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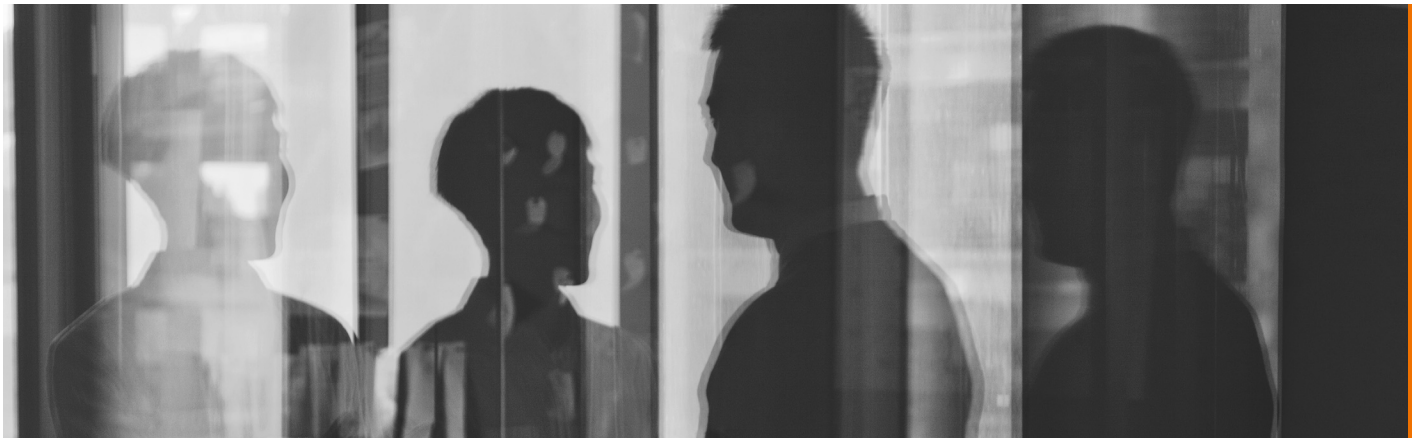

Cartels & Leniency 2020

13th Edition

ISBN 978-1-83918-008-8
ISSN 1756-1027

Published by
global legal group
59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
www.iclg.com

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Printed by
Stephens and George
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Cover Image
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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
International Comparative Legal Guides

Flexibility and Discretion in the EU Commission's Cartel Fines Calculation: Recent Decisions and Judgments


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Introduction

Regulation 1/2003 of 16 December 2002 on the implementation of the EU competition rules provides that in setting the amount of a fine for infringement, the European Commission ("Commission") shall have regard to both the gravity and the duration of the infringement and that, in any event, the fine shall not exceed 10% of the sum of the total turnover of each cartel participant. Within those limits, the Commission enjoys a considerable margin of discretion. The Commission explains, in its 2006 guidelines on the method of setting fines for breach of the EU competition rules ("2006 Fining Guidelines"), that to ensure compliance with the competition rules fines should have a sufficiently deterrent effect. Not only should the fine sanction the cartel participants, it should also deter any other companies from engaging in, or continuing, cartel conducts. To achieve this deterrence objective, the Commission considers it appropriate to rely on the sales value, duration and gravity of the infringement as indicators of the economic importance of the infringement, the economic weight of each participant and the order of magnitude of the fine. To achieve deterrence, the Commission may also decide to adjust upward or downward the amount of the fine obtained on application of its methodology or depart from its methodology altogether.

While it is settled case law that the calculation of cartel fines is not a precise mathematical exercise, recent Commission decisional practice and recent European court cases shed light on the Commission's margin of discretion when applying the 2006 Fining Guidelines. This article focuses on examples of recent Commission decisions and European courts' judgments.

The Commission's Methodology for Calculating Cartel Fines

Regulation 1/2003 provides that in calculating cartel fines, the Commission must have regard to both the gravity and the duration of the infringement and that, in any event, individual fines cannot exceed 10% of an undertaking's total worldwide turnover in the financial year preceding the Commission's decision. Within this legal framework, the Commission sets out in the 2006 Fining Guidelines a two-step methodology that it uses when setting a cartel fine. First, the Commission determines the basic amount of the fine for each party involved in the infringement based on sales relating to the infringement, and the duration and gravity of the infringement. Second, the Commission adjusts the basic amount upward or downward taking into account aggravating and/or mitigating factors, the 10% legal ceiling, immunity/leniency reductions, other reductions (*e.g.*, in the event of a settlement) and, in exceptional cases, the inability of an undertaking to pay.

First Step: Determination of the Basic Amount of the Fine

As a starting point, the Commission determines, for each party to the cartel, the basic amount of the fine by reference to the value of sales of goods or services to which the infringement relates, directly or indirectly, in the relevant geographic market within the EEA – normally during the last full business year of the undertaking's participation in the infringement. The Commission sets a proportion of that value of sales at a level of up to 30% depending on the gravity of the infringement. The Commission determines the gravity based on all circumstances of the case, including, for example, the nature of the infringement, the combined market share of all undertakings involved, the geographic scope of the infringement and whether the infringement has been implemented. The proportion of the value of sales is then typically multiplied by the number of years of participation in the infringement. In addition, in cartel cases, the Commission includes in the basic amount of the fine an additional amount of between 15% and 25% of the value of sales irrespective of the duration of the participation in the infringement, as, deterrent, also referred to as an "entry fee".

The Commission has a certain margin of discretion when determining the basic amount of the fine. For example, it may use a proxy on the value of sales actually made, as it did, *e.g.*, in the *Euro Interest Rate Derivatives* or EIRD cartel case. This case was a hybrid case combining the settlement procedure for some of the cartel participants and the standard procedure for the non-settling undertakings. As regards the settling undertakings, the Commission did not use the sales made by them during the last full business year of their participation in the infringement as a proxy, but rather found it more appropriate to base the annualised sales proxy on the value of sales actually made by the undertakings during the months corresponding to their respective participation in the infringement. The Commission determined the annual value of sales for all settling undertakings on the basis of cash flows that each undertaking received from its respective portfolio of EIRDs entered into with counterparties located in the EEA, discounted by a uniform factor to take account of the particularities of the EIRD industry applied equally to all settling undertakings (Case AT.39914, *Euro Interest Rate Derivatives*, Commission settlement decision of 4 December 2013,

paras. 89–91). Société Générale, one of the settling parties, contested the Commission's approach on appeal arguing that the method used did not reflect the respective positions of the banks. In the course of the appeal, the first ever brought against a settlement decision, the Commission reviewed the settlement decision and reduced Société Générale's fine as a result (Case T-98/14, *Société Générale v Commission*, withdrawn, and the amended Commission settlement decision of 6 April 2016). By contrast, in the context of the standard procedure in the same cartel proceedings, the Commission rejected all claims put forward by the addressees of the decision that the proxy chosen for the value of the sales had been insufficiently explained, that it was too wide in scope, and inappropriate. The Commission also rejected claims that the application of a uniform discount factor for all undertakings on the basis of a proxy for the value of sales was arbitrary and/or insufficient. The Commission explained that for the "*exercise of the rights of defence, the Commission is not required to explain exactly what amount of the fine will be and in particular what discount it intends to apply for the value of sales or the basic amount* [...]", and "*[i]n any event, the Statement of Objections is transparent about the Commission's intention*" (Case AT.39914, Euro Interest Rate Derivatives, Commission prohibition decision of 7 December 2016, paras. 709–710; on appeal before the General Court, Cases T-105/17, *HSBC Holdings v European Commission;* T-106/17, *JP Morgan Chase v European Commission;* T-113/17, *Crédit Agricole and Crédit Agricole Corporate and Investment Bank v Commission*, not yet decided).

In the *Yen Interest Rates Derivatives* cartel appeal, the Court of Justice recalled that the value of sales of the products to which the infringement related may prove unsuited to the particular circumstances of a case to set the basic amount of the fine; this is particularly the case when a company found liable for facilitating a cartel does not generate any turnover in the relevant product markets (C-39/18 P, *Commission v Icap* and Others, judgment of 10 July 2019, para. 27). In such a situation, the Commission may be justified to depart from its methodology, in accordance with paragraph 37 of the 2006 Fining Guidelines, in setting a basic amount of the fine. The Commission observed in its decision against Icap that since Icap was an operator active on the brokerage services markets, and not on the interest rate derivatives market, the Commission could not substitute brokerage fees for those for the prices of Japanese Yen interest rate derivatives in determining the value of sales and setting the fine, as such substitution would not reflect the gravity and nature of the infringement. The Commission considered necessary to depart from its general fining methodology to calculate Icap's fine. Both the General Court and the Court of Justice, however, concluded that the Commission failed to explain the weighting and assessment of the factors taken into account (T-180/15, *Icap and Others v Commission*, judgment of 10 November 2017; upheld on appeal in Case C-39/18 P, *Commission v Icap and Others*, judgment of 10 July 2019).

Second Step: Adjustments to the Basic Amount of the Fine

In a second step, the Commission may increase or reduce the basic amount of the fine as a result of an overall assessment of all circumstances of the case. For example, the Commission may increase the amount of the fine in cases with aggravating circumstances, such as recidivism; acting as the (ring)leader or instigator of a cartel; refusal to cooperate with the Commission; and/or obstruction of the investigation. In the *Marine Hoses* cartel appeal, the General Court confirmed that "*the role of 'ringleader' (leader) played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the amount of the fine, in so far as the undertakings which played such a role must therefore bear special responsibility in comparison with the other undertakings*" (Case T-146/09 RENV, *Parker Hannifin v Commission*, judgment of 14 July 2016, para. 98). However, in that case, the court found that the Commission wrongly applied a 30% increase to the fine imposed on Parker-Hannifin on account of the leadership role of its subsidiary ITR SpA due to the lack of links between the two companies during the relevant period.

The basic amount of the fine may be reduced as a result of mitigating circumstances such as, for example, an effective cooperation with the Commission outside the scope of the Leniency Notice or legal obligations to do so, evidence of termination of the infringement, evidence that the infringement was committed by negligence, and/or evidence of substantially limited involvement. The General Court recently confirmed that, in order for an undertaking to claim the benefits of such reduction, "*it must establish that its cooperation went beyond its legal obligation to cooperate and was of objective use to the Commission, which was able to rely, in its final decision, on evidence which the applicant submitted to it in the context of its cooperation, without which the Commission would not have been in a position to penalise the infringement in question in whole or in part*" (Case T-701/14, *Niche Generics Ltd v Commission*, judgment of 12 December 2018, para. 476 and case-law cited; appeal pending before the Court of Justice, Case C-164/19 P).

Although the 2006 Fining Guidelines indicate that the lists of aggravating and mitigating circumstances are non-exhaustive, the Court of Justice seems to hesitate in widening the scope of mitigating factors. In the *Bathroom Fittings* cartel appeal, the Court of Justice considered that the exclusively passive or "follow-my-leader" role of a company listed as a mitigating factor in the old 1998 Fining Guidelines no longer constituted a mitigating circumstance according to the 2006 Fining Guidelines and that in order to be given the benefit of mitigating circumstances, the company was required to prove that it had refrained from adhering to the offending agreements, which it failed to do in this case (Case C-604/13 P, *Aloys v Commission*, judgment of 26 January 2017, para. 63). Similarly, the Commission has repeatedly and publically stated that compliance programmes cannot be seen as a mitigating factor that would justify a fine reduction.

Within the scope of its margin of discretion, the Commission is under no obligation to adjust the basic amount of fine on account of aggravating or mitigating circumstances. For example, the Commission found that there were no aggravating or mitigating circumstances in each of the *Cathode Ray Tubes*, *Window Mountings*, *Animal Feed Phosphate*, *Aluminum Fluoride*, *International Removal Services*, and *Euro Interest Rate Derivatives* cartel cases, which was upheld by the European courts on appeal.

With regard to mitigating circumstances, the General Court recently restated the case law in the *Cathode Ray Tubes* cartel appeal according to which "*the grant of a reduction of the basic amount of the fine in respect of mitigating circumstances is necessarily linked to the circumstances of the particular case, which may lead the Commission not to grant that reduction to an undertaking which is party to an unlawful agreement. Recognition of a mitigating circumstance, in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement, cannot result in the fine imposed being deprived of deterrent effect and the effectiveness of Article 101(1) TFEU being undermined*" (Case T-104/13, *Toshiba Corp. v Commission*, judgment of 9 September 2015, para. 201 and the case-law cited; upheld on appeal by the Court of Justice in Case C-623/15 P, judgment of 18 January 2017). The court further stated that the Commission is "*under no obligation systematically to take account separately of each of the mitigating circumstances listed or to grant a further reduction in the basic amount of the fine as a matter of course once an undertaking has put forward evidence of the existence of one of those circumstances. The appropriateness of any reduction of the amount of the fine in respect of mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances*" (para. 202 and the case law cited; upheld on appeal by the European Court in Case C-623/15 P, judgment of 18 January 2017). Furthermore, in *Lundbeck*, the General Court held that the Commission is not required to grant a reduction of the fine even if the infringements had been committed as a result of negligence and explained that "*[a]s the wording of point*

29 of the 2006 Guidelines confirms, the Commission has a discretion in that regard, taking account of all the circumstances of the case. Accordingly, although the circumstances set out in the Guidelines are certainly among those which may be taken into account by the Commission in a specific case, it is not required, where an undertaking puts forward evidence capable of indicating the presence of one of those circumstances, to grant a further reduction as a matter of course without performing an overall analysis. The appropriateness of any reduction in the fine in respect of mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances" (Case T-472/13, *Lundbeck v Commission*, judgment of 8 September 2016, para. 841; appeal pending before the Court of Justice, Case C-591/16 P).

Within the limit of the 10% legal ceiling, the Commission may further apply a specific increase for deterrence. For example, the Commission may increase the fine to be imposed on cartel participants which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount (Point 30 of the 2006 Fining Guidelines).

To the amount of fine thus obtained, and after application of the 10% fine ceiling, the Commission applies the adjustments as applicable under the 2006 Leniency Notice on immunity from fines and reduction of fines in cartel cases ("2006 Leniency Notice") according to which companies which do not qualify for full immunity from fines may still benefit from a reduction of fines which the Commission would have otherwise imposed on them. In order to qualify for a reduction, the cartel participant must provide the Commission with evidence of "*significant added value*" to the evidence the Commission already possesses and which strengthens the Commission's ability to prove the alleged infringement and must have terminated their participation in the alleged cartel. The first company to meet these conditions is granted a reduction of 30% to 50%, the second company to meet these conditions is granted a reduction of 20% to 30% and subsequent companies to meet these conditions are granted a reduction of up to 20% (Point 26 of the 2006 Leniency Notice).

Where a cartel case is suitable for settlement under the 2008 Commission Notice on the conduct of settlement procedures in cartel cases ("2008 Settlement Notice"), the Commission applies a further 10% reduction to the parties that have come forward and admitted their involvement in the cartel. Provided that the cooperation offered by a company qualifies under both leniency and settlement procedures, it can be cumulatively rewarded. Since the introduction of the settlement procedure in 2008, the Commission has issued 29 settlement decisions for a total of 66 cartel cases, five were hybrid cases combining the settlement procedure for some of the cartel participants and the standard procedure for the non-settling parties (*Canned Mushrooms*, *Steel Abrasives*, *Euro Interest Rates Derivatives*, *Yen Interest Rates Derivatives*, *Animal Feed Phosphates* and *Trucks*). By contrast, in the Animal Feed Phosphates cartel appeal, the Court of Justice found that the Commission correctly imposed a higher fine on Timab Industries as the company withdrew from the settlement procedure, thereby losing the benefit of a 52% fine reduction during the settlement procedure. This was a "parallel" hybrid case where the Commission's decision against Timab Industries under the normal procedure was adopted at the same time as the settlement decision against the other cartel participants. The Court of Justice held that Timab Industries could not rely on any legitimate expectation that the scope of the case or the contemplated fine for the company that opted out of the settlement would remain the same as discussed and disclosed during the settlement procedure (Case C-411/15 P, *Timab Industries v Commission*, judgment of 12 January 2017, paras 135–138).

In exceptional cases, the Commission may, at the request of a company, take into account the company's "*inability to pay in a specific social and economic context*". The Commission will not grant any such reduction on the mere finding of an adverse or loss-making financial situation, such as a risk of bankruptcy or liquidation. Rather, a reduction for inability to pay can be granted solely on the basis of objective evidence that the imposition of the fine as calculated would "*irretrievably jeopardise*" the "*economic viability*" of the undertaking concerned and "*cause its assets to lose all their value*" (Point 35 of the 2006 Fining Guidelines as recalled in Case T-426/10 and others, *Moreda-Rivere Trefilerías et al. v Commission*, judgment of 2 June 2016 [in FR], paras. 491–495 and case law cited; upheld on appeal by the Court of Justice in Case C-53/15 P and others). In the *Car Battery Recycling* appeal, the General Court upheld the Commission's decision to reject the reduction of the fine on account of inability to pay. The court observed that "*to take account of the economic situation of an undertaking concerned, and in particular of its financial capacity, would be tantamount to conferring unfair competitive advantages on the undertakings least well adapted to market conditions*" and added that "*the fact that the fine causes financial difficulties does not justify a reduction on the ground that it is not commensurate with the gravity or the duration of the infringement*" (Case T-222/17, *Recylex and Others v Commission*, judgment of 23 May 2019, paras. 165–166; appeal pending before the Court of Justice, Case C-563/19 P *Recylex and Others v Commission*).

Departure From the 2006 Fining Guidelines

The Commission may exercise its margin of discretion to depart from its methodology where the particularities of a given case or the need to achieve deterrence in a particular case justify so or where the case justifies departing from the 30% proportion of the value of sales limit explained in the section here above (Point 37 of the 2006 Fining Guidelines).

Since the publication of the 2006 Fining Guidelines, the Commission has exercised its discretion to apply Point 37 in just under 20 cases. Typically, the Commission has applied Point 37 to reduce the amount of the fine, in view of the specific circumstances of a case. This was the case, for example, in the *International Removal Services*, *Airfreight*, *Calcium Carbide*, *Mountings for Windows and Window Doors*, *Ordre National des Pharmaciens*, *Shrimps*, *Paper Envelopes*, *Steel Abrasives*, *Polyurethane Foam*, *Bearings*, and *Mushrooms* cases. In limited cases, the Commission applied Point 37 to impose a higher fine than it would have otherwise imposed in order to achieve deterrence. This was the case for example in the *Fentanyl*, *Perindopril*, *Citalopram*, *Power Transformers* and *Car Battery Recycling* cases. However, as the Commission pointed out in *Steel Abrasive*: "*point 37 does not serve a general deterrence purpose. It is rather applied in the context of a particular case, in order to achieve specific deterrence or in view of the particularities of a given case. For this reason point 37 is applied only in exceptional circumstances*" (Case AT.39792, *Steel Abrasive*, Commission decision of 25 May 2016, para. 221).

The European courts recently confirmed that, when departing from the general methodology, the Commission must state its reasons adequately and all the more rigorously (T-95/15, *Printeos and Others v Commission*, judgment of 13 December 2016, para. 48, and reiterated in Cases T-180/15, *Icap and Others v Commission*, judgment of 10 November 2017, para. 289, upheld by the Court of Justice in C-39/18 P; T-222/17, *Recylex v Commission*, judgment of 23 May 2019, para. 120 and T-433/16, *Pometon v Commission*, judgment of 28 March 2019, para. 338).

In the recent *Steel Abrasives* cartel appeal, the General Court reduced the amount of the fine imposed on Pometon by 40% because the Commission failed to state its reasons adequately when adjustments were made to the basic amount of the fine under Point 37. The Commission had applied a reduction rate in Pometon's case that was distinctly lower than the rate applied to the other parties. The case concerned a hybrid cartel procedure where the Commission first reached a settlement decision with four settling parties in April 2014 and then, separately, fined Pometon S.p.A. under the standard procedure two years later. The General Court

stated that "*where the Commission decides to depart from the general methodology set out in the Guidelines for the calculation of fines, the reasoning relating to the amount of such fine must be all the more rigorous as point 37 of the said Guidelines confines itself to a vague reference to the 'particularities of a given case' and thus leaves a wide margin of discretion to the Commission to proceed, as in this case, with an exceptional adjustment of the basic amounts of the fines of the undertakings concerned*" (T-433/16, *Pometon v Commission*, judgment of 28 March 2019, para. 338 and case law cited [free translation from French]; appeal pending before the Court of Justice, Case C-440/19 P). The General Court added that in order to determine the level of an exceptional adjustment of the basic amount of the fine, the Commission is in principle bound to apply the same criteria and same methodology to all parties (para. 340). In the case of *Pometon*, the General Court considered that the Commission's decision did not provide sufficiently precise information on the difference between the reduction rate granted to it and that granted to the other cartel participants (paras. 349 and 351) and noted that the mere reference that "*the value of sales of the cartelised product represented a high proportion of their total turnover and that there were differences between the settling parties with regard to their individual participation in the infringement*" was ambiguous wording on the part of the Commission (para. 353 [free translation from French]).

By contrast, the General Court recently found in the *Car Battery Recycling* cartel appeal that the Commission set out its reasons to apply a 10% increase to the fine imposed on Recylex under Point 37 sufficiently clearly and to the requisite legal standard. The Commission had justified the increase in the fine on the basis that the cartel concerned a purchase cartel where the value of purchases in itself was unlikely to be an appropriate proxy for reflecting the economic importance of the infringement. The Commission noted that, in the case of a cartel whose objective it is to reduce purchase prices or to prevent their increase, the more successful it is, the lower the amount of the value of purchases and thus the amount of the fine. The General Court considered that "*the statement of reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure*" (Case T-222/17, *Recylex v Commission*, judgment of 23 May 2019, para. 121 and case law cited). The court further found that the Commission was entitled, without contradicting itself, to decide that it was not necessary to apply a multiplier for deterrence on the basis of Point 30 of the Fining Guidelines, but that deterrence warranted a 10% increase in the amount of the fine under Point 37. Although Points 30 and 37 of the Fining Guidelines both relate to the objective of deterrence, the court noted that they do not take the same factors into consideration. While the first applies where the turnover of a party is particularly large, the second applies where justified by the particularities of a given case. The court noted that Point 37 is therefore broader in scope and covers particular situations going beyond those envisaged by Point 30 (para. 125).

In the *Yen Interest Rates Derivatives* cartel appeal, the General Court annulled in its entirety the fine imposed on Icap for facilitating the cartel and recalled that "*the Guidelines lay down a rule of conduct indicating the approach to be adopted from which the Commission cannot depart, in an individual case, without giving reasons which are compatible with, inter alia, the principle of equal treatment*", and stressed that "*[t]hose reasons must be all the more specific because point 37 of the Guidelines simply makes a vague reference to 'the particularities of a given case' and thus leaves the Commission a broad discretion where it decides to make an exceptional adjustment of basic amount of the fines to be imposed on the undertakings concerned. In such a case, the Commission's respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance*" (T-180/15, *Icap and Others v Commission*, judgment of 10 November 2017, para. 289 and case law cited). This case, again, concerned a hybrid cartel procedure where Icap was investigated under the standard procedure while all other parties to the cartel agreed to settle. As explained earlier, the Commission found it could not substitute brokerage fees for those for the prices of Japanese yen interest rate derivatives in determining the value of sales and setting the fine, as such substitution would not reflect the gravity and nature of the infringement. The Commission therefore considered it necessary to depart from the general methodology to set Icap's fine. The General Court held that the Commission's decision did "*not enable the applicants to understand the justification for the methodology favoured by the Commission, or the Court to verify that justification*" and did "*not provide the minimum information which might have made it possible to understand and ascertain the relevance and weighting of the factors taken into consideration by the Commission in the determination of the basic amount of the fines, in breach of the case law*" (para. 294). As a result, the General Court annulled in its entirety the fine imposed on Icap for facilitating the cartel. On appeal, the Court of Justice confirmed that although the Commission is not required to provide all figures relating to each of the intermediate steps relating to the method of calculation, it is nevertheless incumbent on it to explain the weighting and assessment of the factors taken into account (C-39/18 P, *Commission v Icap and Others*, judgment of 10 July 2019, para. 31). The court added that "*where the Commission departs from the 2006 Guidelines and applies another methodology specifically adapted to the particularities of the situation of undertakings that have facilitated a cartel, it is necessary, in view of the rights of the defence, that that methodology be disclosed to the interested parties, so that they can be put in a position to make their views known on the factors on which the Commission intends to base its decision*" (para. 35 and case law cited). The court concluded that the Commission failed to do so in this case.

Factors Potentially Limiting the Commission's Wide Margin of Discretion: Right to Be Heard; Legitimate Expectations; and Proportionality

While it is settled case law that the Commission has a duty to explain adequately the reasons of any departure from the methodology, the impact of the right of cartel participants to be heard, legitimate expectations and the proportionality of fines on the Commission's discretion is less clear.

Right to Be Heard

In the *Gas Insulated Switchgear* cartel appeal, the Court of Justice recently recalled that to fulfil its obligation to respect the right of companies to be heard the Commission is required to indicate expressly in the statement of objections that it will consider whether it is appropriate to impose fines and to set out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and whether it has been committed intentionally or negligently. However, once it has indicated the main factual and legal criteria on which it will base its calculation of the amount of the fines, the Commission is not required to specify the way in which it will use each of those elements in order to determine their level (C-180/16, *Toshiba v Commission*, judgment of 6 July 2017, para. 20). The Court of Justice added that when the Commission intends to depart from the 2006 Fining Guidelines "*it may be desirable that the Commission should specify the way in which it proposes to employ the imperative criteria of the gravity and the duration of the infringement when determining the amount of the fines, the fact remains that the right to be heard does not cover such elements related to the method for determining the amount of the fines*" (para. 33).

This case law was restated recently in *Recylex* where the General Court found that the factual and legal criteria on which the Commission based its calculation of the amount of the fines were all indicated in the statement of objections and that the Commission was not required to specify the conclusions it drew, in particular, from the fact that the cartel related to purchase prices rather than selling prices (Case T-222/17, *Recylex v Commission*, judgment of 23 May 2019, para. 133 and case law cited; appeal pending before the

Court of Justice, Case C-563/19 P, *Recylex and Others v Commission*). The court added that Recylex was able to submit its observations on the increase in the amount of the fine following a letter from the Commission informing Recylex of its intention to apply Point 37 of the 2006 Fining Guidelines and that Recylex's observations were duly taken into account in the prohibition decision (para. 133).

Legitimate Expectations

In the *Marine Hose* cartel appeal, the General Court recalled the case law according to which "*the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration, by giving him precise assurances, led him to entertain legitimate expectations* […] *Regardless of the form in which it is communicated, precise, unconditional and consistent information which comes from authorised and reliable sources constitutes such assurances* […]. *However, a person may not plead infringement of that principle unless he has been given precise assurances by the authorities* […]. *Moreover, only assurances which comply with the applicable rules may give rise to legitimate expectations*" (Case T-146/09, *Parker v Commission*, judgment of 17 May 2013, para. 217 and case law cited). In that case, the court rejected Parker's claim that the Commission breached the principle of the protection of legitimate expectations when calculating the fine imposed on them. The court noted that the Commission had not given Parker any assurances within the meaning of the case-law that the sales data that Parker provided would not be used to calculate the fine. Similarly, in the *Animal Feed Phosphates* cartel appeal, the Court of Justice held that Timab Industries could not rely on any legitimate expectation that the contemplated fine for the company that opted out of the settlement would remain the same as discussed and disclosed during the settlement procedure. (Case C-411/15 P, *Timab Industries v Commission*, judgment of 12 January 2017, paras. 135–138). In that case, the court explained that any economic operator to whom an institution has, by giving him precise assurance, caused to contemplate justified expectations may rely on the fundamental principle of the protection of legitimate expectations (para. 134). The court further explained that "*the Commission cannot, in the procedural stage preceding the adoption of the final decision, give any precise assurance as to any reduction of, or immunity from, fines and that the participants in the cartel cannot therefore entertain a legitimate expectation in that regard*" (para. 135 and case law cited).

Proportionality

Article 49(3) of the EU Charter of Fundamental Rights ("EU Charter") provides that the severity of penalties must not be disproportionate to the criminal offence. While this provision constrains the Commission's margin of discretion, the 2006 Fining Guidelines do not expressly refer to the proportionality of fines, although the detailed methodology could be said to be a reflection of the proportionality principle.

The European courts have examined the proportionality of fines. In the *Synthetic Rubber* cartel, the General Court merely stated that "*the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued … in the context of the calculation of fines, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified*" (Case T-38/07, *Shell v Commission*, judgment of 13 July 2011, para. 175).

Similarly, in the Smart Card Chip cartel appeal, the Court of Justice asked the General Court to examine the case again to assess the proportionality of the fine imposed. (Case C-99/17 P, *Infineon Technologies v Commission*, judgment of 26 September 2018, referred back to the General Court under Case T-758/14/RENV, pending). The General Court had found that the fine imposed on Infineon could be explained by Infineon's turnover which was much higher than that of the other parties punished and merely reflected the economic importance of its own participation in the cartel. The Court of Justice found that the General Court actually failed to review the proportionality of the amount of the fine imposed on Infineon in light of the small number of contacts in which Infineon effectively took part, "*such an examination was necessary in order to assess, in particular, whether the small number of those contacts warranted a reduction of the amount of the fine imposed on the appellant exceeding the 20% reduction granted to it on account of mitigating circumstances*" (para. 212).

Conclusion

Within the limits of Regulation 1/2003, the Commission enjoys a wide margin of discretion in setting the amount of a fine for cartel conduct with only very limited constraints based on the right to be heard, legitimate expectations and the principle of proportionality of fines. Recent judgments in the appeals in the *Yen Interest Rates Derivatives* cartel (Icap), the *Smart Card Ship* cartel (*Infineon*) and the *Steel Abrasives* cartel (*Pometon*) seem, however, to start drawing lines in the sand on the outer boundaries of the Commission's discretion.

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