under the 1998 guidelines - 10% of sales for 'minor', 20% for 'serious', and 30% for 'very serious' offences. A further 25% of sales was added as a deterrent factor. Sales were those within the EEA. The adjustments for aggravating and mitigating factors have been left as in the reported decisions except for *Lysine* where the 10% reduction for the immediate termination of the infringement when the Commission intervened given to all cartel members, and the additional 20% reduction given to Sewon for its passive role were removed, as these are unavailable under the 2006 guidelines. An uplift was added for prior offences of 50% each for ADM and Roche (*Citric Acid*) and Ajinomoto, Cheil and Takeda (*Food Flavour Enhancers*); and 100% for Akzo (*Choline Chloride*).

The fines under the new guidelines are on average more than double those imposed by the Commission (Table below). They would have totalled €7.7 billion compared to €3.4 billion actually imposed. Coincidentally, the fines imposed by the Commission were about the same as the total sales of all 57 firms; and hence the recalculated fines under the new guidelines are more than double the last years' sales. For many firms, the fines re-calculated under the new guidelines are substantially larger - in some cases as much as 5, 6 and up to 8 times greater. This is the case for firms involved in *Carbonless Paper* and *Plasterboard* cartels who would be substantially worse off under the new guidelines. A surprising finding is that for 23 out of the 57 firms/offenders - that's about 40% - fines under the new guidelines would have been lower, and in some cases substantially lower, than they paid. Firms implicated in the *Vitamins B2, B5, C, D3, Beta carotene & Carotinoids, Lysine, and Food Flavour Enhancers* cartels (as shaded in the Table below) would have been better off under the new guidelines. This is surprising given that the *Vitamins'* cartels were regarded

as the most outrageous examples of price-fixing yet detected. However, this finding may not reflect the true position generally, given that these cartels were fined very heavily under the 1998 guidelines. They may also have had the ‘book thrown at them’ had the new guidelines been in operation at the time of the decisions.

Assessment

The 2006 *Penalty Guidelines* directly link fines to sales, the duration of the offence, and offenders’ gains. They are therefore more likely to reflect the overcharge and gains/losses arising from a cartel. This contrasts with the arbitrary amounts under the 1998 guidelines. There is also a greater focus on deterrence with fines aimed at ensuring that offenders’ do not profit from price-fixing. Moreover, there is an appreciation of marginal deterrence in the way recidivism and other indicators of greater involvement in cartel formation and enforcement are penalised. These are all moves in the right direction. On the other hand, there is evidence that the 1998 guidelines were capable of meting out very high fines and possibly larger ones than the new guidelines. The guidelines are also overly complicated, and take the same factors into account several times e.g. in the calculation of the basic amount there is an uplift for deterrence and then a further uplift to reflect the offenders’ gain; cooperation is rewarded and again rewarded under the leniency programme. Given the large number of appeals against the Commission’s fines these ambiguities should have been avoided. Finally, whether these fines are high enough to deter price-fixing is another question – we have previously indicated that the optimal fine necessary to adequately deter price-fixers is many orders of magnitude greater than those possible under the 1996 and also 2006 guidelines (see our May 2006 *Casenote*).

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This is the third in a series of Casenotes on fines, deterrence and damages under EC competition law.

Fines under 1998 and 2006 penalty guidelines						
Cartel/Date	Cartelists	Basic amount	2006 Fine		1998 Fine	ratio
			€m	% Sales		
Amino Acids (Lysine)	ADM	34.9	52.3	128%	52.6	1.0
	Ajinomoto	78.8	118.1	150%	56.6	2.1
	Kyowa	16.8	16.8	105%	18.9	0.9
	Cheil Jedang Corp	14.5	14.5	85%	17.4	0.8
	Sewon	15.8	15.8	105%	17.8	0.9
Vitamin A	BASF	132.8	179.2	398%	92.3	1.9
	Roche	177.0	265.5	443%	171.0	1.6
	Aventis	110.6	110.6	295%	68.4	1.6
Vitamin E	BASF	184.4	248.9	398%	179.7	1.4
	Roche	184.4	276.6	443%	199.5	1.4
	Aventis	147.5	147.5	295%	39.9	3.7
	Eisai	99.4	99.4	265%	18.9	5.3
Vitamin B2	BASF	20.3	27.4	196%	37.8	0.7
	Roche	29.0	43.5	218%	84.0	0.5
	Takeda	7.8	7.8	130%	13.5	0.6
Vitamin B5	BASF	27.8	37.6	358%	68.0	0.6
	Roche	41.7	62.6	398%	108.0	0.6
	Daiichi	27.8	27.8	265%	36.0	0.8
Vitamin C	BASF	28.8	38.9	216%	29.4	1.3
	Roche	126.4	189.6	240%	131.0	1.4
	Takeda	20.8	20.8	160%	43.5	0.5
	Merck	20.8	20.8	160%	10.9	1.9
Vitamin D3	BASF	5.8	7.8	196%	15.1	0.5
	Roche	8.7	13.1	218%	42.0	0.3
	Aventis	2.9	1.5	73%	5.6	0.3
	Solvay	13.1	13.1	145%	14.0	0.9
Beta carotene	BASF	23.4	31.5	277%	86.4	0.4
	Roche	132.4	198.6	308%	96.0	2.1
Carotinoids	BASF	14.3	19.2	257%	83.7	0.2
	Roche	14.3	21.4	285%	93.0	0.2
Carbonless Paper	AWA	480.9	721.3	195%	283.5	2.5
	Bollore	53.6	53.6	95%	28.4	1.9
	Carrs	8.7	8.7	75%	1.8	5.0
	Divipa	15.4	15.4	75%	1.8	8.8
	MHTP	210.2	210.2	130%	33.1	6.4
	Zicunaga	7.6	7.6	45%	1.5	4.9
	Mougeot	25.7	25.7	85%	7.3	3.5
	Koehler	144.8	144.8	130%	33.1	4.4
	Sappi	37.2	37.2	95%	15.1	2.5
	Torraspapel	58.3	58.3	95%	14.2	4.1
	Zanders	175.9	175.9	130%	33.1	5.3
Citric Acid	ADM	48.3	89.4	194%	79.4	1.1
	Cerestar Bioproducts	24.3	24.3	115%	4.6	5.3
	Haarmann & Reimer	45.5	45.5	145%	122.5	0.4
	Hoffmann-La Roche	59.9	110.9	268%	79.4	1.4
Plasterboard	Jungbunzlauer	101.5	101.5	145%	29.4	3.5
	BPB	1,111.0	1,666.5	330%	198.0	8.4
	Knauf Westd'	737.0	737.0	220%	85.8	8.6
	Lafarge	584.3	876.4	308%	249.6	3.5
	Gyproc	53.6	40.2	49%	7.2	5.6
Food Flavour Enhancers	Ajinomoto	6.6	9.9	293%	22.2	0.4
	Cheil	2.3	3.5	308%	4.6	0.8
	Daesang	2.3	2.3	205%	4.6	0.5
	Takeda	2.4	3.6	323%	9.4	0.4
Choline Chloride	UBC	131.0	97.2	100%	14.8	6.6
	Akzo Nobel	20.4	40.8	270%	30.0	1.4
	BASF	13.4	20.0	203%	43.7	0.5
Totals		5,924.6	7,655.6	226%	3,368.6	2.3

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