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INTERNATIONAL CHAMBER OF COMMERCE

Discussion Paper



Prepared by ICC Commission on
Competition

The fining policy of the European Commission in competition cases

Highlights

- The role of fines in effective competition enforcement
- Calculation methods
- The institutional and the procedural framework
- The level of fines

The fining policy of the European Commission in competition cases

SUMMARY AND CONCLUSIONS

ICC condemns anticompetitive behaviour (cartels and abuses of dominant positions) and supports the appropriate, objective, and proportionate enforcement of competition laws, which focuses on fostering compliance, and not just punishment and deterrence. However, ICC is concerned that the above principles in competition law enforcement are not sufficiently reflected in the manner in which fines are imposed in the EU. First, ICC believes that the imposition of fines - in particular at such a high level - is only defensible where the rules governing the determination of sanctions in EU competition cases comply with the requirements of "fair trial" as generally understood in democratic countries. ICC is concerned that increasingly this does not appear to be the case. Second, growing broad-based criticism raises important questions regarding the current calculation methods and parameters used in determining the level of fines.

In view of this situation, ICC offers the following observations intended for the Members of the European Parliament, the Members of the European Commission, and the Representatives of the Member States.

■ The Fining Guidelines¹ need radical revision, and should also be put on a legislative footing

New guidelines should be prepared in order to:

- better comply with the principles of proportionality and equal treatment;
- implement a fining policy focused on fostering compliance with European competition law, rather than on mere punishment and deterrence;
- duly take into consideration the existence and implementation of compliance programs, which should be taken into account as a mitigating factor in determining the amount of fines.

These new guidelines should be put on a legislative footing in order to ensure that they are legally binding.

■ An in-depth reform of EU Competition procedural rules is necessary

In order to introduce the "fair trial" principle and to comply with the provisions of the European Convention for Human Rights (ECHR), a reform of EU competition rules is necessary, in order to:

- introduce a clear distinction in the EU process between the persons responsible for investigation and those responsible for imposing sanctions;
- ensure that sanctions are responsibility based;
- ensure a better compliance with the principle of the presumption of innocence.

■ The level of fines needs urgent review

Fines for antitrust infringements are now so high that they are effectively penal in nature, raising increasing concerns regarding fair trial and proportionality, and creating what may become an unsustainable burden of appeals. This suggests that as long as new guidelines and procedural rules do not enter into force, the European Commission should adopt a more moderate policy concerning the fines imposed on undertakings.

¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, adopted on 28 June 2006 (Official Journal C 210, 1.09.2006).

The role of fines in effective competition enforcement

Compliance as well as punishment

ICC supports the use of fines in competition cases as one tool for enforcement. However, ICC believes first and foremost in the importance of compliance and questions the role of huge fines as part of an effective competition enforcement strategy. The role of the Commission in overseeing competition in the market is to promote pro-competitive behaviour; therefore rigorous competition between undertakings should be encouraged. However, when such aggressive behaviour turns anti-competitive or when companies collude with each other to avoid such aggressive behaviour, the Commission should rightly step in and restore the competitive balance. With this as the Commission's primary objective, fines are useful in that they recoup administrative costs and because punishment and deterrence are necessary to enforce antitrust compliance. However, an excessive fines policy may not bring significant additional benefits in terms of increased deterrence and may even have counter-productive effects in that it may unnecessarily affect the competitive strength of some undertakings whose wealth are necessary to foster competition. In that respect, high fines can begin to deter pro-competitive conduct.

Compliance should remain an important objective pursued by the Commission, in addition to punishment and deterrence. Fines should not act as the only remedy tool of the Commission. ICC is concerned that the current Commission approach to fines seems to suggest that it is becoming the chief remedy tool and therefore believes it is time for the Commission to examine the role fines play in effective competition enforcement.

ICC encourages the Commission to engage with business and academia to identify the elements of an "effective" antitrust compliance programme for companies. Once the required elements of an "effective" compliance programme have been established, the Commission should take into account the existence and implementation of those programmes in establishing the appropriate level of the fine. Such programs should in particular, be considered a mitigating factor when establishing the responsibility of a parent company for violations by a subsidiary. This would underpin the Commission's policy objective of enforcement by incentivising companies to adopt recognised "best practice" procedures in compliance.

Sanctions should be responsibility-based

High fines penalize shareholders who have nothing to do with the infringements, and may act as a deterrent to investors. In this regard, ICC calls for a debate at the EU-level, notably regarding the appropriate balance between sanctions to companies and sanctions for individuals. A system where only sanctions to companies exist may lead to a lack of deterrence, while insufficiently encouraging companies to adopt effective and responsible compliance programs.

Criticisms relating to the calculation methods

ICC observes that the amount of the fines imposed by the European Commission for antitrust infringements has reached such a high level that the correlation between the severity of the fine and the gravity of the infringement can be seriously challenged. In many cases, the level of fine appears to be confiscatory, something which is not acceptable. ICC doubts whether such a level of fines meets the general principle of proportionality, pursuant to which "*any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*"² This results from various deficiencies in the method used by the Commission for calculating fines.

² Article 5 of the EC Treaty.

“Turnover” or “value of sales” are unsatisfactory parameters

The concepts of “turnover” and “value of sales” play an essential role for the setting of fines when an infringement is characterized. First, the fines imposed by the Commission in competition cases cannot exceed 10% of the total (global) turnover in the preceding business year for each of the involved participants. Second, the Commission refers to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine (the basic amount of the fine is related to a proportion of the value of sales, up to 30%).

One problem is that the current ceiling for sanctions relies on global turnover. Given the number of countries with antitrust jurisdictions, using global turnover for determining the maximum level of fine may lead to “*bis in idem*” sanctions (i.e. double punishment for the same offence) not to say to extraterritorial effects. Therefore, geographically-based turnover seems a more reasoned approach for fixing the maximum level of fines.

However, ICC also submits that turnover does not reflect the likely impact of the infringement or the size or financial position of an undertaking. It also does not adequately reflect the ability of an undertaking to pay a particular sum. For this reason, ICC suggests that the Commission explores ways to refer to other concepts provided by accounting standards, like net operating profit, in order to better take into account the likely impact of the infringement and the financial position of the undertakings it intends to fine.

Moreover, the notion of “value of sales” is in practice difficult to handle, both for the Commission as for the undertakings. It can be the equivalent of turnover of some of the undertakings concerned, which might lead to possible inequality of treatment between them.³

The duration criterion

The Fining Guidelines attach a much greater significance to an infringement’s duration than was previously the case. Indeed, the established value of sales is to be multiplied by the number of years during which the undertaking participated in the infringement. ICC considers that such an arithmetic calculation does not allow for a clear assessment of an infringement. Such calculation penalizes undertakings whose sales have significantly increased, which is a paradox.

The criteria for liability should be re-evaluated

With regard to liability, it is established case law that “penalties must fit the offence”. Moreover, the Court of First Instance has stated that “*according to the principle that penalties must be specific to the individual concerned, an undertaking may be penalised only for acts imputed to it individually.*”⁴ However, the Commission addresses the decision imposing fines to the parent company of a group of companies unless the companies concerned prove that the subsidiary involved had determined independently its conduct on the market. Additionally, it is up to the parent company to prove that it has not been involved in the infringement, which is not consistent with the presumption of innocence.

ICC considers that this case law allows the Commission imposes a disproportionate level of fines, since the 10% ceiling can be calculated on the basis of the turnover of the parent company, even though the parent company did not actually commit the infringement.

³ According to established case law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Case C-174/89, Hoche [1990]). This principle applies in the determination of the fine in competition cases (Case T-101/05, BASF vs Commission [2007]).

⁴ Case T-340/03, France Télécom vs. Commission [2007].

A substantial and a temporal connection between continuous or repeated infringements should be determined

ICC agrees that the continuation of an infringement or the repetition of the same or a very similar infringement should be taken into account and may lead to a significant increase of the basic amount of the fine for each such demonstrated infringement. However, ICC considers that there should be a connection between the old and the new infringement for this principle to be applied.

The Fining Guidelines limit the previous offences to the “*same or similar infringements*”. ICC observes that it is unclear what is meant by infringements of the “same or similar” type and considers that the notion of “same or similar infringements” should be more strictly interpreted. Thus, repeat infringements should only relate to the same or very similar infringement in the same sector.

Additionally, it is settled case law that no time-limit should be placed on the possibility of taking action against any repeated infringement.⁵ As a consequence, an undertaking can be fined for an infringement that has already been prosecuted and which may have occurred 10, 20 or 30 years before.

ICC submits that, in order to ensure the proportionality of the fines, a time-limit should be set when addressing repeated infringements. It must be noted that such a temporal connection is also necessary because infringements that occurred decades ago cannot be attributed to undertakings in the same way, since the current responsible parties may not be personally connected with the previous offences. In this respect, ICC recalls that the abovementioned parent liability theory leads to situations where a company is sanctioned for a repeat offence although it was not the addressee of the previous decision.

Additionally, it should be clear that leniency applications do not “count” towards the recidivism multiplier.

Compliance programs should be taken into account as a mitigating circumstance

ICC regrets that the Commission does not take into consideration best practice compliance programs as a mitigating circumstance when determining the level of fines. The ACCC in Australia and the OFT in the UK both give credit for implementing such systems. Recognizing that best practice compliance programs can have a possible mitigating effect on fines would send a very positive signal and encourage companies to set in place such programs, which would contribute to the policy goal of specific and general prevention of infringements.

Criticisms relating to the institutional and the procedural framework

The inherent “criminal” nature of the European Commission fines should be recognized

The case law of the European Court of Justice (ECJ) and provisions relating to EC competition proceedings specifically provide that Commission decisions imposing fines for breach of competition law are not of a criminal nature.

However, the European Court of Human Rights considers that “the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature.”⁶ In this respect, the ECJ has unequivocally admitted that the fines imposed by the European Commission in competition cases

⁵ Case C-3/06, *Groupe Danone vs Commission* [2007]: “It must be emphasised that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission’s discretion and that the Commission cannot be bound by any limitation period when making such a finding”.

⁶ Case No. 8544/79, *Östürk* [1984].

were intended to be deterrent and punitive.⁷ In addition, the ECJ has recognized that the principle of presumption of innocence is relevant in competition cases because of “the nature of the infringements in question and the nature and degree of severity of the ensuing penalties.”⁸ Finally, the considerably high level of fines imposed during recent years clearly reveals a criminal nature. For these reasons, the fines imposed under European competition law should be regarded as having a criminal character, in the sense of Article 6 of the ECHR. The principles applicable in criminal cases as provided by the ECHR (i.e. requirements of fair trial) should thus be complied with in EU competition proceedings. This should have the implications below.

The fining authority must comply with the requirements of fair trial

Given the criminal nature⁹ of fines in EU competition cases, ICC considers that the fines cannot legitimately be imposed following the procedural rules enforced by the EU Commission. ICC recalls that it already stressed in October 2008 the “*overarching institutional problem*” which consists of the “*absence of an independent decision maker during the administrative process.*”¹⁰ Indeed, the European Commission acts as the authority conducting the inquiry phase, the authority notifying the objections as well as the deciding authority. Thus, ICC holds that the Commission cannot be seen as impartial, pursuant to the principle of fair trial.¹¹ In this respect, the review by the Community Courts does not remedy the lack of an independent fining jurisdiction. This is of particular importance at a moment where the European Union intends to become a party to the ECHR. It follows that the institutional and the procedural framework of European Competition Law should be overhauled. A clear distinction should be made between the persons responsible for investigating the cases and the persons responsible for deciding on the culpability of the undertaking(s) concerned.

Additionally, with regard to mitigating circumstances, the Commission sometimes seems to reverse the onus of proof.¹² In this respect, ICC recalls that the principle of presumption of innocence, which applies in competition cases, implies that the benefit of any doubt that exists must be given to the undertaking accused of the infringement.

With respect to the above, ICC emphasizes that the European Union should not only recognize fair trial as a general principle and as stated in the European Charter of Human Rights, but also comply with the ECHR’s standards and amend procedural rules accordingly.

The level of fines should be consistent with the concept of administrative sanctions

As soon as the fine takes on a penal character within the meaning of ECHR, fair trial rules as described in the previous paragraph should apply. Subsequently, as long as new procedural rules do not enter into force, leading the EU competition rules to better comply with the principle of fair trial, the Commission should ensure that the fines it sets are of a level which make them acceptable as a mere “administrative” sanction under the ECHR criteria, i.e. a sanction whose purpose is not both deterrent and punitive. This implies a significant reduction in the levels of fines.

⁷ *Case 41/69, ACF Chemiefarma [1970]*.

⁸ *Case C-199/92 P Hüls [1999]*.

⁹ *In the meaning of the European Court of Human Rights case law.*

¹⁰ *ICC Document n° 225/653 “EC Regulation 1/2003: views on its functioning”, 23 October 2008 at [http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/EC%20Regulation%201%202003\(1\).pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/EC%20Regulation%201%202003(1).pdf).*

¹¹ *See also: OECD, European Commission - Peer review of Competition Law and Policy [2005]*.

¹² *Sünner (E.), op. cit.*

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 130 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



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Policy and Business Practices

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