The Commission revises its Guidelines for setting fines in antitrust cases (1)

Hubert de BROCA, Directorate-General for Competition, unit A-1

On 28 June 2006, the Commission adopted its new Guidelines on the method of setting fines imposed on undertakings which infringe Articles 81 and/or 82 EC (2). These Guidelines (hereafter the “2006 Guidelines”) refine the existing ones adopted in 1998 (hereafter the “1998 Guidelines”). In part, they update the text in order to reflect the Commission’s most recent practice as well as the state of play of the case-law on a number of issues. But they also introduce a couple of significant changes. The present article highlights the main elements of the 2006 Guidelines.

A. General remarks

1. Objectives

The 1998 and 2006 Guidelines obviously share common general objectives. The key purpose of Fining Guidelines is to set out publicly the methodology which the Commission will apply in its future decisions imposing fines and therefore to enhance transparency. By doing so, the Commission simultaneously ensures the consistency of its fining policy and provides undertakings with some degree of legal certainty. As the Court of Justice (ECJ) and the Court of First Instance (CFI) held on various occasions, such guidelines form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see for instance case C-189/02 P, Dansk Rørindustri A/S a.o. v Commission, ECR [2005] p. I-5425, paragraph 209). Moreover, both Guidelines set out a methodology which ensures that fines have a sufficiently deterrent effect. Indeed, by nature, fines are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of Community competition law in future (see for instance case C-289/04 P, Showa Denko v Commission, ECR [2006] not yet reported, paragraph 16).

The 2006 Guidelines intend to correct notably some drawbacks of the existing methodology. True, the CFI and the ECJ repeatedly confirmed the legality of the 1998 Guidelines. In so doing, the Courts rejected a large number of pleas which parties had — in vain — tried to raise against the previous Guidelines. It however appeared that, in practice, some aspects of the 1998 Guidelines deserved to be improved. First, the classification of infringements as “minor”, “serious” and “very serious” appeared to be an initial and largely unnecessary step, in particular with regard to abuses of dominant positions (only “clear-cut” abuses were referred to in the 1998 Guidelines as possible “very serious” infringements) and cartels (although, on the basis of the most recent case-law, it had become quite clear that every cartel should be classified as very serious by its very nature — see notably case T-49/02 and T-51/02, Brasserie nationale SA a.o. v Commission, ECR [2005] not yet reported, paragraph 178). Moreover, the category of minor infringements appeared almost useless in practice. Second, and more importantly, the duration of the infringement had a marginal impact on the level of the basic amount of the fine, since each additional year of infringement could only lead to a maximum 10% increase of the starting amount; the 2006 Guidelines multiply by 10 the impact of duration on the level of fine, as will be seen below.

Finally, by using a clearer reference to each undertaking’s “value of sales”, the 2006 Guidelines intend to reflect, even approximately and imperfectly, the economic importance of the infringement as a whole as well as the relative weight of each undertaking participating in the infringement. The 1998 Guidelines, based on a lump sum system, have often been criticized on that particular aspect, even though this criticism was largely misplaced. In fact, a number of tools corrected the obvious drawbacks of a pure lump sum system. For instance, the Commission fixed starting amounts below the 20 million euros threshold mentioned in the 1998 Guidelines for very serious infringements taking place on small markets; it also differentiated between undertakings on the basis of their respective size in the market concerned (the so-called “groupings”) (3). If anything, the 1998 Guidelines rather reflected the insufficient level of

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author.
fines imposed on “large” infringements or on large players, something which the 2006 Guidelines will probably correct.

2. Entry into force

The 2006 Guidelines apply to every case for which a statement of objections is notified after the 1st September 2006, which is the date of publication of the Guidelines in the Official Journal. As of this date, statements of objections will therefore contain a specific reference to the 2006 Guidelines. Incidentally, since point 38 of the Guidelines refers to “a” statement of objections, the 2006 Guidelines will apply in every case where a supplementary statement is notified after the 1st September 2006, even if the first statement was notified before that date.

In Dansk Rørindustri A/S a.o. v Commission, cited above, the ECJ held that the Commission is entitled to modify its methodology on fines and to apply such new methodology to infringements committed in the past without infringing the principles of legitimate expectation and non-retroactivity, provided that the methodology appears “reasonably foreseeable”, which is plainly the case here.

Indeed, the assessment of (and obviously the reference to) the gravity of the infringement was reasonably foreseeable, since they directly derive from Regulation No 1/2003. In fact, two of the four criteria listed in point 22 of the 2006 Guidelines are even identical to those contained in the 1998 Guidelines. The reference to the “value of sales” (as compared to the lump sum applied in the 1998 Guidelines) was also foreseeable. First, such a reference was often used before the adoption of the 1998 Guidelines (4); in a number of cases before the Courts, applicants even expressed their “preference” for such a methodology as compared to the one described in the 1998 Guidelines (see for instance Dansk Rørindustri A/S a.o. v Commission, cited above, at paragraphs 156 and 157). Moreover, even under the lump sum system of 1998, the sales of each undertaking were already used for the purpose of the so-called “groupings”. Finally, the fact that fines will from now on plainly reflect the duration of each undertaking’s participation in an infringement cannot be a surprise to anyone. In fact, duration is one of the only two criteria mentioned in Article 5 of Regulation No 1/2003, as it has already become known as “the entry fee”) irrespective of the duration. Since both amounts are based on the “value of sales” of each undertaking, this notion will be reassessed first.

a. The value of sales

In fixing the basic amount of the fine, the Commission will have regard to “the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant area within the EEA”. According to point 14 of the Guidelines, where the infringement of an association relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members. This mirrors the wording of Article 23(2), last paragraph, of Regulation No 1/2003. The value of sales will be assessed before VAT and other taxes directly related to the sales.

In general, the scope of products whose sales are relevant will derive from the very purpose of the infringement. Indirect sales may cover the situation where parties reach a price agreement on obviously already reflected in the 1998 Guidelines, even though its impact on the level of fines was less. Incidentally, one can add that the 2006 Guidelines appear similar (including with regard to the impact of duration) to the methodologies applied by some of the national competition authorities within the EU (5).

B. The setting of fines

The 2006 Guidelines set out a two-step methodology. The Commission will first define the basic amount of the fine, based on the gravity and duration of the infringement. Where applicable, it will then take account of possible adjustment factors. To put it simply, the first step rather corresponds to the assessment of the infringement as a whole, while the second rather reflects all possible elements which are specific to each undertaking (6).

1. The basic amount

The main changes in the fining method concern the setting of the basic amount of the fine. The latter will (or may, depending on the case) be the sum of two components: first, an amount which varies depending on the value of sales and on the duration of the infringement; second an amount (which has already become known as “the entry fee”) irrespective of the duration. Since both amounts are based on the “value of sales” of each undertaking, this notion will be assessed first.

a. The value of sales

In fixing the basic amount of the fine, the Commission will have regard to “the 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”. According to point 14 of the Guidelines, where the infringement of an association relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members. This mirrors the wording of Article 23(2), last paragraph, of Regulation No 1/2003. The value of sales will be assessed before VAT and other taxes directly related to the sales.

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(4) Considering the often long duration of antitrust infringements such as cartels, it is even likely that, in a number of cases, the first years of infringement will have taken place at a time when the reference to the “value of sales” was the criterion applied by the Commission (i.e. before 1998).

(5) See the methodologies applied in the UK and the Netherlands, for instance, respectively available at http://www.oft.gov.uk and http://www.nmanet.nl

(6) This distinction should however not be exaggerated. Duration (which is part of step 1) will be assessed for each undertaking. On the other hand, some adjustment factors (which are part of step 2) may be valid for all parties to the infringement.
a given product, where the price of that product then serves as a basis for the price of lower or higher quality products. It may also be relevant when assessing the value of sales in some abuse cases, such as tying, or in parallel trade cases.

The relevant sales are those achieved in the territory where the infringement took place. As the case may be, it can therefore be either the whole EEA or one or more Member States. Point 18 of the 2006 Guidelines concerns the setting of fines in case of infringements whose geographic scope extends beyond the territory of the EEA. In such cases, the sales in the EEA may not adequately reflect the importance of each undertaking in the overall infringement. The 2006 Guidelines codify the Commission’s past practice, which has been confirmed by the Court for worldwide market sharing arrangements (see joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon a.o. v Commission, ECR [2004] II-1181, paragraphs 196 to 204) and for worldwide price-fixing cartels (see joined cases T-71/03, T-74/03, T-87/03 and T-91/03, Tokai Carbon a.o. v Commission, ECR [2005] not yet reported, paragraphs 180 to 189). In brief, in such cases, the Commission may apply the worldwide market shares of each player to the total EEA sales.

The Commission will consider the sales during the last full business year of participation in the infringement (point 13). Such a year will be presumed to be sufficiently representative of each undertaking’s sales. By nature, it is inherent to the normal business life that sales fluctuate from one year to the other. It is accordingly inherent to the system that each of these fluctuations should not be reflected in the value of sales. As the preamble makes clear, the value of sales only provides a proxy of the appropriate amount of the fine. Where sales during the last year are clearly not representative (the undertaking sold all or a substantial part of its relevant business or, conversely, acquired the business of one of its competitors, or the geographic scope of the infringement significantly changed during the lifetime of the infringement), then alternative references may be used, as point 13 suggests (see the word “normally”).

The figures used will normally be those provided by the undertaking itself. Whenever possible, the figures appearing in official [audited, where applicable] accounts will be used. The Commission should however be in a position to check the reliability and completeness of figures provided by the parties. Where figures appear to be incomplete or unreliable, the Commission will assess the value of sales of the relevant undertaking. To that end, it may use the partial figures it has obtained or any other relevant information (for instance: data collected during inspections or general market information which may be available in business press).

b. The variable amount

The variable amount corresponds to a given percentage of the value of sales, multiplied by the number of years of participation in the infringement. It therefore implies two steps: the fixing of the percentage and the determination of duration for each undertaking.

The percentage may be set at a level from 0 to 30% of the value of sales. This rather wide range of possible percentages appeared necessary mainly for the following two reasons: (1) unlike the 1998 Guidelines, the 2006 Guidelines do not contain categories of infringements (minor, serious or very serious infringements). Since there is no classification anymore, the methodology applies to every possible infringement; there was therefore a need to have a sufficient range of percentages available to cover every possible type of infringement; (2) the Guidelines now set a maximum basic amount. In order to ensure that this maximum level would nevertheless leave sufficient room of manoeuvre for the Commission, the Guidelines had to include a wide range of percentages of the value of sales.

The choice of a given percentage depends upon the gravity of the infringement. To that end, point 22 lists — in a non-limitative way — four examples of factors that may be taken into account. The first two (nature and geographic scope of the infringement) are similar to those mentioned in the 1998 Guidelines and are already subject to a substantial line of case-law. In practice, the nature of the infringement will certainly remain one of the key factors, as point 23 illustrates with regard to cartels. The other two factors (whether or not the infringement has been implemented and the combined market share of the parties) are new. It may be noted that the 2006 Guidelines do not refer to the “actual impact, where this can be measured”, as the 1998 Guidelines used to do. In practice, however, the Commission gathered evidence of the implementation of the infringement and was rarely in a position to measure the actual impact; in addition, since cartels (which represent the majority of cases where fines are imposed) are traditionally infringements by object, it appeared to make more sense to solely refer to the implementation — or not — of the infringement.

With regard to cartels, point 23 presumes that these are infringements such as to justify the application of a percentage of sales which will “generally be set at the higher end of the scale” (point 23 insists on
the fact that cartels should be heavily fined “as a matter of policy” because they are “by their very nature” particularly harmful infringements).

Since the assessment of gravity is based on an examination of the overall infringement, the same percentage will apply to all the parties involved in the same infringement. Elements specific to each company enter into account at the level of the “adjustment factors” (see below).

The amount resulting from the percentage of the value of sales will then be multiplied by the number of years of participation in the infringement (duration is assessed undertaking by undertaking). Duration therefore becomes a key factor in the 2006 Guidelines, since each and every year of participation will be fully reflected in the basic amount of the fine. Contrary to the Commission’s practice under the 1998 Guidelines, periods of less than six months will be counted as half years, and periods longer than six months but shorter than a year will be counted as a full year. This illustrates the Commission’s wish that duration should play as big a role as possible (as underlined in point 5 of the preamble). Moreover, in practical terms, for infringements of less than six months for which no entry fee applies, the fine would otherwise be equal to 0.

In principle, each undertaking will therefore support a basic amount which is tailored to its particular situation. Point 26 of the Guidelines however contains two qualifications in this regard. First, the Commission may set an identical basic amount for two undertakings, even though they only have similar, and not identical, values of sales. Indeed, where the sales on the market of two or more undertakings are similar, even though they are not identical, the difference between their respective likely weight in the infringement and the respective impact of their behaviour on the market is probably not such that it deserves to result in different amounts of fines. Second, rounded figures will be used for the basic amount.

c. The entry fee

The entry fee is one of the “novelties” of the 2006 Guidelines. It is a “one shot” exercise. It applies once, whatever the duration of the infringement, and, contrary to the variable amount of the fine (see point 24 of the Guidelines), is not multiplied by the number of years of participation in the infringement. The main purpose of the entry fee is to deter undertakings from even entering into an illegal behaviour (to try and see...). This entry fee is expressed as a percentage of the value of sales and can vary from 15 to 25%. This range of percentages will allow reflecting the more or less serious nature of the infringement also at the level of the entry fee.

As the actual level of the entry fee depends very much on general criteria (similar to those listed for the assessment of the variable amount), the same level of entry fee will apply to all participants in a given case.

The 2006 Guidelines draw a distinction between cartels (for which an entry fee “will” be applied) and other types of infringements (for which an entry fee “may” be applied). In the latter case, an entry fee may be particularly justified where the infringement appears rather obvious (consistent line of previous decisions) or where the infringement, despite its very short duration, produced or was likely to produce significant effects.

In other words, undertakings participating in a three-month cartel may have to support a basic amount representing up to 40% of their yearly value of sales (7). Undertakings participating in a cartel during 5 years and eleven months may face a basic amount of more than two years of their respective relevant turnover (8). The final level of the fine may be lower or higher than this, depending on the adjustment factors.

2. The adjustment factors

No major changes have been made to the possible adjustment factors compared to the 1998 Guidelines. The 2006 Guidelines mainly draw the consequences of the case-law and reflect the developments of the Commission’s practice in the last few years.

a. Aggravating factors

Among the non-exhaustive list of factors which the Commission may take into account as aggravating circumstances, the 2006 Guidelines refer to the role of leader and/or instigator as well as possible measures of coercion and/or retaliatory measures. They also provide for the possibility of increasing the fine imposed on undertakings that have refused to cooperate with, or obstructed, the Commission in carrying out its investigations (see for instance case C-308/04 P, SGL v Commission, ECR [2006], not yet reported, paragraph 169).

But the main change regards the situation of repeat offenders. The Commission’s practice so far is to increase the fine by 50% where the undertaking has been found by the Commission to have been pre-

(7) Up to 25% for the entry fee, and up to 15% (i.e. up to 30% multiplied by 0.5) for the variable amount.
(8) Up to 25% for the entry fee, and up to 180% (i.e. up to 30% multiplied by 6) for the variable amount.
viously involved in one or more similar infringements. The 2006 Guidelines give clear indications as to the Commission’s future policy on this matter. The existing approach is indeed modified in three ways. First, the Commission will take into account not only its own previous decisions, but also those of National Competition Authorities applying Articles 81 or 82; this is in line with the modernisation of EU antitrust rules which entered into force in May 2004. Second, the increase of the fine may now be up to 100%; in so doing, the Commission highlights that repeat offences are regarded as a very serious aggravating circumstance which is such as to justify a “significant” increase of the fine, as the CFI admitted in case T-38/02, *Groupe Danone v Commission* (ECR [2005] not yet reported, paragraph 348). Third, each prior infringement will now justify an increase of the fine. In other words, contrary to the past, the Commission’s policy against repeat offenders will sanction even more the “multi-recidivists”.

**b. Mitigating factors**

The examples of mitigating factors in the 2006 Guidelines make clear — stating the obvious — that it belongs to the undertaking claiming the application of mitigating circumstances to provide evidence that such circumstances are met. Among possible mitigating factors, the Guidelines refer to the following non-exhaustive elements.

First, the Commission may have regard to the termination of the infringement as soon as the Commission intervenes. The 2006 Guidelines however specify that — in line with the Commission’s current practice, confirmed by the CFI in *Tokai Carbon a.o. v Commission* (2005), cited above, paragraph 292 — such mitigating factor will not apply to secret agreements. This would otherwise be counterproductive, since undertakings could always enter into secret arrangements knowing that they would in any event get the benefit of a mitigating circumstance if they stop their conduct once discovered. Second, infringements by negligence (which, along with intentional violations, is one of the two types of infringements covered by Article 23(2) of Regulation No 1/2003) may justify the granting of a reduction. Practice however shows that the type of conduct which is fined by the Commission rarely appear to be “infringements by negligence”. Such a mitigating circumstance should therefore play a marginal role in future — as it did under the 1998 Guidelines. Third, the substantially limited role of an undertaking may mitigate that undertaking’s liability. However, in line with the Commission’s current practice, in order to benefit from such a mitigating factor, the undertaking will have to show that, during the period in which it was a party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market. The 2006 Guidelines further indicate that the mere fact that an undertaking participates to an infringement for a shorter period of time than other infringers will not be regarded as a mitigating factor; in fact, that circumstance will already be fully reflected in the basic amount of the fine, which is notably based on the duration of each undertaking’s participation in the infringement. Fourth, the mitigating circumstance of “effective cooperation outside the leniency notice and beyond the legal obligation to do so” mainly targets non-cartel cases. As the wording of the Guidelines makes clear, not all cooperation will deserve a reward however. Fifth, the fact that the illegal conduct of the undertaking has been authorised or encouraged by public authorities or by legislation may also be taken into account in order to decrease the level of the fine.

**c. Special increase for deterrence**

(i) Multiplier

The practice of applying a so-called “multiplier” has been developed under the 1998 Guidelines and approved by the Courts on a number of occasions (notably on the day after the adoption of the 2006 Guidelines, in *Showa Denko v Commission*, cited above, paragraphs 15 to 18 and 28 to 30. See also the developments in case T-15/02, *BASF v Commission*, ECR [2006] not yet reported, paragraphs 205 to 263). This reflects the constant line of case-law where the Court considered that the overall size of the undertaking can be among the list of elements to be looked at when setting the level of fines (see Cases 100/80 to 103/80, *Musique Diffusion Française a.o. v Commission*, ECR [1983] 1825, paragraph 120). The possibility of fixing a multiplier is now more explicitly stated in point 30 of the 2006 Guidelines. The rationale is that a fine imposed on large multi-product undertakings should be increased in order to deter such companies from entering into an infringement. The deterrence of a fine without a multiplier may otherwise be too low compared to the overall ability to pay of the undertaking as a whole. This rationale remains valid under the 2006 Guidelines, since the basic amount notably depends upon the sales to which the infringement relates and therefore ignores the overall size of the company (something which the multiplier has always been supposed to correct, at least in part).

Under the 1998 Guidelines, the assessment of the multiplier was part of the assessment of gravity. Under the 2006 Guidelines, it will take place at a later stage of the reasoning on fines, as part of the “adjustment factors”. The reason for this change has
nothing to do with substance and is simply linked
to the logic of the Guidelines. Section 1 concerns
the assessment of the infringement, while Section
2 rather deals with factors that are specific to each
undertaking. Since the application of the multiplier
relates to the size of each undertaking, it has been
considered more appropriate to assess it under
Section 2 of the Guidelines rather than under Sec-
tion 1. In any event, as the CFI rightly observed
in BASF v Commission, cited above, at paragraph
243, the end result is the same, whatever the order
of the calculation.

(ii) Improper gains

The possibility to increase the fine in order to
exceed the gains improperly made as a result of
the infringement already existed under the 1998
Guidelines, although it was listed as a possible
aggravating circumstance. The purpose of this
provision is not to force the Commission to enter
into such an estimate of the gains or even to sug-
gest that the Commission should systematically
try to make such an estimate, but rather to avoid
a situation where the fine, set in accordance with
the Guidelines, would not even correspond to the
gains achieved by the parties. In such a scenario,
the Commission would otherwise knowingly set
the fine at a level which is obviously under-deter-
rent.

d. Maximum fine and Leniency Notice

The application of the 10% ceiling for fines, which
directly derives from Article 23 of Regulation No
1/2003, as well as that of the leniency notices are
obviously not affected by the 2006 Guidelines. The
latter simply codify the Commission's practice
according to which any reduction granted on the
basis of the Leniency Notice will be applied after
the 10% ceiling. In so doing, the Commission
makes sure that cooperation under the Leniency
notice will always be rewarded, even for undertak-
ings whose fine exceeds the 10% ceiling.

e. Inability to pay

A specific subsection of the 2006 Guidelines is
dedicated to the inability to pay, which was only
briefly mentioned in point 5(b) of the 1998 Guide-
lines. In line with the Commission's practice, when
setting fines, the inability to pay will only be taken
into account exceptionally. Indeed, according to
settled case-law, the Commission is not required,
when determining the amount of the fine, to take
into account the poor financial situation of an
undertaking, since recognition of such an obliga-
tion would be tantamount to giving unjustified
competitive advantages to undertakings least well
adapted to the market conditions (see for instance
SGL v Commission, cited above, paragraph 105).
Point 35 of the Guidelines provides some formal
and substantial indications as to how and when a
reduction for inability to pay could be granted. As
to the form, it states that it obviously belongs to
the undertaking concerned to request the taking
into account of such a situation. Such a request can
furthermore only be made on the basis of objective
evidence. On substance, the 2006 Guidelines set a
rather high standard, in line with the case-law. The
undertaking will have to show that the imposition
of a fine “would irretrievably jeopardise the eco-

nomic viability of the undertaking concerned and
cause its assets to lose all their value”.

3. Final remarks

The 2006 Guidelines present the methodology
which the Commission will in principle apply in
future. There are however situations where the
Commission may depart from this methodology.
Points 36 and 37 cover such situations. First, the
Commission remains free to set symbolic fines
(as it did in a limited number of cases between
1998 and 2006); where such will be the case, the
Commission will explain its reasoning in the deci-
sion. Second, the Commission may apply a differ-
ent methodology for setting fines or apply higher
percentages than the one mentioned in point 21
of the 2006 Guidelines in order to take account of
“the particularities of a given case or the need to
achieve deterrence in a particular case.” Such may
be the case, for instance, where no turnover figures
are available at all.

Although it is obviously not possible to antici-
pate in the abstract what the level of fines will be
in future (notably because the application of the
Guidelines logically implies a number of variables),
its main features provide tools to ensure adequate
deterrence, in particular on large players who have
taken part to an infringement for a number of years
on significant markets. After more than 50 years
of application of EU antitrust rules, the likelihood of
having to bear high fines should not come as a sur-
prise to any such EU antitrust law offender.