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**ABSENCE DE CAPACITE CONTRIBUTIVE AU TITRE DU PARAGRAPHE 35 DES
LIGNES DIRECTRICES DU 1/09/2006 CONCERNANT LE CALCUL DES AMENDES
INFLIGÉES EN APPLICATION DU RÈGLEMENT (CE) N° 1/2003 RELATIF A LA
MISE EN ŒUVRE DES RÈGLES DE CONCURRENCE**

Note d'information de M. ALMUNIA et de M. LEWANDOWSKI

Cette question est inscrite à l'ordre du jour de la 1922^{ème} réunion de la Commission, le mardi 15 juin 2010

Destinataires : Membres de la Commission
Directeurs Généraux et Chefs de service

INFORMATION NOTE

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Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines

I. INTRODUCTION

1. The Commission's methodology of setting fines for antitrust cases is set out in detail in its 2006 Fining Guidelines. The first step consists of calculating the so-called "basic amount", based on the companies' EEA sales related to the infringement in the relevant market and the duration of the infringement. This amount includes an "entry fee", based on a percentage of the value of sales, in order to generally deter the undertakings from entering into the anticompetitive practice. In a second step, aggravating circumstances as well as mitigating circumstances are considered. The basic amount may also be increased through a "multiplier" in order to ensure sufficient deterrence for particularly large companies. Finally, fines are capped to a maximum of 10% of the total turnover in the year previous to the adoption of the Decision and then possible reductions under the Leniency and Settlements Notices are applied. Once the fine is set, the Commission may, upon request of the companies concerned, assess a company's alleged inability to pay the fine (hereinafter "ITP").
2. The number of companies invoking ITP and requesting a reduction of the fine pre-decision in view of their alleged critical financial situation has risen significantly in recent years. Similarly, companies are also more frequently requesting, post-decision, different types of financial relief such as the exemption from the obligation to provide a security pending the appeal before the Court, the full or partial release of a security already provided or even a full or partial waiver of the fine imposed by the Commission.
3. The basic principles under which the Commission may take into account a company's inability to pay when setting fines prior to the adoption of a decision are set forth in paragraph 35 of the 2006 Fining Guidelines.¹
4. As a general matter, any type of reductions in the fine, either in the nominal amount or through favourable payment conditions, in view of a company's alleged critical financial situation has to be treated with great caution. Granting such favourable treatment to one company may give rise to concerns of equal treatment with regard to those companies that do not obtain such treatment. In addition, taking into

¹ Paragraph 35 reads as follows: "*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.*"

account the distressed financial situation of a company can carry the inherent risk of favouring those companies that are inefficient, badly managed or over-leveraged at the expense of well managed and financially prudent companies. It may also encourage strategic behaviour (moral hazard), in particular financial engineering or corporate restructuring, aimed at avoiding the payment of the fine. It should also be considered that the more the Commission takes into account the financial situation of companies when setting fines or granting payment conditions, the more the Commission may be drawn into discretionary and potentially conflicting situations in its fining policy, which would put into question its credibility as an objective enforcement institution. A generous treatment of such ITP requests may also diminish the deterrent effect of the Commission's fines. Conversely, the Commission should avoid imposing fines that would drive competitive companies and productive assets out of the market, especially of SMEs and/or mono-product companies.

5. Within this context, this information note provides a brief overview regarding four specific issues that have arisen. The first point concerns the clarification of the interpretation of the ITP conditions under paragraph 35 of the 2006 Fining Guidelines and the general principles to be applied in this field. The second point addresses the question of how to adjust the fine for successful ITP applicants under paragraph 35. The third point deals with the issue of how to address requests by companies which have appealed the fine and/or asked for interim relief to provide a bank guarantee as security instead of provisionally paying the fine. The fourth point concerns the question if and to what extent companies may be granted financial relief post-decision by way of a College decision, in view of their financial situation that deteriorated following the adoption of a Commission fining decision.

II. THE INTERPRETATION OF PARAGRAPH 35 AND ITS COMMUNICATION TO THE PUBLIC

6. **Background.** Whereas there is no legal requirement for the Commission to consider the financial situation of a company when setting fines, paragraph 35 of its 2006 Fining Guidelines foresees that the Commission may take into account requests by companies based on their inability to pay.² The purpose of this provision has been to avoid that the Commission's fines drive financially distressed but competitive companies out of the market and cause adverse social and economic consequences. In order to ensure that companies are systematically made aware of the possibility to invoke ITP, it is proposed to include an explicit reference to paragraph 35 in every Statement of Objections in antitrust cases where fines are likely to be imposed or in the requests for information that are sent out closer to the adoption date of the decision in order to collect the parties' latest turnover figures, which serve as a basis for the calculation of the fine.
7. **The interpretation of paragraph 35 by the Commission.** In 2009, the Commission deepened and intensified its review of ITP requests in order to be able to deal better with the rising number of such requests. The focus of last year's effort was to enhance the assessment of whether a fine imposed by the Commission will "*irretrievably jeopardise the economic viability of the undertaking*", which is the most important but also most complex and difficult part of the ITP test laid down in paragraph 35. The latest refined methodology now assesses the financial situation of

² A similar provision also existed in point 5(b) of the pre-existing Guidelines on fines of 1998.

a company on the basis of a number of indicators of profitability, capitalisation, solvency and liquidity (derived from recognised bankruptcy prediction models, including the so-called *Altman Z-score* test). The ITP methodology has been refined, compared to previous practice, in particular in three respects: (i) the Commission gives more emphasis to solvency and liquidity relative to capitalisation and profitability of the company, (ii) it assesses whether and how the fine would cause the above financial indicators to deteriorate, and (iii) it relies not only on historical data but also uses projections, in particular regarding cash flows (for the current year and two future years) in its assessment. Thus, if there is sufficiently clear evidence that a company is in immediate danger of bankruptcy, the Commission will try to assess whether it is likely that bankruptcy would indeed be caused by the fine.

8. The remaining conditions of paragraph 35 of the 2006 Fining Guidelines, namely (i) the economic context, (ii) the social context, and (iii) asset loss are being interpreted rather broadly by the Commission. In particular, these conditions will be fulfilled relatively easily, e.g. during a sectoral or general economic crisis. The specific economic context can be argued if the sector concerned by the decision is going through a cyclical crisis (e.g., suffering from overcapacity or falling prices), but it may also be considered in this context whether companies have difficulties in obtaining access to capital or credit as a result of the prevailing economic conditions. The specific social context is also likely to be present in the context of high and/or mounting unemployment at a regional or wider level.
9. With respect to the condition that the company's assets have to lose "*all their value*", it has become apparent that a literal interpretation of this wording would rather lead to a systematic rejection of all ITP claims since individual assets practically never lose completely their value, even if the company that participated in the anticompetitive practice goes bankrupt (because the assets normally will retain a certain operational and resale value). The Commission therefore interprets this condition as requesting that the fine would not only be likely to lead to the bankruptcy of an undertaking as such, but also that it would cause its productive assets to lose "significantly" their value. This would be the case if the bankruptcy would lead to the disappearance of the undertaking as a going concern (because of dismantling and/or closure), its jobs being lost and the assets (property, buildings, machinery etc.) being sold separately at substantially discounted prices. Conversely, there would be no significant asset loss if there are clear indications that the undertaking will be acquired and its business will be continued as a going concern (i.e. without job losses, etc.) by another company, even if the infringing undertaking as a legal entity would declare bankruptcy. The condition of the asset losing "*all their value*" is more likely to be fulfilled when the sector concerned or the whole economy at the local or wider scale is going through a serious crisis.
10. **Further action.** The Commission has already adjusted and improved its assessment of ITP claims in order to take account of the increasing number of requests and has been applying the refined assessment in the most recent and upcoming cases. It is nevertheless important to clarify the interpretation of paragraph 35 and in particular of the condition of the assets losing "*all their value*". The above mentioned principles for the application of paragraph 35 of the Fining Guidelines, as applied recently and as clarified herewith, will be made public through case practice (e.g., in upcoming Statements of Objections or decisions) and, possibly, through more general public statements in an appropriate manner. As noted before, the companies

will in the meantime be made systematically aware of the possibility to invoke ITP, by explicitly referring to paragraph 35 in each Statement of Objections or the requests for information to obtain turnover data which are sent to all undertakings prior to the adoption of the decision.

III. THE CONSEQUENCES OF SUCCESSFUL ITP APPLICATIONS

11. **Background.** In case a company can demonstrate that it is unable to partially or fully pay the fine imposed by the Commission and meets the criteria for ITP under paragraph 35 of the 2006 Fining Guidelines, there are two principal options to address this situation. The first option would be to reduce the amount of the fine to a level that the company is currently able to pay or, if necessary, to zero (no fine at all). The second option would be not to reduce the amount of the fine but to grant deferred payment by instalments, unsecured by a bank guarantee for the amount that the company is currently unable to pay (this amount would then be paid in yearly instalments over a certain time period, normally not exceeding 3 to 5 years). A combination of these two options would only be possible in exceptional cases.
12. On the one hand, by keeping the nominal amount of the fine the Commission would arguably increase deterrence and the Commission would keep a claim on profits, if the financial situation of the company improves. On the other hand, a clear-cut fine reduction is considerably more beneficial for companies in a distressed financial situation than deferred payments and, hence, it will better achieve the objective of ITP, namely to prevent bankruptcies of competitive undertakings. In particular, fine reductions definitely remove the claim from the company's balance sheet, clarify the liability and allow for more effective financial planning. In addition, the calibration of instalments pre-decision can be practically very difficult without engaging in a discussion with the companies concerned (which do not know yet the precise amount of the expected fine) and may risk leading to unequal treatment.
13. **Further action.** Fines of applicants meeting the ITP conditions will, as a matter of principle, be reduced in upcoming cases to a level that the company will be considered to be able to pay at the time of the decision without seriously jeopardising its economic viability. Only in exceptional circumstances, should the possibility of granting deferred and unsecured payments by instalments, specified with corresponding deferred due dates in the fine decision be considered as an alternative to fine reductions. The exceptional circumstances will be explained in the basic decision imposing the fines in order to prevent any criticism from an equal treatment perspective by the other undertakings that participated in the anti-competitive conduct. A combination of the above two options would only be possible in exceptional cases.

IV. THE RIGHT OF COMPANIES TO PROVIDE A VALID BANK GUARANTEE

14. **Background.** The companies against which a fine has been imposed but which appeal the fine must either pay the fine provisionally or provide a bank guarantee covering the full fine amount, in accordance with Article 85a of the implementing rules for the Financial Regulation.³ Provisional payments and bank guarantees have the purpose of securing the fine amount for the Commission until the fine is confirmed or annulled by the Community Courts. The question has arisen recently in a number of cases whether companies, which have sufficient liquidity to provisionally pay the fine, have the right to provide a bank guarantee as security or whether the companies may only provide a bank guarantee if they can demonstrate to the Accounting Officer that they have insufficient liquidity. It should be noted that bank guarantees involve a higher financial risk (corresponding to the standing of the issuing bank). In addition, the management of fines guarantees and their safekeeping impose an administrative burden on the Commission that does not exist in the case of provisional payments.
15. The current wording of the implementing rules for the Financial Regulation is not very clear as to whether the undertakings have a right to provide a bank guarantee or whether the Accounting Officer should first attempt to obtain provisional payment as the "safest" security. As the choice of the option can have financial consequences for the companies concerned, it is necessary to amend the implementing rules for the Financial Regulation in order to clarify that, in such situations, the undertakings concerned have the right to choose between providing valid bank guarantees (i.e. fulfilling the relevant criteria which will be established and, for transparency reasons, made public by the Accounting Officer⁴) or of making a provisional payment, because in either case the payment of the fine will be secured.
16. **Further action.** The relevant Article 85a of the implementing rules for the Financial Regulation will however be changed so as to reflect better that undertakings have the right to provide either a valid bank guarantee or make a provisional payment. From now on, the body of the decision and its operative part imposing the fines should specify that, pending an appeal, the undertaking has the option of covering the fine by the due date either by providing a valid bank guarantee or by making a provisional payment of the fine.

V. FINANCIAL RELIEF POST DECISION

17. **Background.** For all requests for payment relief post-decision an ITP analysis should be carried out, similar to those performed in case such a request is made before the decision is taken, in order to assess the company's financial situation. If it

³ Article 85a reads as follows: "*Where an action is brought before a Community court against a Commission decision imposing a fine, periodic penalty payment or other penalty under the EC Treaty or Euratom Treaty and until such time as all legal remedies have been exhausted, the accounting officer shall provisionally collect the amounts concerned from the debtor or request him to provide a financial guarantee.*"

⁴ While the precise criteria will need to be determined in detail such guarantee must be acceptable to the Accounting Officer and, to that purpose, issued, along the model adopted by the College in its internal rules on the implementation of the General budget, by a European bank (i.e. with its seat within the Union), with at least a AA long term rating. These criteria will also be communicated in the reminders sent by the Accounting Officer before the fine falls due.

is decided to intervene in favour of the company, which in principle should only be done exceptionally, the appropriate solution will obviously depend on the individual financial situation of the company in question (i.e. the results of its ITP analysis). Indeed, financial relief should only be granted if the criteria for the assessment of ITP claims under paragraph 35 of the 2006 Guidelines are fulfilled, in particular when it can be demonstrated with a sufficient degree of probability that it is the Commission's fine (covered by a security) that is likely to cause the company's bankruptcy.

18. In practice, such situations are expected to be rare in the future when an ITP request will have been made, in view of the refined ITP methodology that would be applied before adopting the basic decision setting the fine amounts. However, such situations cannot be excluded with absolute certainty. In particular, in the course of appeal proceedings⁵, which normally last several years, it cannot be excluded that a company's financial situation may worsen significantly. Any form of financial relief should however be operated with great caution and can only be granted when a proper ITP assessment demonstrates that the conditions are fulfilled. Three situations must be distinguished:

- a) The financial distress occurs during the period immediately after the adoption of the fine until the due date (three months after the notification of the decision)

Notwithstanding the refined ITP assessment method, it cannot be totally excluded in pending or upcoming cases that a situation may still arise where the company will claim ITP immediately after the adoption of that decision and claim that it is unable to provide a security to the Accounting Officer. In order to address this type of situation, it is proposed to amend the implementing rules of the Financial Regulation to the effect that the companies can make a well-documented request to the Accounting Officer for an exemption from the obligation to provide a security in combination with a deferred payment plan (which will carry late payment interest). Financial relief can only be envisaged after an ITP analysis evidencing a distressed situation of the company, unless such an analysis has been performed recently. The request for such financial relief is examined by the Accounting Officer in collaboration with DG Competition.

Pending the revision of the current implementing rules of the Financial Regulation, the College should empower on a case-by-case basis the Accounting Officer to allow a deferred coverage of the fine without guarantee, if he decides in collaboration with DG Competition and the Legal Service that this solution is justified by an ITP analysis, there are prospects to recover the fine and that the financial interest of the Union and the principle of equal treatment are taken into account. Under this new ad-hoc competence of the Accounting Officer it is expected that the number of applications for interim measures introduced by companies before the President of the General Court in order to obtain financial relief would be further reduced. In exceptional circumstances, where deferred security coverage does not prevent the company's bankruptcy (for which

⁵ Around 85% of the decisions imposing a fine are appealed to the General Court and about 20% of its judgments are further appealed to the Court of Justice.

an ITP analysis will be required), the fine amount might have to be partially or totally waived by the College⁶. A combination of the two options (partial waiver of the fine and deferred coverage of the balance without guarantee) would also be possible in appropriate cases. When the request to review the company's financial situation is accepted in the above scenarios, the ITP is performed by DG Competition.

- b) The financial distress occurs during the period after the due date of the fine and pending appeal proceedings:

Financial relief may not be granted by way of release of securities (payments of guarantees) already provided. Upon request of the company and after examination by the Accounting Officer in collaboration with DG Competition and the Legal Service, a new ITP analysis should be performed. The College could then in exceptional circumstances, fully or partially waive the fine, and the amount of any security provided would be correspondingly adjusted.

- c) The financial distress occurs after the fine becomes definitive (no appeal or all legal remedies exhausted).

In case the fine becomes due, Article 85 of the implementing rules of the Financial Regulation currently provides for the possibility, upon a company's reasoned request, of a deferred payment plan covered by a valid bank guarantee for the open balance and interest. It will be proposed⁷ to amend the implementing rules of the Financial Regulation to the effect that, in exceptional circumstances, the Accounting Officer in collaboration with DG Competition may also accept a deferred payment plan without bank guarantee in the exceptional cases where such a guarantee has not been already provided.

19. The formal act for partially or fully waiving the fine would in each case be a College decision. The legal basis for waiving the fine would either be Article 87(1)(c) of the implementing rules for the Financial Regulation – if the conditions are fulfilled - or otherwise an ad hoc College decision or an amendment of the basic decision that imposed the fines. The legal basis for granting a deferred payment plan with interest but without guarantee will be the revised implementing rules for the Financial Regulation and, pending this revision, an empowerment of the Accounting Officer by the College on an ad hoc basis.
20. **Further action.** The implementing rules for the Financial Regulation should be amended in order to enable the Accounting Officer, in collaboration with DG Competition, to exempt a company that meets the ITP test from the obligation to provide a security for an appealed fine in combination with a deferred payment plan after the adoption of the decision. With respect to financial difficulties of a

⁶ In accordance with existing Commission procedures.

⁷ Pending the revision of the implementing rules of the Financial Regulation, the College should empower on a case-by-case basis the Accounting Officer, to allow a deferred coverage of the fine without guarantee, if he decides in collaboration with DG Competition, that this solution is justified by an ITP analysis, there are prospects to recover the fine and that the financial interest of the Union and the principle of equal treatment are taken into account

company, in connection with non definite fines under appeal the Commission may exceptionally intervene by way of a partial or full waiver of the fine.⁸ However, financial relief will in both cases (deferred payment or fine waiver) only be granted following a proper ITP analysis by DG Competition. Regarding financial difficulties in case of due fines, the implementing rules of the Financial Regulation should be amended so as to include the possibility to provide for a deferred payment plan without bank guarantee in exceptional circumstances.

21. The proposals aimed at individual decisions in the domain covered by this note will be submitted to the College along the principles as set out above.

⁸ In accordance with existing Commission procedures.