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Fining policy and principles—a review of the 2006 Fining Guidelines

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The power of the European Commission to impose fines for infringements of EU competition law is an important tool in its enforcement armoury. The 2006 Fining Guidelines are the unique reference point used by the Commission to determine its fines.

References:

Commission guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006 Fining Guidelines)

As part of its judicial review, the General Court has the authority to exercise unlimited jurisdiction to review whether a fine for competition infringements is fair and proportionate. This means that the General Court has the power to either reduce or increase a penalty that has been set by the Commission using its own guidelines. Hence the General Court is not bound to follow the Commission's guidelines. However in order to guarantee equal treatment, the General Court will ensure that the 2006 Fining Guidelines are correctly implemented.

References:
Case T-541/08 Sasol and Others v Commission, para 5

The substitution of the 1998 Fining Guidelines by the 2006 version, even if it had the effect of increasing the overall average of the fines imposed, was reasonably foreseeable. Besides, according to the General Court, guarantees in criminal matters enshrined in Articles 6 and 7 of the ECHR and Article 49 of the Charter of Fundamental Rights do not necessarily have to be applied to their full extent in competition law cases. Ultimately, the introduction of the 2006 Fining Guidelines is without prejudice to the only applicable legislation in this matter, ie rule in Article 23(2) of Regulation 1/2003 (setting the maximum fine level).

References:
Charter of Fundamental Rights of the European Union, Arts 6, 7

Case T-544/08 Hansen & Rosenthal and H & R Wax Company v Commission, para 287

2006 Fining Guidelines

Step guide to calculation of fines under the Fining Guidelines

The Commission's Fining Guidelines set out its approach to calculating fines. The latest guidelines were published in 2006 and set out the normal methodology for the calculation of a fine.

References:
2006 Fining Guidelines

In summary, the steps under the normal methodology are set out below:

1. to take an individual participant's turnover in the goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA during the last full business year of the participant's involvement in the infringement (value of sales):

    References:
    2006 Fining Guidelines, para 13

    the Commission may employ an alternative methodology where it considers that: (i) the geographic scope of the infringement extends beyond the EEA, and (ii) the normal methodology, as outlined above, would not properly reflect the weight of each undertaking in the infringement. The latter may be the case, in particular, with worldwide market-sharing arrangements

    References:
    Case C-580/12 P Guardian Industries Corporation and Guardian Europe Sàrl v Commission

    Case C-227/14 P LG Display and LG Display Taiwan v Commission

    Case C-231/14 P InnoLux v Commission

    2006 Fining Guidelines, para 18

    in each methodology, the steps outlined below are the same except that, in the alternative methodology, the 'value of sales' is calculated by taking the aggregate sales of the goods or services to which the infringement relates in the relevant geographic area (eg worldwide), determining the

share of these sales of each undertaking participating in the infringement and then applying the percentage to the aggregate sales within the EEA of those participating in the infringement

2. to multiply the value of sales by a percentage of up to 30% to reflect the 'gravity' of the infringement

References:
2006 Fining Guidelines, para 21

3. to multiply (2) by the number of years of 'duration' of the infringement

References:
2006 Fining Guidelines, para 24

4. to add, in the case of certain horizontal infringements, 15 to 25% of the individual participant's value of sales for 'entry fee deterrence'. Steps (1)-(4) produce a figure called the 'basic amount'

References:
2006 Fining Guidelines, para 25

5. to adjust the basic amount for any 'aggravating circumstances'. The following aggravated circumstances may produce an increase in the fine:

References:
2006 Fining Guidelines, para 28

repeat infringement

refusal to co-operate with or obstruction of a Commission investigation

role of leader in or instigator of the infringement

6. to adjust the basic amount for 'mitigating circumstances'. The Commission may reduce the fine to take account of the following mitigating circumstances:

References:
2006 Fining Guidelines, para 29

early termination of the infringement as soon as the Commission intervened (except in relation to secret agreements or cartels)

where the infringement has been committed as a result of negligence

where the undertaking's involvement in the infringement was limited

where the undertaking has co-operated with the Commission outside the scope of the Leniency Notice

where the infringement was authorised or encouraged by a public authority or by legislation

7. to adjust the resulting figure for 'overall deterrence'

References:
2006 Fining Guidelines, para 30

8. to reduce the resulting fine for 'leniency', see further, Leniency in EU cartel cases

If the overall fine produced by the above methodology exceeds the 10% maximum, it must be reduced by the Commission in order that it does not exceed that legal limit.

References:
2006 Fining Guidelines, para 32

For an overview of the Commission's approach to calculating fines, see EU investigations—calculating fines—flowchart.

Applying the 2006 Fining Guidelines

Value of sales and determining the basic amount

Under paragraph 13 of the 2006 Fining Guidelines, the basic amount of the fine to be imposed is determined on the basis of the sales made during the last full business year during which the undertaking participated in the infringement.

As confirmed in Guardian Industries v Commission, the value of sales referred to in paragraph 13 of those guidelines extends to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel. Paragraph 13 should not be construed as applying only to turnover achieved by the (captive) sales in respect of which it is established that they were actually affected by the cartel (see also the Court of Justice's judgment in LG Display v Commission in which similar issues regarding alleged intra-group sales were addressed).

References:
Case C-444/11 P, Team Relocations and Others v Commission, para 73

Case C-580/12 P, Guardian Industries and Guardian Europe v Commission, paras 57-60

Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10 Villeroy & Boch v Commission, para 342

Cases T-379/10 Keramag Keramische Werke and T-381/10 Sanitec, Europe v Commission, paras 360-362

Case C-227/14 P LG Display and LG Display Taiwan v Commission

The Court of Justice ruled that the proportion of the overall turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of that infringement.

References:
Case C-580/12 P, Guardian Industries and Guardian Europe v Commission, para 57

The Court of Justice has confirmed in LG Display v Commission that sales from a joint venture to its parent companies can be included in the value of sales when calculating the size of the cartel, irrespective of the fact that these sales were made under a preferential price under the terms of the joint venture agreement that established the company. The European Court of Justice deemed that not considering sales from a joint venture would provide an unjustified advantage to an undertaking by allowing it

to avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates.

References:
Case C-227/14 P, LG Display and LG Display Taiwan v Commission, para 60

Further, in its judgment in InnoLux v Commission, the Court of Justice (despite the views of Advocate General Wathelet) upheld the General Court judgment and, in turn, the Commission decision confirming that when cartelised products have been incorporated into finished products by a vertically-integrated undertaking outside the EEA, the Commission may take into account (for the purposes of calculating the fine to be imposed on that undertaking) the sales of its finished products in the EEA to independent third-party undertakings. On this basis, the Court of Justice stated that the General Court had not erred in law (by confirming that the fine imposed on InnoLux could legally take into account the value of intra-group deliveries LCD panels to InnoLux's factories in China and Taiwan and incorporated there into finished products sold into the EEA) and effectively confirmed as legitimate the Commission's attempts to extend the extra-territorial jurisdiction of EU competition law. Interestingly, Advocate General Wathelet had noted that his contrary views were not inconsistent with established jurisprudence on the treatment of intra-company sales (namely, as set out in Guardian) and that they simply added further refinement (in particular, by arguing that while a distinction should not be drawn between captive sales and sales to independent third parties, captive sales should be excluded from the fining calculation where they were made outside the EEA). Such a view was, however, comprehensively rejected by the Court of Justice.

References:
Case C-231/14 P InnoLux v Commission

Reference year

Paragraph 13 of the 2006 Fining Guidelines states that the Commission will 'normally' consider the sales realized by the undertaking during the last full business year of its participation in the infringement. Recently, the practice of the Commission has been to depart from the last full business year, relying on the adverb 'normally' in paragraph 13 but also linked with paragraph 37 of the 2006 Fining Guidelines (for example, the Commission's decisions in the Power cables and Car and truck bearings cartels).

References:
Case AT/39.610 Power Cables

Case AT/39.922 Bearings

The Commission has also used a corrected average instead of the last business year in the Carglass cartel. Such method of calculation has been endorsed by the General Court in Pilkington Group v Commission because it lead to the determination of a fine amount that better reflected the characteristics of the cartel.

References:
Case T-72/09 Pilkington Group and others v Commission, para 216

The specific facts of the case may have also lead the Commission to depart from the last full business year. For example, the fact that the undertaking had transferred the activities involved in the infringement to a joint venture was used by the Commission as a motivation for considering the previous year instead. This approach was upheld by the General Court in Toshiba v Commission principally based on the fact that the share of the sales of a joint venture is not a simple determination. Lastly, the General Court also deemed that the position of a joint venture in the market does not necessarily correspond to the sum of the positions which its parent companies had in the market.

References:
Case T-519/09 Toshiba v Commission paras 258-260

Entry fee deterrence

As seen in paragraph 25 of the 2006 Fining Guidelines, the basic amount encompasses a sum of between 15% and 25% of the value of sales the objective being to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The General Court in Saint-Gobain v Commission considered that the addition of such entry fee in the basic amount ought to be applied automatically in cases concerning serious infringements, relying on the text of the paragraph 'will include'.

An undertaking cannot dispute the addition of the entry by referring to any fine imposed previously for a different infringement partly concomitant. The General Court in Pilkington Group v Commission held that accepting such claim would lead to a paradoxical situation that would diminish the deterrence effect of the fine for future infringements.

References:
Joined Cases T-56/09 and T- 73/09 Saint-Gobain and Others v Commission, para 381

Case T-72/09 Pilkington Group and others v Commission, para 301-305

Aggravating circumstances

Recidivism amounting to increased fines

Under paragraph 28 of the 2006 Fining Guidelines, the basic amount of the fine may be raised where the Commission finds that there are aggravating circumstances, such as recidivism. Where an undertaking repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 or 102: the basic amount may be doubled for each similar infringement (up to 100%).

In several cases the General Court has stated that the criterion for finding recidivism is that an undertaking must be the addressee of a previous decision from the Commission. Otherwise, it is difficult for such undertaking to understand in what capacity and to what extent it was involved in the infringement found by the decision. Consequently, such undertaking does not have the ability to defend itself in the

absence of the appropriate reasoning in the decision.

References:
Case T-391/09 Evonik Degussa and AlzChem v Commission, para 153

In 2015, the Court of Justice in Commission v Versalis and Eni/ Versalis and Eni v Commission specified that what matters to establish recidivism is rather an earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement formed, already at the time of the first infringement, a single undertaking. The rights of the defence will be preserved because the undertaking alleged to have perpetrated a repeated infringement will be able to defend itself in the proceedings that will lead to the possibility to be found recidivist.

References:
Joined Cases C-93/13 P Commission v Versalis and C-123/13 Versalis and ENI v Commission, para 91-102

When the period between the first decision and the infringement under consideration is thirteen years and eight months, without any other finding of infringement in the meantime, the General Court in Saint-Gobain v Commission came to the conclusion that this period of time showed a low propensity to repeat anti-competitive conduct. However, the General Court considered that this first decision could be taken into account nevertheless because there were similarities between the two infringements (the recent one and from the first decision) in that both infringements concerned the same group of products and the same sort of cartel.

References:
Joined Cases T-56/09 and T- 73/09 Saint-Gobain and Others v Commission, paras 330-334

An increase of 50% of the basic amount for a repeat offender is not discriminatory in comparison to an increase of 100% for three past infringements imposed on another undertaking that was part of the same conduct. The increase should not be the result of a linear calculation according to the General Court. The same jurisdiction also considered that such increase was proportional.

References:
Case T-391/09 Evonik Degussa and Alzchem, para 158-167 and 223-226

Leader

The third indent of paragraph 28 of the Fining Guidelines relates to the increase of the basic amount in case of the role of leader or instigator of the infringement. If an undertaking is found to have played such a role, the increase may be significant, for example 50% in the Candle Waxes case. The relevant undertaking was found to be the ringleader based on the fact that the undertaking organised the anti-competitive meetings by convening most of the technical meetings, sending the invitations to the participants, reserving hotel rooms, renting meeting rooms and arranging dinners. Besides, exerting pressure or even dictating the conduct of other members of the cartel is not a necessary precondition for an undertaking to be described as a leader in the cartel. Among the other conditions retained by the Commission and upheld by the General Court in Esso, Sasol, RWE, RWE Dea and others v Commission, there was the fact that the co-conspirators perceived the undertaking as the leader of the cartel and it represented another undertaking which was unable to attend. This was disputed by Sasol but the Court explained that the concepts of 'single and continuous infringement' and 'ringleader' are not based on the same conditions.

References:
Case COMP/39.181—Candle Waxes

Case T-541/08 Sasol and Others v Commission, para 366-397

Mitigating circumstances

Pursuant to paragraph 29 of the 2006 Fining Guidelines, the basic amount may be reduced where the Commission finds mitigating circumstances. The Commission accepts fairly rarely such arguments and is usually upheld by the Courts. As detailed above, paragraph 29 provides a non-exhaustive list of circumstances that the Commission would be willing to take into account. For example, when the undertaking provides evidence that its involvement in the infringement is substantially limited. In Ferriere Nord v Commission, a recent case, the General Court decreased the basic amount by 6% because the Commission failed to take into account the lack of participation of an undertaking to parts of the infringement for a period exceeding three years. The Commission also recently accepted mitigating circumstances in the Power cables case for some undertakings due to their substantially limited involvement in the infringement.

References:
Case T-90/10 Ferriere Nord v Commission, paras 317-325

Case AT/39.610 Power Cables, paras 19-21

The fourth indent of paragraph 29 of the 2006 Fining Guidelines, (as previously seen in the sixth indent of paragraph 3 of the 1998 Fining Guidelines), envisages that the fact that an undertaking has effectively co-operated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so may be taken into account as a mitigating circumstance. However in Saint-Gobain v Commission the General Court considered that in the case of cartels, such mitigating circumstance can only be recognised 'exceptionally'. Otherwise, the application of that provision would lead to depriving the Leniency Notice of its practical effect.

References:
Joined Cases T- 56/09 and T- 73/09 Saint-Gobain and Others v Commission, para 415-41

The Court of Justice judgment in Fresh Del Monte Produce v Commission/Commission v Fresh Del Monte Produce sought to clarify whether a mitigating circumstance would exist simply where an undertaking duly responds to a non-mandatory request for information from the Commission or only where the undertaking provides the Commission with information on its own initiative, that is to say not just voluntarily but also spontaneously. In the cartel investigation in question, Weichert had merely replied to a simple request for information (ie it had not provided information to the Commission gratuitously). The Court of Justice determined (contrary to the finding of the

General Court) that a reduction in fine would only have been justified had Weichert provided information to the Commission without being requested to do so (it having been established in case-law that the conduct of the undertaking in question must 'not only facilitate the Commission's task of establishing the existence of the infringement but also reveal a genuine spirit of co-operation').

References:
Joined Cases C- 293/13 P Fresh Del Monte Produce v Commission and C- 294/13 P Commission v Fresh Del Monte Produce

Pursuant to the fifth indent of paragraph 29 of the 2006 Fining Guidelines, an undertaking may benefit of mitigating circumstances when the anti-competitive conduct has been authorised or encouraged by public authorities or by legislation. The General Court in ONP v Commission recently recognised that a professional association was correct to interpret a specific national legislation in a restrictive way based on a circular. However, this interpretation was only related to one of the four types of decision which the association adopted and for a limited period of time. Hence, the General Court decided that the reduction should be limited to 5%.

References:
Case T-90/11, ONP and Others v Commission, paras 377-382

Specific increase for deterrence

Under paragraph 30 of the 2006 Fining Guidelines, the Commission may increase the fine level for a certain undertaking in order to warrant that such fine would have a sufficient deterrent effect, when such undertaking has a particularly large turnover beyond the sales of goods or services to which the infringement relates.

In Elf Aquitaine v Commission, the Commission made use of this deterrence factor against an undertaking but not against the two subsidiaries that were directly involved in the infringement and subsequently divested by the parent company. The three undertakings were nevertheless jointly and severally responsible for the fine. The General Court endorsed such specific increase based on deterrence, limited to the former parent company. The General Court considered that the need for deterrence is assessed at the time of the decision and not at the time of the infringement.

References:
Case T-40/10 Total and Elf Aquitaine v Commission, paras 350-357

Legal maximum

Pursuant to Article 23(2) of Regulation No 1/2003, the final amount of the fine to be imposed on an undertaking cannot exceed 10% of the total turnover in the preceding business year of the undertaking participating in the infringement.

The General Court held in Saint-Gobain v Commission that the concept of 'undertaking' in Article 23(2) of Regulation No 1/2003 embraces all undertakings that form the economic unit. In such situation, the Commission would not need to establish in its decision the decisive influence exercised by the parent company on all other companies. It is for the undertaking to rebut the presumption that the parent company exercised decisive influence over the commercial policy of the subsidiary or subsidiaries involved in the infringement.

References:
Joined Cases T- 56/09 and T-73/09 Saint-Gobain and Others v Commission, para 450

Joined Cases T- 472/09 and T- 55/10 SP v Commission, paras 309-323

The General Court in Esso, Sasol, RWE, RWE Dea v Commission recently revoked a decision of the Commission to apply the same ceiling to a subsidiary solely liable for a period of an infringement and to its parent company which was found jointly and severally liable with the subsidiary for the most recent period of the infringement. The General Court capped the fine of the subsidiary for the part of the infringement it was exclusively liable for to 10% of its own turnover in the last full business year preceding the adoption of the decision.

References:
Case T-541/08 Sasol and others v Commission, paras 455-463

The Court of Justice in YKK v Commission held that the 10% ceiling must be applied to the subsidiary's turnover relating to part of the infringement committed before the acquisition while the 10% ceiling must be applied to the parent company's turnover for the unlawful act committed after the acquisition. For the European Court, this approach is consistent with the fact that an undertaking cannot be held to be responsible for infringements committed independently by its subsidiaries before the date of their acquisition. In the Prestressing steel cartel the infringing subsidiary company turnover had also been used by the Commission in circumstances where the parent company had not been held jointly and severally liable for the fine, see further, SLM v Commission, et al, for the General Court appeal in the Prestressing steel cartel.

References:
Case C-408/12 P YKK and Others v Commission, para 97

Case COMP/38.344 Prestressing Steel

Joined Cases T-389/10 SLM v Commission and T-419/10 Ori Martin v Commission, et al

Where the competition law infringement of a trade association relates to the activities of its members, the fine must not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.

Paragraph 37 of the 2006 Fining guidelines

The 2006 Fining Guidelines set out the general methodology for the setting of fines, however in specific cases, for example to achieve deterrence, the Commission may depart from such methodology. For example, AC-Treuhand v Commission, the General Court ruled that the Commission was entitled to depart from the 2006 Fining Guidelines in the case of a consultancy firm that was held liable for infringements of Article 101 TFEU but where no market activities were affected by the

infringements, so that the value of the consultancy's sales of services linked directly or indirectly to the infringement was nil. In such circumstance, the Commission was correct in setting the amount of the fine as a lump sum but still within the upper limit set out in Article 23(2) of Regulation No 1/2003.

References:
Case T-27/10 AC-Treuhand v Commission, paras 299-305

When dealing with an association of undertakings, the Commission also decided to depart from the methodology of the 2006 Fining Guidelines on the basis of paragraph 37. The Commission determined the fine in abstract relying on several general criteria. The General Court in ONP v Commission deemed that it would have been preferable for the Commission to set out some figures in its decision to provide an indication of how the different parameters were considered when determining the amount of the fine. However, the Commission had not infringed its duty to state reasons.

References:
Case T-90/11 ONP and Others, paras 354-357

In June 2014, the Commission made use of this provision in its Canned mushrooms case. The Commission considered that it was appropriate to exercise its discretion when setting the fine for a very small independent company that did not belong to a large group of companies, while ensuring an appropriate level of deterrence. For these reasons, the Commission granted an additional 10% reduction to this undertaking.

References:
Case AT/39.965 - Mushrooms, para 73

EU fining principles

The Commission is required to observe certain general principles of EU law when setting fines (as confirmed by the General Court in Panasonic v Commission). These principles apply outside the Fining Guidelines. Many appeals against fines have raised arguments that the Commission failed to comply with such general principles of EU law when setting the fine. The key general principles are discussed below.

References:
Case T-82/13 Panasonic and MT Picture Display v Commission

Equal treatment

The principle of equal treatment requires that, when setting fines, the Commission must not apply a different treatment to comparable situations, or treat different situations in the same manner in the absence of an objective justification.

The EU Courts have reduced the fine where the Commission has not complied with the principle of equal treatment including in such situations as where:

- the Commission had not taken into account the fact that two cartel participants had only been involved in one aspect of the cartel, whereas other parties had been involved in multiple elements

  References:
  Case T-11/05 Wieland-Werke and Others v Commission

  Case T-18/05 IMI and Others v Commission

  Case T-19/05 Boliden and Others v Commission

  Case T-20/05 Outokumpu and Luvata v Commission

  Case T-21/05 Chalkor v Commission

  Case T-25/05 KME Germany and Others v Commission

- the increase for deterrence did not take into account the difference in size in the undertakings involved in the cartel

  References:
  Case C-266/06 Evonik Degussa GmbH v Commission

- the undertakings have made similar contributions in the context of leniency but the Commission has applied unequal reductions

  References:
  Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 Bollore and Others v Commission

- under paragraph 24 of the 2006 Fining Guidelines, the basic amount is multiplied by the number of years of participation in the infringement. When the relevant period is less than six months, it will be counted as half a year. Conversely, a period of more than six months but shorter than one year is counted as a complete year. However, the General Court's judgment in Gigaset v Commission held that the rounding (to the higher or lower number) of the relevant time period of the different undertakings in one and the same infringement is incompatible with the principle of equal treatment.

  References:
  Case T-395/09 Gigaset, v Commission, para 140-150

  Case T- 384/09 SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie v Commission

  Case T- 391/09 Evonik Degussa and AlzChem v Commission

  Case T- 395/09 Gigaset v Commission

Proportionality

The principle of proportionality requires that the Commission should not impose fines that are disproportionate to the aim of ensuring compliance with competition law and the seriousness of the infringement.

Arguments based on proportionality are frequently raised in appeals against cartel fines and are rarely successful. One successful plea on the ground of proportionality was in the Greek Ferries case where the General Court reduced the fine in light of the relative scope of the infringement and the presence of each ferry on the market affected by the infringement.

References:
Case T-56/99 Marlines SA v Commission

Case T-59/99 Ventouris Group Enterprises SA v Commission

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Case T-61/99 Adriatica di Navigazione (Adriatica) v Commission

Case T-65/99 Grammes Strinzi Naftiliaki AE (Strinzi Lines Shipping) v CommissionCase T-66/99 Minoikes Grammes ANE (Minoan Lines) v Commission

In addition, the application of this rounding approach (see above) can lead to a breach of the principle of proportionality. In particular, when the duration of an infringement found against an undertaking is rounded to six months when the actual participation of the undertaking in the infringement was only four months.

References:
Case T-391/09 Evonik Degussa GmbH v Commission, para 136

Good administration

The principle of good or sound administration requires the Commission to undertake a careful examination of the evidence in the overall legal and procedural context.

In the Archer Daniels Midland case, the Court of Justice found that the principle of sound administration had been breached where the Commission incorrectly applied the 1998 Fining Guidelines.

References:
Case C-397/03 P Archer Daniels Midland Company and Archer Daniels Midlands Ingredients Limited v Commission

Double jeopardy

The principle that a person should not incur multiple fines in respect of the same conduct (Ne bis in idem) has often been raised in circumstances where an undertaking has also been fined by competition authorities outside the EU.

The Court of Justice has laid down specific conditions that need to be met in order to rely on the principle of double jeopardy. These are that:

References:
Case C-204/00 Aalborg Portland and Others v Commission

- the penalty must be imposed in respect of the same facts as the prior imposition of a penalty
- the offenders must be the same, and
- the legal interests protected by the penalty must be the same.

Non-retroactivity

The principle of non-retroactivity requires that penalties must correspond with those in force at the time that the unlawful conduct was committed.

The principle has had a difficult application in appeals against EU cartel fines.

For example in the Pre-Insulated Pipe cartel appeal the Court of Justice rejected an argument that the Commission's application of the 1998 Fining Guidelines contravened the principle even though such guidelines were not adopted at the time the relevant infringements were committed. The Court of Justice held that the fines were consistent with the relevant legal framework in force at the time of the infringements.

References:
Cases T-9/99, T-15/99, T-16/99, T-17/99, T-21/99, T-23/99, T-31/99, Dansk Rorindustri and others v Commission

An undertaking has no legitimate expectation that the Commission will not impose fines in excess of those imposed in previous cases. Further, the General Court in Saint-Gobain v Commission held that it is irrelevant that the increase in the average level of fines resulting from the application of the 2006 Fining Guidelines followed a period during which other rules of conduct of general application were applicable and resulted in lower fine levels. In particular, when the Commission applied the rule of conduct set out at paragraph 38 of the 2006 Fining Guidelines (which states that those guidelines will be applied in all cases where a statement of objections is notified after 1 September 2006). Therefore an undertaking cannot rely on the principles of non-retroactivity of penalties and the protection of legitimate expectations to exclude the application of the 2006 Fining Guidelines, even if that choice led to the imposition of a larger fine than would have been imposed under the 1998 Fining Guidelines.

References:
Case C-397/03 P Archer Daniels Midland Company and Archer Daniels Midlands Ingredients Limited v Commission

Joined Cases T-56/09 and T-73/09 Saint-Gobain and Others v Commission, para 283

Inability to pay

Pursuant to the paragraph 35 of the 2006 Fining Guidelines, upon request from an undertaking, the Commission may take into account the specific social and economic context of an undertaking's inability to pay. There are two cumulative conditions in order to benefit of this provision: (i) an insuperable difficulty in paying the fine; and (ii) a specific social and economic context.

A reduction under paragraph 35 may be based on objective evidence that the imposition of a fine pursuant to the 2006 Fining Guidelines would 'irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value'.

The Commission has a very strict interpretation of these cumulative conditions and the General Court in Donau Chemie followed accordingly in its interpretation. A difficult financial situation or deficit position or even the risk of bankruptcy is not sufficient to satisfy the first condition.

As for the second condition, it could be fulfilled according to the General Court if the payment of the fine were to lead to an increase in unemployment or deterioration in the economic sectors upstream and downstream.

The Commission also enjoys a broad discretion. However, the General Court specified that use of the word 'may' in paragraph 35 of the 2006 Fining Guidelines does not mean that the

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Commission applies this paragraph as it pleases. Should all the conditions set out in paragraph 35 be fulfilled, the Commission cannot refuse the application of this provision.

References:
Case T-406/09 Donau Chemie v Commission, paras 285-292 and 299-304

In order to benefit of such provision, the undertaking needs to make such request during the administrative stage to the Commission. A belated initial request to the General Court is not accepted.

References:
Case T-27/10 AC-Treuhand v Commission, para 311-312

The Commission is increasingly being faced with claims of inability to pay and each case is assessed on the basis of company-specific and objective data. In relation to the Bathroom Fittings cartel the Commission reduced fines on three undertakings by 50% and two by 25% due to inability to pay. Ten companies argued for a reduction on such grounds.

The Commission has also reduced fines of three of the seventeen companies fined in the Prestressing steel cartel. The Commission granted reductions of, respectively, 25%, 50% and 75% of the fine that would otherwise have been imposed, this was the first time that arguments based on inability to pay had succeeded, However, the General Court in SLM v Commission was later to reject the basis for the decision, finding that the companies had failed to demonstrate that having to pay the fine would have resulted in their assets losing all value. Likewise, in the 2014 decision in the Envelopes cartel, the Commission reduced the fines of two companies due to inability to pay.

References:
Joined Cases T-389/10 SLM v Commission and T-419/10 Ori Martin v Commission, et al

Case AT/39.780 - Envelopes

Who is liable to pay fines?

The question of who is liable to pay fines can impact on the magnitude of fines. For example, attribution of liability to a parent for the acts of a subsidiary or to a successor company in respect of the acts of a target company prior to the date of acquisition can affect such matters as:

References:
Case C-408/12 P YKK and Others v Commission

- the application of the 10% turnover ceiling (ie whether this is calculated by reference to the subsidiary or group)—see above, Legal Maximum
- increases for repeat infringements committed by the relevant undertaking
- increases for deterrence to take account of a larger corporate undertaking
- determining jurisdiction in private litigation (ie where it is necessary to identify an 'anchor' defendant with a sufficient nexus to the jurisdiction where proceedings are initiated).

Parental company liability and single economic units

According to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The Court has also deemed that the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal. It is also settled case-law that where a parent company has a 100% shareholding in a subsidiary which has EU competition law, the parent company can exercise a decisive influence over the conduct of the subsidiary (and there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence). When the shareholding held by the parent company is less than 100%, there is no such presumption. However, even a shareholding of 57% in one subsidiary can lead to a single economic unit when the parent company exercises sufficient decisive influence on the subsidiary. Several factors may be taken into account by the Commission in determining whether a parent company exercises decisive influence over a subsidiary.

References:
Case C-90/09 P General Química SA and Others v Commission, para 34

Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA, para 40

Case C-97/08 P Akzo Nobel and Others v Commission, para 60

Case T-395/09 Gigaset v Commission, paras 15-98 and 228-234

Parent company involvement in management of the subsidiary and such elements as transactions requiring approval of the parent company, cross-board representation and the parent's involvement in subsidiary profits, dividends and appointment, dismissal and terms of remuneration of key management of the subsidiary tend to suggest decisive influence over the subsidiary.

References:
Case C-97/08 P Akzo Nobel NV and Others v Commission

Case T-24/05 Alliance One International, Inc., Standard Commercial Tobacco Co., Inc. and Trans-Continental Leaf Tobacco Corp. Ltd v Commission

In terms of the level of fine imposed on a parent company, the Court of Justice clarified in P Total v Commission that any liability imputed cannot be greater than that imposed on a subsidiary where that liability derives solely from the illicit activities of the subsidiary. This must also be reflected in any adjustment made following actions brought before the General Court (ie where parallel applications sharing the same goals are brought by both the parent and implicated subsidiary)—underscoring the fact that the General Court must, in such circumstances, have regard to the outcome of a parallel action brought by the subsidiary when it is assessing the extent of the parent's purely derivative liability.

References:
Case C-597/13 P Total v Commission

See further, The construct of parental company liability.

Successor companies

The Commission adopts the view that where the owner of the direct participant in an infringement has changed between the time of the infringement and the Commission's decision, the original owner will remain liable provided that it continues to have an independent existence.

A purchaser/successor may attract liability for infringements committed by a company prior to its taking over that company if the original entity responsible for the infringement no longer has a separate legal personality. If the entity originally responsible for the infringement is amalgamated within another undertaking, that undertaking may be liable for the infringement for the total period of the infringement—though noting comments above in relation to the recent YKK judgment.

As highlighted by the Court of Justice in Commission v Parker Hannifin, where an undertaking acquires control of another through an asset purchase (as opposed to a share purchase of a legal company), the same principle applies, although the analysis will be far more complicated.

References:
Case C-434/13 P Commission v Parker Hannifin Manufacturing (formerly Parker ITR) and Parker-Hannifin

See further, The economic continuity principle.

Trade associations

When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association. After the Commission has required payment on this basis, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the relevant market. However, the Commission shall not require payment from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case. The financial liability of each undertaking in respect of the payment of the fine must not exceed 10% of its total turnover in the preceding business year.

References:
Case 19/77 Miler v Commission

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