

Unclassified

DAF/COMP/GF/WD(2016)17

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

07-Oct-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 04 October 2016

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by the European Union

-- Session IV --

1-2 December 2016

This contribution is submitted by the European Union under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

JT03402281

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2016)17
Unclassified

English - Or. English

SANCTIONS IN ANTITRUST CASES

-- European Union --

1. Determination of the basic fine

1.1 If you have imposed fines in antitrust cases, please describe type and nature of financial sanctions in antitrust cases (civil, administrative, criminal, combined): On whom (e.g. companies, individuals) can sanctions be imposed?

1. The EU enforcement system is an administrative one, built around financial sanctions against "undertakings" and "associations of undertakings", not individuals. The current legal framework of the European Union does not provide for criminal sanctions, and, in particular, custodial sanctions.

2. What kinds of laws or regulations provide criteria for determining fines? If you have guideline(s) on calculation of fines or detailed rules for calculating fines, when have you introduced the guidelines (or rules) and what aspects do the guidelines (or rules) include? (e.g. how to set the base fine, mitigating and aggravating circumstances).

3. Pursuant to Article 23(2) of Regulation N°1/2003 the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: a) they infringe Article 101 or 102 of the Treaty; or b) they contravene a decision ordering interim measures under Article 8; or they fail to comply with a commitment decision made binding by a decision pursuant to Article 9.

4. Article 23(3) of Regulation N°1/2003 provides that in fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement.

5. The Commission enjoys a wide margin of discretion in exercising its power to impose fines within the limits set by Regulation 1/2003. It has imposed a limit on the exercise of its discretion by adopting Guidelines (2006 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation N°1/2003 (OJ C 210 of 1.9.2006 <http://ec.europa.eu/competition/antitrust/legislation/fines.html>).

6. The Commission cannot depart from those rules to the disadvantage of the parties (under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (see Judgment of the ECJ of 28.6.2005, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, C-213/02 P, Dansk Rørindustri a.o. v. Commission, pts.211-213).

1.2 *Is the proportionality principle explicitly provided under laws, regulations or guidelines for determining fines? How do you respect the proportionality principle when calculation the amount of the fine?*

7. The principle of proportionality applies, as a general principle of law, to the Commission's fining decisions. This means that fines must not be disproportionate to the objectives pursued, namely by reference to compliance with those rules, and that the amount of the fine must be proportionate to the infringement, seen as a whole, having regard, in particular to the gravity and duration.

8. The principle of proportionality mainly requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (see e.g. Case T-11/06 Romana Tabacchi, para 105) whilst also having particular regard to the duration of the infringement.

2. Adjustment of the basic fine

2.1 *If you have mitigating and aggravating circumstances in laws, regulations or the guidelines, which circumstances are frequently applied in antitrust cases?*

9. Point 28 of the 2006 COM Fining Guidelines lists a number of aggravating circumstances which it may take into account. It provides that the basic amount of the fine may be increased:

- where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82 [now Article 101 and 102]: the basic amount will be increased by up to 100 % for each such infringement established;
- in case of refusal to cooperate with or obstruction of the Commission in carrying out its investigations;
- where the undertaking has the role of leader in, or is the instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement."

10. Point 28 of the COM Fining Guidelines provides a non-exhaustive list of aggravating circumstances. Therefore, the Commission can take into account other aggravating circumstances depending on the facts of the case.

11. Point 29 of the 2006 COM Fining Guidelines lists a number of mitigating circumstances which it may take into account. It provides that the basic amount of the fine may be reduced where the Commission finds that mitigating circumstances exist, such as:

- where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);
- where the undertaking provides evidence that the infringement has been committed as a result of negligence;

- where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;
- where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;
- where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation."

2.2 *If you consider recidivism for imposing fines (e.g. an aggravating circumstance for calculating fines), have you noticed whether repeated offenders have become more or less frequent over time? What are the reasons in your view for any increase or decrease?*

12. Point 28 of the Commission's Fines Guidelines explicitly indicates that the Commission can take into account previous infringement decisions by national competition authorities applying Article 101 or 102 TFEU.

13. There is no explicit time limit for taking into consideration previous infringements. However, in accordance with the case law of the ECJ in Danone (Case C-3/06 P) the Commission applied an increase for recidivism if the previous infringement decision was adopted not more than 10 years before the new infringement started. Moreover, the Commission did not take into account decisions that are older than 25 years at the time of adoption of the new infringement decision.

14. For example, in the Carglass case (COMP/39125) the Commission took into consideration the fact that Saint-Gobain had already been the addressee of two previous infringement decisions, namely in 1984 and 1988. There was less than 10 years between the involvement of Saint-Gobain in the new infringement (March 1998, Carglass) and the previous decision of December 1988, and also less than 10 years between the 1988 and 1984 decisions. Moreover, less than 25 years lapsed between the July 1984 decision and the November 2008 decision in Carglass.

15. The Commission can take into account both definitive decisions and decisions that are under appeal.

16. The percentage increase of the fine will depend on the number of previous infringements taken into account. According to the 2006 COM Fining Guidelines, the Commission could potentially apply a maximum increase of 100% per previous infringement. The Commission has, under its Fining Guidelines, applied a 50% increase for one previous infringement, a 60% increase for two previous infringements and a 90% increase for three previous infringements.

17. For example, in Carglass based on the two previous infringements the basic amount of the fine for Saint-Gobain was increased by 60%.

2.3 *Should competition authorities treat the fact that competition law offenders have antitrust compliance programmes (CPs) as an aggravating or mitigating circumstance? If you consider CPs for imposing fines (e.g. a mitigating circumstance for calculating fines), what are the grounds for adopting CPs as a circumstance? How do you distinguish genuine programmes from sham ones which are only seeking reduction of fines?*

18. The Commission considers that the prime responsibility for complying with the law, as in any other field, lies with those who are subject to it. EU competition rules applying to undertakings are a fact of daily business life that has to be reckoned with, because ignorance of the law will not shield undertakings from the consequences of breaking it.

19. While it is clear that companies are under an obligation to comply with the rules, they are largely free to decide how to go about it. This is only natural, given that the size of companies, their resources for seeking advice, their field of activity and their exposure to the risk of becoming involved in infringements of EU competition rules vary considerably. It goes without saying that awareness of the rules is always a precondition for effective adherence to them.

20. As set out in its Brochure of 2012 "compliance matters" (http://ec.europa.eu/competition/antitrust/compliance/index_en.html) the Commission considers that any effort by a company to ensure compliance with EU competition rules is laudable. But what matters ultimately is that the rules are actually complied with. When it comes to taking practical steps to ensure compliance, companies should keep in mind that their efforts will be assessed on the basis of results, in other words they will be judged by their success in avoiding infringements. Merely paying lip-service to an abstract or formalistic commitment to comply will get them nowhere. Any credible compliance program must be built on a firm foundation of management commitment and supported by a 'top-down' compliance culture.

21. Compliance programs should not be perceived by companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is 'caught'. The purpose of a compliance program should be to avoid an infringement in the first place. For the purpose of setting the level of fines, the specific situation of a company is duly taken into account. But the mere existence of a compliance program will not be considered as an attenuating circumstance. Nor will the setting-up of a compliance program be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement. It is nevertheless encouraged by the Commission as a preventive means to avoid the occurrence and possible repetition of illegal behaviour in the first place.

22. The existence of a compliance program will not be considered an aggravating circumstance if an infringement is found by the enforcement authorities: if the program has failed to deliver results, the sanction will come in the form of the fine imposed. In other words: a credible competition compliance program can only deliver benefits to a company.

2.4 *In your jurisdiction, may a parent company be held jointly and severally liable for antitrust violations committed by its subsidiary (i.e. parental liability) in certain circumstances? If so, how does parental liability have a significant impact on the way fines are calculated?*

23. A parent entity can be held liable for an antitrust infringement in which its (current or former) subsidiary was directly involved under the double condition that the Commission proves that the parent entity i) had the capability of exercising decisive influence on the commercial policy of its subsidiary and ii) in fact made use of such power, having regard to the economic, legal and organisational links between them. Where that is the case the two entities (parent and subsidiary) will be seen as a single economic unit that is the "undertaking" that infringed Article 101 TFEU in a given case. They will normally be held jointly and severally responsible for the payment of the fine.

24. According to settled case law, however, the burden of proof is alleviated in case of wholly owned subsidiaries (and of shareholding of slightly more than 96%). In such cases, indeed, the parent company is capable of exercising decisive influence and there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the commercial policy its subsidiary. In such cases, therefore, it is sufficient for the Commission to prove that the subsidiary is wholly owned (or nearly wholly owned) by the parent company to establish parental liability (see leading Case C-97/08 P Akzo Nobel a.o. v Commission [2009] ECR I-8237).

25. Once the Commission has determined that a single economic unit exists, ("the undertaking", composed of the parent and one or more of its subsidiaries), it enjoys discretion in deciding which entity(ies) to hold accountable for the infringement: whether only the subsidiary, only the parent, or both companies. That (those) entity(ies) will be addressed the enforcement measure and will be held liable for the fine imposed.

26. The Commission must however observe the principle of equal treatment in respect of the different undertakings having participated in the same infringement : for each single economic unit identified, the enforcement measure must be addressed at the same level (only the subsidiary, only the parent or both), unless objective reasons justify a different treatment for one of the undertakings identified.

27. Parental liability can have an impact on the calculation of the fine as, when established, it is the total turnover of the parent company which is relevant for the legal maximum fine of ten percent of turnover in the preceding business year. Thus a fine which might be relatively low if 'capped' according to the turnover of the subsidiary, can be significantly higher if parental liability is established. Also, the Commission rules on increases in the fine for recidivism are more effectively applied if the parent company is found liable.

2.5 Do you consider 'inability to pay' in imposing or collecting the fine? If so, please specify the exact circumstances under which this criterion could be applied and the method of application.

28. The EU competition law framework foresees the possibility of fine reductions, as set out in point 35 of the 2006 COM Fining Guidelines.

29. Point 35 of the 2006 COM Fining Guidelines reads: "In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."

30. The main condition for a successful ITP claim is for the ITP applicant to prove that the imposition of the fine would irretrievably jeopardise its economic viability (causal link between the fine and a possible bankruptcy of the ITP applicant). If this condition is met, the ITP applicant has to prove that it operates in a specific economic and a specific social context, which justify a fine relief. The last condition is that the imposition of the fine would make the assets of the ITP applicant cause lose their value. ITP reductions are exceptional and can only be granted when all conditions of point 35 of the Fining Guidelines are met, which has to be demonstrated by the applicant. A bad financial situation or risk of insolvency alone does not justify a fine reduction.

31. ITP applications can be submitted both before and after the imposition of a fine by decision.

- In a first step, the standard ITP questionnaire is sent to the applicant asking to submit data and information, including audited annual reports and bank agreements.
- On the basis of the analysis of the reply to the first questionnaire, further requests for information are sent to the ITP applicant in order to clarify the replies provided and obtain further data/information.
- The received data and information are analysed: (i) the quantitative data is used for calculating and analysing various ratios and indicators; (ii) the qualitative information is used for analysing the capacity to raise funds from banks (and other financial institutions) as well as from shareholders.

3. Practical issues in determining the amount of fines

3.1 *Does your law provide for an appeal against a decision that levies fines on competition law infringers? Does an appeal to a decision imposing a sanction / fine bring an automatic suspensory effect on the sanction / fine? If it is necessary to apply for suspension, what are the criteria?*

32. The addressees of a Commission decision (with or without fines) have the right to appeal to the EU General Court, to amend or annul the decision. The Court can cancel, increase or reduce the fine imposed by the Commission.

33. Judgments of the General Court can be appealed before the European Court of Justice (ECJ) by the unsuccessful party (so the Commission can also be an appellant). However, these appeals to the ECJ are limited to questions of law only.

34. A challenge to a decision imposing a sanction / fine has no automatic suspensory effect on that sanction/fine. The Court may, if it considers that circumstances so require, order that the application of the contested act be suspended (Article 278 of the TFEU).

35. Parties who wish to apply for such suspension must do so together with the appeal against the decision and state the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for (Article 156 of the Rules of Procedure of the General Court, Official Journal L 105 of 23 April 2015, pages 1-66).

3.2 *How often does judicial scrutiny modify the amount of fines? What kind of reasons does judicial scrutiny provide to alter the amount of fines imposed by competition authorities?*

36. The European Courts may alter the amounts of fine imposed by the Commission for a wide variety of reasons: e.g. annulment of the underlying prohibition decision for lack of evidence, or procedural shortcomings or for non-compliance by the Commission with its Fining Guidelines.

3.3 *In your cases, have you faced situations where you imposed fines on companies but failed to collect the fines? If so, what are the reasons? How do you encourage or force the companies to comply with payment orders?*

37. Any Commission Decision imposing fines already provides for the following in its operative part:

- amount of the fine (or periodic penalty payment);
- indication of the currency in which the fine should be paid (euros);

- deadline for payment (3 months from the notification);
- bank account to which it should be paid;
- interest rate if payment is not made in due time.

38. The fine must be paid at the latest on the date set by the decision for payment, pursuant to Article 299 TFEU (the Commission's decisions are enforceable) and Article 278 TFEU (the appeal does not have suspensory effect).

39. If the fine is not discharged within the deadline set by the decision, the Accounting Officer of the Commission first proceeds with a letter of formal notice. If the fine remains unpaid after the sending of the letter of formal notice, the Commission will launch the enforcement procedure before a national court pursuant to Article 299 TFEU. According to this Article:

"Acts of (...) the Commission (...) which impose a pecuniary obligation on persons other than States, shall be enforceable. Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice. When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority."

3.4 Do you have any evidence on whether fine levels are sufficient to deter illegal activities?

N.A.

- In order to achieve an "optimal" level of corporate fines, in your jurisdiction, what aspects of criteria for determining fines need to be changed?

N.A.

3.5 In your jurisdiction, is there a leniency programme? If so, how does a leniency programme interact with fines? Have you observed heavier sanction such as higher fines compared to illegal gains encourage more applications for leniency?

40. The Commission has a leniency policy which, along with the other detection and investigation tools at the Commission's disposal, proves very successful in fighting cartels.

41. In essence, the leniency policy offers companies involved in a cartel - which self-report and hand over evidence - either total immunity from fines or a reduction of fines which the Commission would have otherwise imposed on them (<http://ec.europa.eu/competition/cartels/leniency/leniency.html>). It also benefits the Commission, allowing it not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.

42. In order to obtain total immunity from fines under the leniency policy, a company which participated in a cartel must be the first one to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to launch an inspection at the premises of the companies allegedly involved in the cartel. If the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the Commission to prove the cartel infringement. In all cases, the company must also fully cooperate with the Commission throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately. The cooperation with the Commission implies that the existence and the content of the application cannot be disclosed to any other company. The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel.

43. Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Commission's possession and have terminated their participation in the cartel. Evidence is considered to be of a "significant added value" for the Commission when it reinforces its ability to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.

44. The Commission considers that any statement submitted to it within the context of its leniency policy forms part of the Commission's file and may not be disclosed or used for any other purpose than the Commission's own cartel proceedings.

4. Alternatives to fines

4.1 *What sanctions in addition to those fines mentioned above can be imposed on individuals who are involved in anticompetitive conduct?*

None

4.2 *If your jurisdictions provide criminal sanctions against individuals including imprisonment, how many cases did you handle for last few years?*

N.A.

4.3 *Has private enforcement, especially private damages, increased in your jurisdiction? If so, how do private damages interact with sanctions?*

45. Public enforcement is a key driver of antitrust enforcement in the European Union. Its purpose is to ensure effective deterrence by detecting infringements of the competition rules in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and imposing sanctions.

46. Private antitrust enforcement in the EU has so far been less prominent. The Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which the national courts must safeguard. In this respect the Court of Justice of the European Union clarified that anyone who suffered harm as a result of a breach of EU competition rules has a right to claim full compensation before national courts.

47. Private enforcement could become increasingly important as a result of recent legislative changes. The European Parliament and the Council adopted Directive 2014/104/EU (the Directive), which is aimed at facilitating private enforcement by removing legal obstacles in the Member States, which made it difficult to bring actions for damages before the national courts. The Directive ensures claimants can claim compensation for actual loss, loss of profit and interest from the time the harm occurred until compensation is paid in full, ensures parties have easier access to evidence they need, allows claimants to

rely on final decisions by a national competition authority finding an infringement and gives them more time to claim damages, encourages parties to choose consensual dispute resolution as an alternative avenue of redress etc.

48. Although they serve different purposes, public and private enforcement are complementary tools, which need to interact to ensure that competition rules are as effective as possible. The Directive regulates interaction between antitrust damages actions and public enforcement by the European Commission and national competition authorities so as to ensure coherence for instance as regards arrangements for access to documents held by competition authorities, and thus maximise the overall effectiveness of antitrust enforcement in the EU.

4.4 Do you use or plan to use disqualification orders on individuals for sanctions? If so, what are the strengths and weaknesses for the disqualification orders?

N.A

4.5 How effective are fines imposed on individuals if there is no prohibition against reimbursing individuals? On the other hand, can prohibitions against reimbursement be effective?

N.A.

4.6 If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions (e.g. bans on bidding for public contracts), what are the result for those differences? Have you found the differences effective?

N.A.

4.7 What other sanctions have been used and found successful in your jurisdiction?

In particular cease and desist order.

4.8 What are the experiences concerning the effectiveness of various sanctions in order to achieve deterrence and punishment? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? Do you have any suggestions on ways to improve the effectiveness of combinations of sanctions?

N.A.