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The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions between 2000 and 2017

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Abstract

There is a large amount of legal and economic literature on the fining policy of the European Commission for breaches of EU competition law. This paper takes a quantitative approach as it analyses the factors that have been considered by the Commission in establishing the level of the fine imposed on infringing undertakings in 110 cartel decisions, as well 11 abuse of dominance decisions, adopted between January 2000 and March 2017. The factors included in our analysis, which is summarized in two tables provided in an Annex, comprise *inter alia* the gravity of the infringement, the presence of aggravating and mitigating circumstances, the adoption of an entry fee, whether inability to pay was invoked, and in the case of cartels the presence of some form of leniency and/or the use of the settlement procedure. We also looked at whether these Commission decisions have been appealed to the General Court of the EU.

Our analysis shows that the Commission has made significant use of the aggravating and mitigating circumstances listed in the Fining Guidelines to adjust the basic amount of the fine. It also shows that the vast majority of cartel decisions (i.e., 88%) adopted by the Commission during the period analysed involved some form of leniency (immunity from fines and/or fines reduction). Our analysis also shows that the cartel settlement procedure, even though it only provides for a 10% reduction of the level of the fines, has been a significant success with the Commission concluding 22 settlements since 2010. Despite the success of the leniency and cartel settlement procedures, which should in theory have a dampening effect on fines, the level of fines has massively increased over the past couple of decades. As recidivism is still prevalent, it is questionable whether increasingly high fines are an effective remedy to deter undertakings from breaching competition law. Alternative mechanisms, such as personal sanctions, should perhaps be contemplated.

Keywords: Antitrust, EU Competition law, cartels, abuse of dominance, fines, sanctions, leniency, settlements.

JEL codes: K21, K42, L21

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I. Introduction

The fines imposed by the Commission on undertakings for EU Competition law infringements are the result of a complex assessment process in which the Commission takes a variety of factors into account. There is a large amount of legal literature on fines for breach of EU competition rules with a variety of views being expressed. While some consider that the significant increase in the level of fines adopted by the Commission over the past couple of decades is still not sufficient to ensure deterrence,[1] others argue that high fines are misguided[2] and that other punishment mechanisms, such as personal sanctions are needed to ensure deterrence.[3]

In this paper, we take a quantitative approach as we analyse the factors that have been considered by the Commission in establishing the level of the fine in 110 cartel decisions, as well as in 11 abuse of dominance decisions, adopted between January 2000 and March 2017. The factors included in our analysis, which is summarized in two tables provided in an Annex, comprise *inter alia* the gravity of the infringement, the presence of aggravating and mitigating circumstances, the adoption of an entry fee, whether inability to pay was invoked, and in the case of cartels the presence of some form of leniency and the use of the settlement procedure. We identify the number of times these factors have been considered by the Commission in its decisions and illustrate through examples how they are applied in practice. We also looked at whether these Commission decisions have been appealed to the General Court of the EU ("GCEU").

Our analysis shows that the Commission has made significant use of the aggravating and mitigating circumstances listed in the Fining Guidelines to adjust the basic amount of the

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1 See, e.g., E. Combe, C. Monnier, "Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement", (2011) *Antitrust Bulletin* 235, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431644; M. Mariniello, "Do European Union fines deter price-fixing?", (2013) 4 *Bruegel Policy Brief* 1, available at http://bruegel.org/wp-content/uploads/imported/publications/Do_European_Union_fines_deter_price-fixing-__English_.pdf; C. Marvão, G. Spagnolo, "Should Price Fixers finally go to Prison? - Criminalization, leniency inflation and whistleblower rewards in the EU", available at http://www.cresse.info/uploadfiles/2016_pa5_pa2.pdf; J. M. Connor, "Recidivism Revealed: Private International Cartels 1990-2009", (2010) Autumn *Competition Policy International* 101.

2 See, e.g., W. Wils, "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis", (2012) 35(1) *World Competition* 5, available at https://ssrn.com/abstract=1957088; I. S. Forrester, M. D. Powell, "Quinquennial Thoughts: 2009-2014" in B. E. Hawk (*ed.*), *International Antitrust Law and Policy*, Fordham Competition Law, 2014, 345.

3 See, e.g., W. Wils, " Is Criminalization of EU Competition Law the Answer?" in K. Cseres, M. P. Schinkel, F. O. W. Vogelaar (*eds*), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Edward Elgar Publishing, 2006, 78 *et seq.*; W. E. Kovacic, F. Wagner-von Paap, D. Zimmer, A. Stephan, "Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges", (2016) 2 *Concurrences Review* 14, available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2468&context=faculty_publications;
K. Kokkinaki, "An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle?", (2013) 6 *IES Working Paper* 1, available at http://www.ies.be/files/Working%20Paper%20Kokkinaki.pdf

fine. It also shows that the vast majority of cartel decisions (i.e., 88%) adopted by the Commission during the period analysed involved some form of leniency (immunity from fines and/or fines reduction). Our analysis also shows that the cartel settlement procedure, even though it only provides for a 10% reduction of the level of the fines, has been a significant success with the Commission concluding 22 settlements since 2010. This partly explains why the number of appeals filed to the GCEU has progressively decreased to reach a low point in 2016.[4]

Despite the success of the leniency and cartel settlement procedures, which should in theory have a dampening effect on fines, the level of fines has massively increased over the past couple of decades. Thus, the concern that the various fine discounts resulting from these procedures may have a negative impact on deterrence has not proven true given. In any event, as recidivism is still prevalent, it is questionable whether increasingly high fines are an effective remedy to deter undertakings from breaching competition law. We believe that reliance on additional measures, such as personal sanctions, should be contemplated by the Commission.

This paper is divided into six parts. Part II examines the methodology applied by the Commission for the calculation of fines imposed on undertakings that infringe Articles 101 and 102 TFEU, and analyses through multiple examples and statistical data the various factors allowing the Commission to adjust fines. Part III looks at the Leniency Notice and its application by the Commission, while Part IV examines the Cartel Settlement Procedure and its application by the Commission in a growing number of cases. Part V looks at the overall level of fines adopted by the Commission in cartel and abuse of dominance cases, and discusses whether fines are an effective means to deter infringement of EU competition law. Part VI concludes.

II. Description of the EU antitrust fining system

This section examines the methodology applied by the Commission for the calculation of fines imposed on undertakings that infringe Articles 101 TFEU. After briefly reviewing the relevant TFEU and secondary law provisions, it discusses the 2006 Fining Guidelines with references to the EU Courts' case law and the Commission's decisional practice when relevant.[5]

A. TFEU provisions

Article 103(1) TFEU instructs the Council to introduce "the appropriate regulations and directives to give effect to the principles set out in Articles 101 and 102". The rules adopted

[4] Court of Justice of the European Union, *Annual Report 2016*, at 206, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf

[5] This section is based on the decisions issued by the Commission in cartel and abuse of dominance cases between 1 January 2000 and 8 March 2017.

pursuant to Article 103(1) shall ensure compliance with the aforementioned articles "by making provision for fines" (Article 103(2)(a)).

B. Secondary EU legislation

Regulation 1/2003, which implements Articles 101 and 102 TFEU, entered into force on 1 May 2004.[6] Article 23(2), which is the sole legal basis for the imposition of fines by the Commission for anti-competitive conduct, provides that "the fine shall not exceed 10% of [the undertaking's] total turnover in the preceding business year" and that "in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement".

C. The Commission's fining guidelines

In this section, we discuss the Commission's fining guidelines, as well as the factors that can be used by the Commission to adjust the fines. We quantitatively assess the extent to which these factors have been used by the Commission in its decisions.

1. Introduction

Regulation 1/2003 does not impose any obligation on the Commission to publish further guidance regarding the method for setting fines and the CJEU made it clear that the Commission enjoys a "particularly wide discretion, as regards the choice of factors to be taken into account for the purposes of determining the amount of the fines".[7] However, to make its method for setting fines clearer and more transparent, the Commission published its 1998 Fining Guidelines,[8] which were replaced on 28 June 2006 when the Commission issued new Guidelines to which the analysis now turns.[9]

The 2006 Fining Guidelines set out a two-step methodology.[10] First, the Commission defines the *basic amount* of the fine, based on the gravity and duration of the infringement. Second,

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6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ [2003] L1/1.

7 Case C-289/04P *Showa Denco v Commission (Graphite Electrodes)* [2006] ECR I-5859, para 36. See also Case C -189, 202, 205-208, 218/02P *Dansk Rørindustry* [2005] ECR I-5425, para. 172.

8 Guidelines on the Method of Setting Fines imposed pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty [1998] OJ C9/3 ("1998 Fining Guidelines").

9 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210, 1.9.2006, p. 2–5 ("2006 Fining Guidelines", "2006 Guidelines on fines" or "The Guidelines"). They apply to every case for which an SO is notified after 1 September 2006, which is the date of publication of the Guidelines in the OJ.

10 This section draws on Damien Geradin et al., "The EU Competition Fining System", in Geradin & Lianos, *Research Handbook in European Competition Law, Volume II: Enforcement and Procedure*, Edward Elgar, 2013, at 328.

where applicable, it takes additional *adjustment factors* into account.[11] The two-step system introduced by the Guidelines is concisely presented in Figure 1 below.

[11] It has been held that "the first step rather corresponds to the assessment of the infringement as a whole, while the second rather reflects all possible elements which are specific to each undertaking" (H. de Broca, "The Commission revises its Guidelines for setting fines in antitrust cases", (2006) *Competition Policy Newsletter*, is. 3, 1, 2).

Figure 1: EU Commission's methodology for setting the level of antitrust fines

EU COMMISSION'S FINES SETTING METHODOLOGY

STEP 1: CALCULATING THE BASIC AMOUNT (BA)

COMPONENT A: VARIABLE AMOUNT (*VA*)

A1. Value of Sales (VS)

▪ Value pre-tax is taken. Both direct and indirect sales (product to be included in another product) are taken into account. Sales must have taken place during the last full business year of participation in the infringement (unless the figure is not representative).

▪ Only the sales of goods/services *related* to the infringement will be taken into account ("related" refers to "goods/ services", not to individual sales).

▪ Sales within the EEA are calculated. In cases of worldwide cartels, the Commission could instead take into account the value of sales in the overall relevant geographic market, then calculate market shares and then apply this share to the aggregate sales within the EEA (para 18 of the Guidelines).

A2. Percentage (P)

▪ For the calculation of the variable amount, a proportion of the value of sales will be taken. This percentage can range from 0-30% and is determined by the nature of infringement, its geographic scope, if it has already been implemented, and the combined market share of the parties in the relevant market.

A3. Number of years (Y)

▪ The proportion of the value of sales is then multiplied by the number of years the undertaking participated in the agreement. Periods of less than 6 months count as half a year and periods of more than 6 and less than 12 months count as a full year.

COMPONENT B: ENTRY FEE (*EF*)

It applies once and can be a percentage of 15% to 25% of the value of shares. It is always imposed on hard-core cartel participants and might be imposed on other infringers, too. The main purpose is to deter undertakings from even entering into illegal behaviour ("to try and see"). Factors to be taken into account to decide on the percentage level include the nature of the infringement, its geographic scope, if it has already been implemented and the parties' combined market share in the relevant market. It is not multiplied by the number of years.

$$BA = VA + EF = (VS \times P \times Y) + EF$$

STEP 2: ADJUSTING THE BASIC AMOUNT (BA)

A. ADJUSTING FACTORS RELATED TO THE INFRINGEMENT[11]

A1. AGGRAVATING FACTORS	A2. MITIGATING FACTORS
Ringleader or instigator.	Limited involvement and non-implementation of the infringement.
Refusal to cooperate (it can also lead to the imposition of separate fines for procedural infringements).	Cooperation with the Commission (except for leniency applications requirements).
Coercion or retaliatory measures.	Pressure exercised by other companies.
Infringement continues after the Commission's investigation.	Immediate termination of the infringement, as soon as the Commission intervenes.
Awareness of the illegal nature of the conduct.	Negligence.
Recidivism (the fine can be increased by 100%, for each past infringement, also NCA condemning decisions count; no period of limitation).	Introduction of a compliance policy.
Institutionalized nature of the infringement.	--
Significance of the industry influenced.	--
--	Public authorization/ encouragement.
--	Slow reaction/ excessive length of procedures.

B. ADJUSTING FACTORS UNRELATED TO THE INFRINGEMENT

B1. Increase for deterrence

▪ The Commission can increase the fine to be imposed on undertakings that have a particularly large turnover, beyond the sale of goods or services to which the infringement relates. The fine could also be increased to ensure that it exceeds the amount of gains improperly made as a result of the infringement (deterrence).

B2. 10% "ceiling"

▪ (Art 23(2) Reg 1/2003) If the fine, as adjusted to take into account aggravating/ mitigating circumstances and deterrence, exceeds 10% of the firm's total turnover in the preceding business year, the Commission will apply a reduction so as to no longer exceed the maximum fine (*NB:* the reduction occurs before the application of any further reduction under the Leniency Notice).

B3. Inability to pay defense

▪ Reduction of the fine is possible, when there is (i) a specific social and economic context and (ii) paying would irretrievably jeopardize the economic viability of the undertaking and cause its assets to lose all their value".

$$BA \times af_1 \pm af_2 = fine \leq 0.1 \times \text{total turnover}$$

af_1: adjusting factor (percentage),
af_2: adjusting factor (fixed sum).

[12] The light grey-shaded cells indicate a factor that is mentioned in the 2006 Guidelines, as opposed to a factor derived from the Commission's decisional practice.

2. First Step: Calculating the Basic Amount

The basic amount is derived by adding two sums: the "variable amount" and the "entry fee". The calculation of the "variable amount" involves three levels of assessment. First, the value of sales of the infringing undertaking must be determined. The Commission takes the value of the undertaking's sales of goods/services to which the infringement directly or indirectly relates.[13] Value is determined before VAT and other taxes.[14] Pursuant to the recent decisional practice of the Commission, captive sales should also be considered.[15] As regards the time period covered, only sales realized in the last full business year of participation in the infringement will be considered. However, the Commission may base its calculation on a different period to make the covered period more representative.[16] Generally, only sales within the EEA are considered.[17]

Second, the Commission only takes a proportion ("up to 30%") of that value to proceed with the calculation of fines. The gravity of the infringement must be examined to determine the proportion of the value of the sales that will be considered. The relevant assessment can be based on four factors (among others): "the nature of the infringement; the combined market share of all the undertakings concerned; the geographic scope of the infringement; and whether or the infringement has been implemented".[18] In the most serious infringements, such as hard-core cartels, the proportion will be set close to 30%. For instance, in the *Marine Hoses* decision,[19] the Commission stated that the cartel in question involved the most harmful restrictions of competition, including bid rigging, price fixing, quotas, fixing sales conditions, geographic market sharing and exchange of commercially sensitive information. Since the infringement covered the whole EEA market and the cartelists held around 90% of the market, 25% of the value of sales was chosen to reflect the gravity of the infringement. By contrast, in the *Telefónica/Portugal Telecom* decision, which involved a non-compete clause, the Commission calculated the fine based on 2% of the companies' sales. The Commission justified its choice by the fact that the clause was not secret, and it was notified to the national competition authority and the telecommunications regulator.[20]

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13 2006 Fining Guidelines, para. 13.

14 2006 Fining Guidelines, paras 13-17.

15 Case COMP/39.309 - *LCD*, 08.12.2010, C(2010)876/ final.

16 See, for instance, Case COMP/39.406 - *Marine Hoses*, 28.01.2009 [2009] OJ C198/06.

17 2006 Fining Guidelines, para. 18. In cases of worldwide cartels, the Commission can instead assess the total value of sales at a world level. Then, each participant's share of sales at a world level will be determined and finally, it will apply this share to the aggregate sales within the EEA.

18 2006 Fining Guidelines, para. 22.

19 See *supra* note 16.

20 Case COMP/AT.39839 – *Telefónica / Portugal Telecom*, 23.1.2013, C(2013) 306 final.

Third, the sum resulting from steps 1 and 2 is multiplied by the number of years each undertaking participated in the infringement.[21] Six months or less will be rounded up to half a year, while six to twelve months will be rounded up to one full year. For instance, in *Marine Hoses* the initial amount equal to 25% of sales was then multiplied by 19 for Bridgestone Corporation (which was involved in the cartel for 19 years 5 days), 8 for Dunlop Oil & Marine Limited participating (which was involved in the cartel for 7 years, 10 months and 12 days), and 2,5 Continental AG (which was involved in the cartel for 2 years, 1 month and 24 days).[22] In the recent decisional practice of the Commission, this rounding up is being gradually abandoned as it is not in line with the principle of proportionality.[23]

When calculating the fine, the Commission can add an extra sum to the variable amount: the two components together form the basic amount. This extra sum is set between 15% and 25% of the value of sales and is known as the "entry fee". Its main purpose is to deter undertakings from participating in anticompetitive behaviour (i.e., preventing them from participating "to try and see").[24] The "entry fee", which is commonly imposed on hardcore cartel participants, is not multiplied by the number of years of participation in the infringement. Since 2000, this aggravating circumstance has been used by the Commission in 24 cartel decisions.

3. Second Step: Adjusting the Basic Amount

Once the basic amount is established, the Commission will increase or decrease it by evaluating the presence of aggravating or mitigating factors.[25] Additionally, three special adjustment factors are provided for in the 2006 Fining Guidelines: an exceptional deterrence multiplier; the 10% ceiling (cap) on the fine; and the inability to pay defence. Aggravating and mitigating circumstances sometimes appear as "different sides of the same coin", as illustrated in Figure 1 above.[26]

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21 2006 Fining Guidelines, para. 24.

22 See *supra* note 16.

23 See, e.g., Case COMP/AT.39633 – *Shrimps*, 27.11.2013, C(2013) 8286 final, Case COMP/AT.39226 - *Lundbeck*, 1.06.2013, C(2013) 3803 final, Case COMP/AT.39437 – *TV and computer monitor tubes*, 05.12.2012, C(2012) 8839 final, Case COMP/AT.39462 – *Freight forwarding*, 28.03.2012, C(2012) 1959 final. See also E. Barbier de la Serre and C. Winckler, "A Survey of Legal Issues Regarding Fines Imposed on EU Competition Proceedings (2010)", (2011) 2 *Journal of European Competition Law and Practice*, 356, 359.

24 H. De Broca, *supra* note 11, 4

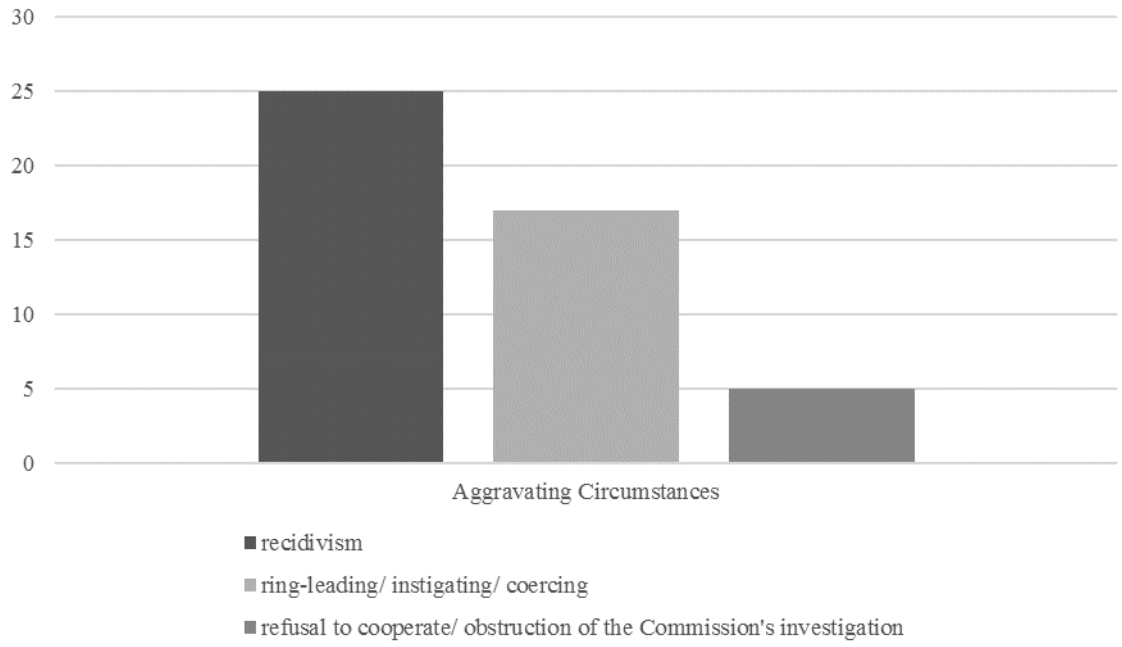
25 It is common that the absence of specific aggravating factors can be considered as mitigating factors and vice versa. For a presentation of such equivalencies, see Figure 1.

26 See, however, Case COMP/38.069 - *Copper Plumbing Tube*s, 03.09.2004 [2006] OJ L192/21, para. 740, whereby it was stated that the absence of aggravating circumstances is not an attenuating factor.

a. Aggravating circumstances

The 2006 Fining Guidelines include a non-exhaustive list of aggravating circumstances: recidivism, ring leading/instigating/coercing, refusal to cooperate.[27] The frequency of their recognition in the Commission's decision practice is illustrated with the Figure 2.

Figure 2: Frequency of the recognition of various aggravating circumstances by the Commission[28]



Recidivism

Recidivism is described in the Guidelines as a situation: "[w]here an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article [101] or [102], the basic amount will be increased by 100% for each such infringement established."[29] The rate of recidivism is relatively high, especially considering the high level of the fines. The Commission

[27] The cases described below include also the decisions issued on the basis of 1998 Guidelines on fines since some of the aggravating and mitigating factors remained the same. Relevant differences between 1998 and 2006 Guidelines are indicated when appropriate.

[28] Figure 2 comprises the number of Commission decisions recognizing the factors referred to in the 2006 Guidelines. The calculations are based on the decisions issued by the Commission in cartel and abuse of dominance cases between 1 January 2000 and 8 March 2017, see Annex.

[29] 2006 Fining Guidelines, para. 28(a).

has identified 25 cases of recidivism in its cartel and abuse of dominance decisions since 2000.[30] This is the most common aggravating circumstance identified by the Commission.

The increase in the amount of fine due to recidivism is designed to strengthen the level of deterrence after the fine imposed in the initial case has proven insufficient to discourage the undertaking in question to engage again in anti-competitive action. Recidivism occurs when the same undertaking commits a similar antitrust infringement regardless of the product and geographic markets in which it takes place. In *Interbrew/Alken Maes*[31] and *French Beer,*[32] Danone was reprimanded for the fact it had already participated in antitrust infringements on a different market, namely the market for glass containers.[33] The Commission also noted that the amount of time that passed between the previous infringement and the conduct in question is irrelevant. Similarly, in *Michelin,*[34] the Commission rejected the argument that there was no recidivism because the second abuse of a dominant position was made on a different geographic market than the one which had already been sanctioned. The Commission observed that "when a dominant undertaking has been censured by the Commission it has a responsibility not only to put an end to the abusive practices on the relevant market but also to ensure that its commercial policy throughout the Community conforms to the individual decision notified to it".[35]

Furthermore, recidivism is given a wide personal scope. In the *Slovak Telekom* margin squeeze case,[36] the Commission increased the fine jointly and severally imposed on Slovak Telekom ("ST") and its parent company ("DT") because DT had already been condemned for margin squeeze in the past, although the alleged anticompetitive conduct in the latter case was committed by its subsidiary. The Commission stated that "DT was already at the time of the 2003 Commission decision, the parent company of ST as it had acquired on 4th August 2000 51% of ST's shares. It has been established … that DT had the ability to exercise decisive

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30 According to the GCEU, "recidivism is a circumstance which justifies a significant increase in the basic amount of the fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent". Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR II-04071.

31 Case COMP/IV/37.614/F3 - *PO/Interbrew and Alken-Maes*, 07.08.2003 [2003] OJ L 200, P. 0001 – 0058.

32 Case COMP/C.37.750/B2 - *Brasseries Kronenbourg, Brasseries Heineken*, 29.09.2004 [2004] OJ L 184, 15.7.2005, p. 57–59.

33 See Cases COMP Case IV/400 - *Agreements between manufacturers of glass containers*, 15.05.1974 [1974] OJ L 160/1 and 23.07.1984 [1984] OJ L 212/13. (Danone was called BSN at the time of these two previous infringements) infringements. The same person acted as CEO of the same company.

34 Case COMP/E-2/36.041/PO — *Michelin,* 20.06.2001 [2001] OJ L 143, 31.5.2002, p. 1–53.

35 *Id.*, para. 362.

36 Case COMP/ AT.39523 - *Slovak Telekom*, 15.10.2014, C(2014) 7465 final.

influence over ST and actually exercised it and is therefore liable for the infringement committed by the undertaking ST/DT."[37]

Ring leading/instigating/coercing

The GCEU stated in the *Graphite electrodes* case that "[w]here an infringement has been committed by a number of undertakings, it is necessary, in determining the amount of the fines, to establish their respective roles…"[38] Hence, ringleaders, instigators or coercers bear special responsibility in comparison to other participants as confirmed by the 2006 Fining Guidelines.[39] This aggravating factor also plays an important role in the Commission's decision practice and it appears in 17 cartel decisions since 2000.

In *Nintendo/Video Games*,[40] the Commission increased the basic fine by 50% on Nintendo as it was, among other aggravating circumstances, the leader and instigator of an anti-competitive distribution agreement involving the monitoring of parallel trade, enforcing the measures to prevent it and directly benefiting from their implementation. In *Carbonless Paper*,[41] strong evidence corroborated the Commission's finding that AWA had been able to exercise pressure on its competitors as it acquired or distributed large proportions of small producers' output. It also played a key role in monitoring and ensuring compliance with the agreements. This led to an increase of 50% of the basic amount of the fine. In *Graphite Electrodes*,[42] both SGL and UCAR were found to have been the cartel ringleaders as they had, for example, organised the "Top Guy" meeting at chief executive level to agree concerted price increases. SGL's fine was increased by 85% while UCAR's was by 60%.

Retaliatory measures and threats are similarly considered as aggravating factors. For instance, in the *Volkswagen II* decision,[43] the Commission considered that Volkswagen had systematically urged by means of circulars all members of its distribution network to maintain price discipline. Some of the circulars and individual letters to dealers were not just intended to restrict the freedom of dealers to set their prices, but they also threatened dealers to terminate their contract unless they demonstrated greater price discipline. The basic amount of the fine was therefore

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37 *Id.*, para. 1529.

38 Case T-236/01 *Tokai Carbon and Others v Commission (Graphite electrodes)* [2004] ECR II-1181, para. 301.

39 2006 Fining Guidelines, para. 28(c).

40 Case COMP/35.587 PO - *Video Games*, COMP/35.706 PO - *Nintendo Distribution* and COMP/36.321 - *Omega — Nintendo*, 30.10.2002 [2003] OJ L 255, 8.10.2003, p. 33–100.

41 Case COMP/E-1/36.212 — *Carbonless paper*, 20.12.2001 [2001] OJ L 115, 21.4.2004, p. 1–88.

42 Case COMP/E-1/36.490 — *Graphite electrodes*, 18.07.2001 [2001] OJ L 100, 16.4.2002, p. 1–42.

43 Case COMP/F-2/36.693 — *Volkswagen*, 29.06.2001 [2001] OJ L 262, 2.10.2001, p. 14–37.

increased by 20%. Similarly, in the *French Beef* cartel case,[44] which involved an agreement to set a minimum purchase price for certain categories of cattle and to suspend imports of beef into France, some members of the federations of farmers used violence to compel slaughterers to comply with the above measures. The fines were increased by 30% on three farmers' federations for this conduct.

Retaliatory measures are, however, not only taken against members of the cartel itself. In the particularly pernicious *Pre-insulated pipes cartel*,[45] retaliatory action was taken, not against a co-conspirator for failing to abide by the terms of the agreement, but to drive a competitor, which did not participate in the cartel, from the market. Retaliatory action in this case included a concerted effort by ABB to lure key members of a competitor's (Powerpipe) staff away from it. The gravity of this conduct was exacerbated by a stepping up of the effort of the cartel members to eliminate Powerpipe from the market, after Powerpipe had lodged a complaint concerning the cartel but before the Commission had carried out its investigation.

Refusal to cooperate

This aggravating factor reflects settled case law, pursuant to which an undertaking that is subject to an investigation should cooperate with the Commission.[46] A breach of this obligation leads to an increase in the level of the fine pursuant to paragraph 28(b) of the 2006 Guidelines on fines. The Commission also has the power to impose a separate, procedural fine under Article 23(1) of Regulation 1/2003. However, a refusal to cooperate cannot lead to both a procedural fine and be considered as an aggravating circumstance.[47]

The way in which the Commission applies this aggravating circumstance can be illustrated in the following cartel decisions. In *Graphite Electrodes*,[48] SGL had obstructed the Commission investigation by warning its co-conspirators of the forthcoming Commission investigation. Its basic fine was thus increased by 85%. In *Greek Ferries*,[49] Minoan Lines, to thwart the Commission's investigation, instructed the other cartel members to differentiate their prices by 1% for four cabin categories. This constituted a deliberate attempt to pull the wool over the Commission's eyes, which led to a 10% increase of its basic fine. In the *Nintendo/Video Games*

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44 Case COMP/C.38.279/F3 — *French beef*, 02.04.2003 [2003] OJ L 209, 19.8.2003, p. 12–41.

45 Case COMP/IV/35.691/E-4 - *Pre-Insulated Pipe Cartel*, 21.10.1998 [1999] OJ L 24, 30.1.1999, p. 1–70.

46 Most prominently, see Case 374/87 *Orkem SA v Commission* [1989] ECR 3283, para. 27 (which refers to Regulation No. 17).

47 See Case T-384/06, *IBP and International Building Products France v Commission* [2011] not yet reported, para. 109.

48 See *supra* note 42.

49 Case COMP/IV/34466 – *Greek Ferries*, 09.12.1998 [1998] OJ L 109, 27.4.1999, p. 24–50.

decision,[50] John Menzies, following a request for information, adduced false information which misled the Commission as to the exact scope of the infringement. This course of action led to a 20% increase on the basic fine.

Other aggravating factors not explicitly mentioned in the Guidelines can be found in the Commission's decisional practice, including a company's awareness of the unlawfulness of its conduct,[51] the importance of the industry affected,[52] the institutionalized nature of the infringement,[53] or the continuation of the conduct after the Commission opened its investigation.[54]

b. Mitigating circumstances

The 2006 Fining Guidelines also include a non-exhaustive list of mitigating circumstances: immediate termination of the infringement, negligence, limited involvement and non-implementation of the infringement, public authorization/encouragement, cooperation outside the Leniency Notice.[55] The frequency of their recognition in the Commission's decisional practice is illustrated with the Figure 3.

[50] See *supra* note 40.

[51] Case COMP/30.809 - *John Deere*, 07.02.1985, [1985] OJ L35/58, paras 21, 27.

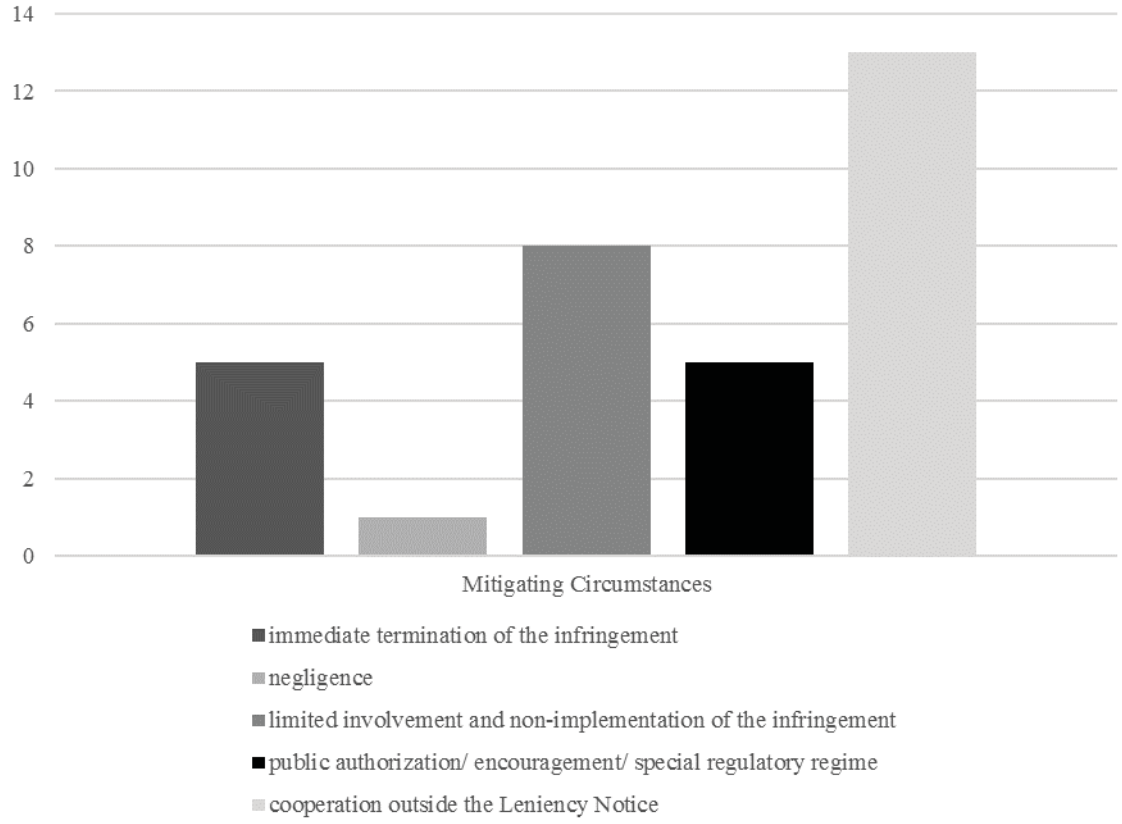
[52] Case COMP/29.725 - *Wood Pulp*, 19.12.1984, [1985] OJ L85/1, para. 25.

[53] Case COMP/31.571, 31.572 - *Building and Construction industry in the Netherlands*, 07.04.1992, [1992] OJ L92/1, para. 141.

[54] Case COMP/35.587 - *Nintendo*, 30.10.2002, [2003] OJ L255/33, paras 407-411.

[55] See *supra* note 27.

Figure 3: Frequency of the recognition of various mitigating circumstances by the Commission[56]



Immediate termination of the infringement.

In its 2006 Guidelines on fines, the Commission indicated that it will reduce the basic amount of the fine when offenders terminate the infringement as soon as the Commission intervenes. The Guidelines state that this mitigating circumstance is not applicable to secret infringements.[57] This is a change in comparison to the 1998 Guidelines on Fines, which applied this mitigating factor to all types of infringements except for the most flagrant ones.[58]

[56] Calculations include a number of the Commission's decisions recognizing the factors enlisted in the 2006 Guidelines. Calculations made on the basis of decisions issued by the Commission in cartel and abuse of dominance cases between 1 January 2000 and 8 March 2017, see Annex.

[57] 2006 Fining Guidelines, para. 29(a).

[58] See, e.g., Case COMP/36.545/F3 — *Amino Acids*, 07.06.2000 [2001] OJ L 152, 7.6.2001, p. 24–72; Case COMP/E-1/37.512 — *Vitamins*, 21.11.2001 [2001] OJ L 6, 10.1.2003, p. 1–89.

The *PO/Michelin* decision,[59] which dealt with an abuse of dominance, lays down the principle that if an undertaking ends the infringement on its own initiative before the Commission sends its statement of objections, this circumstance will be considered by the Commission when it sets the fine. As Michelin amended its commercial policy to bring the infringement to an end before the Commission sent the statement of objections, the Commission considered that "this has to be considered a mitigating circumstance, justifying a reduction of 20 % in the basic amount of the fine."[60]

Similarly, in *Telefónica, S.A. and Portugal Telecom*,[61] the parties agreed to terminate the infringement by eliminating the anti-competitive non-compete clause 16 days before the Commission initiated proceedings and 30 days before the Commission sent its first request for information. As the clause was not secret, the Commission considered this course of conduct as a mitigating factor.

Negligence

The concept of negligence is interpreted restrictively. The undertaking can be considered negligent only when it "could not have been unaware" of its conduct's anti-competitive object or effect.[62] The fact that it simply was not aware is insufficient.

In the *Bananas* case,[63] Weichert, one of the cartelists claimed that it was not aware of the part of the communications aimed at setting the prices exchanged between two other cartelists, Chiquita and Dole. This claim was accepted by the Commission, which stated that even though Weichert was responsible for the single and continuous infringement as it colluded with Dole, "the Commission [did] not have sufficient evidence to conclude that Weichert was aware of pre-pricing communications between Chiquita and Dole or to establish that it could have reasonably foreseen them and therefore is not found responsible for the cartel arrangements between Chiquita and Dole."[64] Weichert received a 10% fine reduction.

In the *Microsoft tying* decision, Microsoft had committed to offer European users of Windows to select their preferred web browsers through a so-called "Choice Screen".[65] Microsoft, however,

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59 See *supra* note 30.

60 *Id.*, para. 364.

61 See *supra* note 20.

62 Case C-279/87 *Tipp-Ex v Commission* [1990] ECR I-261, para. 2.

63 Case COMP/39188 – *Bananas*, 15.10.2008 [2008] C(2008) 5955 final.

64 *Supra* note, para. 255.

65 Antitrust: Commission accepts Microsoft commitments to give users browser choice, 16 December 2009, IP/09/1941, available at europa.eu/rapid/press-release_IP-09-1941_en.htm?locale=en

did not comply with its commitments as it failed to display the Choice Screen.[66] The Commission recognized that this failure resulted from "inadvertent technical and human errors."[67] It nevertheless concluded that a company having such vast resources and know-how "should have been able to avoid such errors and should have had better processes in place to ensure that the Choice Screen was correctly displayed".[68] As a result, Microsoft's negligence was not considered as a mitigating factor.

Limited involvement and non-implementation of the infringement

The 2006 Guidelines on fines state that "where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount."[69]

For instance, in *Air Freight,*[70] the Commission reduced a fine by 10% for some of the cartelists that operated on the periphery of the cartel, had limited contacts with other cartelists, and were not involved in the entire anticompetitive conduct. In its *Shrimps* decision,[71] the Commission reduced the fine imposed on Stührk, one of the cartelists, because its participation in the cartel was limited to Germany, its involvement was of a different kind than the anti-competitive behaviour of other cartelists, it never expressly agreed on prices adapting its own pricing strategy, and it was never involved in market sharing practices.

Undertakings that do not implement the infringement can also benefit from a fine reduction, although this mitigating circumstance is applied strictly by the Commission. For instance, in *Graphite Electrodes,*[72] apart from only playing a passive role in the cartel, C/G was granted a further reduction based on its partial non-implementation of the infringing agreements. Between 1993 and 1996, C/G increased its sales in Europe, thereby not complying with the cartel's "stay home" policy. In *Organic Peroxides,*[73] however, the Commission stated that as deviations from

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66 Case COMP/AT.39530 – *Microsoft (Tying),* 06.03.2013 [2013] C(2013) 1210 final.

67 *Supra* note, para. 52.

68 *Id*.

69 2006 Fining Guidelines, para. 29(c).

70 Case COMP/39258 – *Airfreight*, 09.11.2010, C(2010) 7694 final.

71 Case COMP/AT.39633 – *Shrimps*, 27.11.2013, C(2013) 8286 final.

72 See *supra* note 42.

73 Case COMP/IV/30.907 - *Peroxygen products* 23.11.1984 [1985] O.J. L 35/1, Case COMP/IV/31.149 – *Polypropylene*, 23.04.1986 [1986] O.J. L 230/1.

cartel agreements are frequent, occasional or temporary non-implementation of certain parts of the overall agreement do not qualify as attenuating circumstances. It further held that as long as deviations remain limited in time and in importance, corrective measures such as retaliatory deviations, compensations or subcontracting often restored the overall agreed quotas prices.

Since 2000, the Commission has granted a reduction in fine for limited involvement in the cartel or its non-implementation in 8 cartel cases.

Public authorization/ encouragement

The existence of specific regulatory obligations or the authorization of public authorities to pursue certain policies may be considered by the Commission as a mitigating factor.[74] This should not be, however, confused with situations where the undertakings are required by national legislation to engage in anti-competitive conduct. When that is the case, they cannot be held accountable for infringement at all.[75] Since 2000, public authorization/encouragement has been recognized as a mitigating circumstance in 3 cartels and 2 abuse of dominance decisions.

In the *Deutsche Telekom* margin squeeze case,[76] the Commission took into consideration the fact that the retail and wholesale charges at stake in the proceedings were subject to sector-specific regulation. Deutsche Telekom argued that its conduct could not be condemned under EU competition rules as its tariffs had previously been approved by the German telecommunications regulator. The Commission, however, stated that national legislation did not require the infringing conduct and that Deutsche Telekom had commercial discretion to avoid the margin squeeze.[77] The fact that the charges in question were subjected to the sector-specific regulation nevertheless led the Commission to grant Deutsche Telekom a 10% reduction of the fine as a mitigating circumstance.

In the *Bananas* cartel case,[78] the undertakings involved argued that there was a regulatory regime in force, which restricted, predetermined and eventually imposed on all economic operators the volumes of bananas sold in the EU and that this influenced the importers' market shares of bananas. This argument was largely accepted by the Commission, which granted the cartelists a significant 60% fine reduction.

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74 2006 Fining Guidelines, para. 29(e).

75 Case C-198/01 *CIF* [2003] ECR I-8055, para. 51.

76 Case COMP/C-1/37.451, 37.578, 37.579 — *Deutsche Telekom AG*, 21.05.2003 [2003] OJ L 263, 14.10.2003, p. 9–41.

77 *Id.*, para. 57.

78 See *supra* note 63.

Similarly, in *Air Freight*,[79] the Commission recognized the existence of specific regulatory regimes encouraging the anticompetitive conduct. In Hong Kong and Japan, the authorities required consultations of the tariffs and many bilateral Air Service Agreements provided tariffs were to be collectively agreed by designated airlines. The Commission concluded that the anti-competitive conduct was encouraged by these regulatory regimes and applied to all cartelists a reduction of 15% to the basic amount of the fine.

Cooperation outside the Leniency Notice

To be recognized as a mitigating circumstance, cooperation should go beyond the undertaking's relevant legal obligation. It should also be "effective" in that it enables the Commission to establish the existence of an infringement and bring it to an end.[80] Since 2000, cooperation outside the Leniency Notice has been recognized as a mitigating circumstance in 12 cartel cases and one abuse of dominance case.

For instance, in the *Organic Peroxides* cartel,[81] Atochem was unable to fulfil the requirements of the leniency notice. However, it was substantially rewarded for the assistance it gave to the Commission, which enabled it to establish the full duration of the cartel.[82] In the *Fasteners* case,[83] three of the cartelists applied for leniency. The 1996 Leniency Notice,[84] which applied at the time of the case, did not reward disclosure of information that was unknown to the Commission. The cooperation of the companies was, nevertheless, taken into account by the Commission in its analysis of mitigating factors. As a result, the Coats Group and YKK Group were respectively granted EUR 850,000 and EUR 9,375,000 fine reductions. The Commission shed some further details on cooperation outside the Leniency Notice in the *Pre-stressing Steel* case.[85] It provided that a mere absence of opposition to the facts described by the Commission or even an acknowledgment of these facts are in principle not considered as forms of cooperation,

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79 See *supra* note 70.

80 Case C-297/98 P SCA *Holding v Commission (Cartonboard)* [2000] ECR I-10101, para. 36.

81 Case COMP/E-2/37.857– *Organic Peroxides*, 10.12.2003 [2003] OJ L 110, 30.4.2005, p. 44–47.

82 *Id*. para. 493 ("Atochem strengthened the Commission's arguments to prove the 29-year duration of the cartel. Without Atochem's voluntary information, the Commission could still have considered the continuation of the cartel during a period of cartel tension in 1992, but the evidence would have been more scarce. More likely however, the Commission would have dropped the period 1971-1993 from the duration, and the maximum increase for duration would have been around 65% for all participants for a cartel duration of 6½ years.")

83 Case COMP/E-1/39.168 – *PO/Hard Haberdashery: Fasteners*, 19.09.2007, C(2007) 4257 final.

84 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C 207, 18.7.1996, p. 4–6.

85 Case COMP/38.344 – *Prestressing Steel*, 30.06.2010, C(2010) 4387 final.

which merits a fine reduction.[86] Thus, in the *Prestressing Steel* case, only ArcelorMittal España S.A. cooperated with the Commission to an extent that was sufficient for obtaining a 15% fine reduction.

Cooperation with the Commission was also recognized as a mitigating circumstance in one 102 TFEU case. In *ARA Foreclosure*,[87] a case in which ARA, an Austrian waste management company, was investigated for blocking competitors from entering the Austrian market for management of household packaging waste, ARA cooperated with Commission by acknowledging the infringement, as well as by proposing a structural remedy. This allowed the Commission to reach administrative efficiencies. As a result, ARA's basic fine was reduced by 30%.

Other mitigating factors not explicitly mentioned in the Guidelines can be found in the Commission's case practice, including the introduction of a compliance policy,[88] the pressure exercised by other companies[89] or the excessive length of procedures before the Commission.[90]

c. Further adjustment factors

Apart from the aggravating/mitigating factors discussed above, three additional adjusting elements can be considered. *First*, there can be an increase in the fine imposed on undertakings that have a particularly large turnover *beyond* the sale of goods or services to which the infringement relates. For instance, in the *Browser Tying* case, the Commission set a fine corresponding to 1,02% of the Microsoft's overall turnover for the failure to comply with the Commission's Commitment Decision.[91] The fine can also be increased to ensure that it exceeds the amount of illicit gains generated by the infringement.[92]

Second, if the fine, as adjusted, exceeds 10% of the firm's total turnover in the preceding business year, the Commission applies a reduction to bring the new fine below that ceiling. The

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86 *Id*. para. 1009 ("Also the non-contestation of the facts does not in itself suffice to qualify for a reduction of the fine under Point 29 of the 2006 Guidelines on fines, particularly when the facts are established on the basis of ample evidence.")

87 Case COMP/AT.39759 - *ARA Foreclosure*, 20.09.2016 [2016] not yet reported.

88 Case COMP/ 30.178 - *Napier Brown/ British Sugar,* 19.10.1988 [1988] OJ L284/41, para. 86.

89 Case COMP/31.192 - *Tipp-Ex*, 10.08.1987 [1987] OJ L222/1, paras 78-79.

90 Case COMP/30.717 - *Eurocheque: Helsinki Agreement,* 09.04.1992 [1992] OJ L95/50, para. 89.

91 See *supra* note 66.

92 2006 Fining Guidelines, para. 13. See also Case C-189/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-05425, para. 292.

capping occurs before any further reduction under the Leniency Notice.[93] The parental liability rules can, however, vitiate the practical importance of this cap. Extending the liability to the parent company enables the Commission to apply the 10% ceiling to the turnover of the parent undertaking, which might be much higher.[94]

Third, when "the imposition of the fine… would irretrievably jeopardize the economic viability of the undertaking… and cause its assets to lose all their value", the Commission may take account of its inability to pay ("ITP").[95] This reduction will only be granted when the inability to pay is connected to the general social and economic context. Before 2010, all requests for a reduction of a fine on ITP grounds were rejected. The Commission, however, accepted on several occasions to reduce the amount of the fine without relying on the ITP provision.[96] The Commission granted the first fine reductions on the basis of ITP in 2010 in the *Prestressing Steel* cartel.[97] A Note clarifying the concept and the applicable criteria was also issued in 2010.[98] This note constitutes a positive development which seems to indicate that the Commission is committed to increasing predictability and transparency in relation to ITP.

While the Guidelines are not binding legal rules, the Commission must follow them "under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations".[99] Nonetheless, the Guidelines add

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93 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel cases [2006] OJ C298/17. See also Case T-52/02 *SNCZ v Commission (Zinc Phosphate)* [2005] ECR II-5005, para. 41.

94 Case T-112/05 *Akzo Nobel NV et al./Commission* [2007] ECR II-5049, para. 90.

95 2006 Fining Guidelines, para. 35.

96 See e.g., Case COMP/35.814 - *Alloy surcharge*, 21.01.1998, paras 83-84 (where the Commission reduced the fine by 33% because there was a deep crisis in the industry); Case COMP/38.359 - *Electrical and mechanical carbon and graphite products*, 3.12.2003, paras 360 *et seq*. (where the Commission reduced the fine by 33% because the company was both undergoing serious financial constraints and had recently been subject to other fines for cartel activities which occurred during the same time period); Case COMP/38.543 —*International Removal Services*, 11.03.2008, OJ C 188, 11.8.2009, p. 16–18, 656-662 (where the Commission refused to grant a reduction of the fine on the basis of para graph 35 of the 1998 Fining Guidelines (i.e., inability to pay mitigating circumstance) but where it accepted to reduce the fine by 70% on the basis of paragraph 37 of the 1998 Fining Guidelines by taking into account particular circumstances concerning the situation of the individual company).

97 Case COMP/38.344 - *Prestressing Steel*, 30.06.2010. See also E. Barbier de la Serre and C. Winckler, *supra* note 23, p. 357.

98 SEC (2010) 737, 'Absence de capacité contributive au titre du paragraphe 35 des lignes directrices du 1/09/2006 concernant le calcul des amendes infligées en application du Règlement (CE) No 1/2003 relatif à la mise en œuvre des règles de concurrence', 12 June 2010. For reductions against the background of the financial crisis, see M. Reinolds, S. Macrory, M. Chowdhury, "EU Competition Policy in the Financial Crisis: Extraordinary Measures", (2011) 33 *Fordham International Law Journal* 1670, 1733-1736.

99 Case C-189/02 P, *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425, para. 211.

that in view of the particularities of a given case, or in view of the need to achieve deterrence for a specific undertaking, the Commission might be justified in departing from this methodology.[100]

d. The large discretionary power of the Commission to modulate the fine

While the adoption of the Fining Guidelines by the Commission has provided welcomed transparency as to the way in which fines are calculated, the above analysis nevertheless shows that the Commission enjoys a large amount of discretion in the calculation of the fines, subject of course to the control of the EU courts. This explains why, although basic EU competition rules have not changed, the Commission has been able to steadily increase the level of the fines over the past couple of decades as will be made clear in Part V below. A striking finding when analysing the aggravating circumstances relied upon by the Commission in its infringement decisions is the prevalence of recidivism despite the increasingly stringent level of fines. As will be discussed below, this raises the question of whether corporate fines are sufficient to deter competition law infringements.

III. Leniency

With a view to incentivise companies to report the cartels in which they are involved,[101] the Commission adopted a Leniency Notice in 1996,[102] which was reviewed and amended twice, first in 2002[103] and then in 2006.[104] As will be seen, the data shows that the Leniency Notice has been a very successful tool in that the vast majority of the cartel decisions adopted by the Commission involve some form of leniency.

Because it consists in granting immunity from any fine that would otherwise have been imposed, or a reduction of such fine, leniency can have a significant impact on the level of the fines that are imposed by the Commission in cartel cases.

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100 2006 Fining Guidelines, para. 37. For an application of this clause, see Case COMP/39.510 - *Ordre National des Pharmaciens en France (ONP)*, 08.12.2010.

101 S. D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Address Before the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf.

102 Commission Notice on the non-imposition or reduction of fines in cartel cases, Official Journal C 207, 18.07.1996 p. 4-6.

103 Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 45, 19.02.2002, p. 3-5.

104 Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8.12.2006, p. 17.

A. Immunity from fines and reduction from fines

The Commission grants immunity from any fine that would otherwise have been imposed on an undertaking disclosing its participation in an alleged cartel if the undertaking is the first to submit information and evidence which allows the Commission to "carry out a targeted inspection in connection with the alleged cartel."[105] No immunity is granted if the Commission already had sufficient evidence to carry out an inspection in connection with the alleged cartel or *a fortiori* if the Commission had already carried out such an inspection.[106]

In the case where no undertaking has been granted immunity for allowing the Commission to carry out a targeted inspection, immunity will be granted to the undertaking which is the first to submit information and evidence which enables the Commission to find an infringement of Article 101 TFEU in relation with the alleged cartel. Immunity will only be granted on the condition that the Commission did not have sufficient evidence to find such an infringement.[107]

In order to qualify for a reduction of the fine that would otherwise have been imposed, an undertaking must disclose its participation in an alleged cartel and provide the Commission with evidence of the alleged infringement that represents significant "added value" with respect to the evidence already possessed by the Commission.[108] The evidence must strengthen, "by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel".[109] Of particular relevance is written evidence originating from the period of time to which the facts pertain.[110]

The first undertaking to provide evidence with significant added value will benefit from a reduction of 30 to 50% of the fine that would otherwise have been imposed. The second undertaking to submit such evidence will enjoy a reduction of 20 to 30%, while subsequent undertakings will profit from a reduction of up to 20%.[111] To determine the precise level of

[105] *Id.*, para. 8 (a)

[106] *Id.*, para. 10.

[107] *Id.*, paras 8 (b) and 11.

[108] *Id.*, para. 24.

[109] *Id.*, para. 25.

[110] *Id.*

[111] *Id.*, para. 26.

reduction within each of these bands, the Commission takes into account the time at which the evidence was submitted and the extent to which it represents added value.[112]

B. Success of the Leniency Notice

Our analysis reveals that some form of leniency has been granted in 86 cartel decisions (out of 98 published decisions) since 2000. These numbers also include settlement decisions, in which leniency reductions have been frequently granted and appeared in 17 settlement decisions (out of 19 published decisions). In total, the Leniency Notice has been applied in 88% of the Commission's cartel decisions. That is a striking number, which suggests that leniency has become the prime detection tool used by the Commission in cartel cases.

One possible adverse effect of the success of the Commission's leniency programme is that could reduce its eagerness to invest in detecting and prosecuting cartels by other means that leniency. When competition authorities receive a regular supply of leniency applications, they may simply go for the low-hanging fruit of "easy" cartels rather than in investing resources in cartels that are more difficult to detect and prosecute.[113] While such an approach would be convenient in the short-run, it would be ultimately self-defeating. As pointed out by Wils, the success of the Commission's leniency programme depends *inter alia* on the probability of detection and punishment in the absence of cooperation (absent the risk of detection, companies will not report cartels to competition authorities as they have nothing to gain by doing so).[114]

IV. Cartel settlements

The cartel settlement procedure allows the European Commission to settle a cartel case if the cartel participants are willing to admit liability and waive certain procedural rights.[115] In exchange for settling, cartel participants are offered a reduction of the fine by 10 per cent and expedited proceedings. The aim of the settlement procedure is to allow the Commission to handle faster and more efficiently cartel cases, thereby freeing up resources to deal with more cartel cases. The objective of the settlement procedure is thus different from that of the Leniency programme which is an investigative tool designed to uncover cartels and gather evidence.

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112 *Id.*, para. 26.

113 D. Sokol, "Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement", (2012) 78 *Antitrust Law Journal* 201, 212.

114 See W. Wils, "Leniency in Antitrust Enforcement: Theory and Practice", 43, 24.10.2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939399 .

115 Settlements procedures also exist at the national level. For an overview of the settlement procedures in the different Member States, see M. Marquis, "Settling cartel investigations in the EU and its Member States", 14 March 2012, available at http://ssrn.com/abstract=2070190 or http://dx.doi.org/10.2139/ssrn.2070190.

Our analysis reveals that the Commission has adopted 22 cartel settlement decisions since 2010, as compared to 21 regular decisions adopted in the same timeframe. It means that since the adoption of the first settlement decision settlement procedure has been applied in more than 50% of the prohibition decisions. The importance of the settlements is increasing and recent years show particularly high ratio of the settlements, namely 80% in 2014 and 60% in 2016. These are striking numbers especially considering that the fine reduction is limited to 10%. Settlements confer, however, other benefits to undertakings, such as faster proceedings, lower legal costs and reputational damage, and fewer distractions from conducting their business. Cartel participants also benefit from the fact that the settlement procedure reduces the amount of publicly available information which could be used by potential damage claimants.[116] But perhaps the key advantage of the settlement procedure for cartel participants is that it allows for more meaningful and transparent discussions with the Commission than under a standard cartel procedure. In particular, the dialogue with the Commission in the context of settlement discussions may allow the parties to influence the scope and duration of the infringement.[117]

The success of the leniency and cartel settlement procedures means that in many instances members of a cartel benefit from significant discounts on the fines that would be imposed on them in the absence of these tools. This could potentially affect deterrence. There is no evidence, however, that the overall level of fines has decreased since the adoption of the leniency and cartel settlement procedures. On the contrary, since the adoption of the Leniency Notice, fines have increased spectacularly.

Although the increase in the level of the fines may be explained by a variety of factors (leniency allowing the detection of bigger cartels, cartels lasting for longer periods, etc.), it can also be explained by the fact that the Commission retains wide discretionary powers over the calculation of the basic amount of the fines, as well as the various factors that can be used to adjust it. Thus, it cannot be excluded that what when the Commission gives a leniency/settlement discounts, it has no impact on the level of the fine given the Commission's ability to control how the fine is set.

V. Judicial Review of the Commission's Decisions

An important factor regarding the fines that infringing companies eventually pay relates to judicial review of the fines by the EU courts. Article 31 of the Regulation 1/2003 provides that

[116] Statement of M. Hansen in D. Vascott, "EU cartel settlements: are they working?", *Global Competition Review*, 7 May 2013.

[117] Statements of G. Van Gerven and M. Hansen in D. Vascott, "EU cartel settlements: are they working?", *Global Competition Review*, 7 May 2013.

"[t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed."

Among the factors subjected to the review of the EU Courts is the imputation of liability for the alleged anticompetitive acts. In the *Galp Energía* decision,[118] the Commission stated that energy companies, Galp Energía España, Petróleos de Portugal and Galp Energía SGPS concluded market-sharing and customer-allocation agreements on the Spanish bitumen market. According to the Commission, the cartel involved a monitoring and compensation mechanisms to observe and correct the deviations from the above arrangements. The CJEU, however, disagreed with this conclusion stating that the Commission failed to provide evidence of the appellants' participation in the cartel's compensation and monitoring system.[119] It thus reduced the amount of the joint and several fine of GALP Energía España and Petróleos de Portugal from EUR 8,662,500 to EUR 7,700,000 of which the share of joint liability of GALP Energía SGPS was reduced from EUR 6,435,000 to EUR 5,720,000.

The EU Courts also analyse whether the basic amount of fine is calculated consistently with the Fining Guidelines. For instance, in the *Seamless Steel Tubes* cartel case,[120] the GCEU stated that the Commission incorrectly assessed both the duration and the gravity of the cartel. The cartel for seamless steel stubs had its origins in disturbances on the market for iron and steel in the 1970s and an agreement between the Commission and Japan to a voluntary restraint of exports of seamless steel tubes. Although these measures were abandoned in the 1990s, the Commission observed that restrictions in the supply of seamless steel tubes continued and imposed on all cartelists fines totalling to EUR 99 million.[121] However, the GCEU concluded that these fines were misguided. First, the Commission wrongfully estimated the duration of the cartel.[122] Second, the Commission wrongly treated different infringements as being of the same gravity. The GCEU stated that there were two aspects of the misconduct, an intra-Community infringement and an intercontinental infringement. Whereas the first one was to be considered as a serious breach of EU competition law, the latter one was a mere contribution to the

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118 Case COMP/38710 – *Bitumen Spain*, 03.10.2007, C(2007)4441 final.

119 Case C-603/13 P *Galp Energía España SA, Petróleos de Portugal (Petrogal) SA, Galp Energía SGPS SA v Commission* [2016] OJ C 98, 14.3.2016, p. 2–3.

120 Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp., formerly NKK Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd v Commission of the European Communities* [2004] II-02501.

121 Case COMP/E/-1/35.860-B – *Seamless steel tubes*, 08.12.1999, 2003/382/EC [2003] OJ L 140/1.

122 Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *supra* note 120, para. 514.

continuation of the European-Japan agreement.[123] The total fine was reduced to EUR 87.12 million.

Furthermore, the EU Courts control the application of aggravating and mitigating circumstances, as well as the application of the Leniency Notice. In the *Vitamins* cartel,[124] BASF received a EUR 296.16 million fine as the leader and instigator of several infringements on the markets for vitamins A, E, B2, B5, C and D3, beta-carotene and carotinoids. However, the GCEU considered that there was insufficient evidence to identify BASF as the leader of the cartel on the markets for Vitamin C, vitamin D3, beta-caroeten and carotinoids.[125] Hence, the Commission's 35% increase of the basic amount of the fine imposed on BASF on the markets for Vitamin C, D3, beta-caroeten and carotinoids was set aside. Finally, the GCEU observed that the information provided by BASF with respect to the beta-caroeten and carotinoids cartel could be considered as cooperation falling within the scope of Section B of the Leniency Notice, which resulted in a 75% discount to the basic amount of the fine for the infringement on these markets.[126] Consequently, the GCEU reduced BASF's total fine for BASF to EUR 236.845 million.

Since the EU Courts enjoy unlimited jurisdiction in deciding about the appropriateness of the Commission's fines, they review the fines based on all the circumstances of a given case. This has led them to reduce fines for a variety of reasons, such as the expiry of the limitation period for the imposition of the fines,[127] the Commission's failure to establish alleged competition law violations[128] or the application of an incorrect method for calculation of fines.[129]

Our analysis shows that the large majority of Commission decisions are appealed by the parties to the GCEU. Perhaps the main explanatory factor is that the parties consider that they have little to lose (except legal fees) by appealing a Commission decision. Moreover, EU Courts assess the Commission's decisions critically (this is true for cartel decisions, less so for abuse of dominance ones) and fines are regularly reduced in appeals. Recent data, however, shows that the number of

123 *Id*. para. 566-579.

124 Case COMP/E-1/37.512 — *Vitamins*, 21.11.2001 [2003] OJ L 6, 10.1.2003, p. 1–89.

125 *Id*. para. 461.

126 *Id*. para. 574.

127 Case T-213/00 *CMA CGM v. Commission* [2003] ECR II-913.

128 Case T-67/01 *JCB Service v. Commission* [2004] ECR II-00049.

129 Case T- 224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission* [2003] ECR II- 2597; Case T-230/00 *Daesang Corp. and Sewon Europe v. Commission* [2003] ECR II-2733; Joined cases T- 236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd. v. Commission* [2004] ECR II-01181.

appeals filed against Commission decisions has significantly dropped in 2015 and 2016.[130] Whereas 79% of the Commission's cartel and abuse of dominance decisions were appealed between 2000 and 2009, since 2010 the appeals have been filed only with respect to 57% of the decisions. While several factors may be at play, the success of the cartel settlement procedure is probably the main reason for a decrease in the appeals filed at the GCEU as settlement decisions are very rarely appealed.

VI. Designing appropriate sanctions and incentives

It is fundamental that appropriate sanctions and incentives are put in place to ensure the effectiveness of the prohibition against cartels contained in Articles 101 and 102 TFEU. Over the past couple of decades, the Commission has gradually increased the level of corporate fines despite the frequent application of the leniency and the cartel settlement procedures. This Section examines whether the current level of corporate fines is optimal, and whether a further increase of these fines is desirable. It also considers the issue of whether the effective enforcement of EU competition law could be enhanced by introducing sanctions against the individuals that have committed the infringement.

A. What is the optimal level of corporate fines?

The optimal level of fines is generally measured by reference to their deterrent effect. As explained by the Commission, one of the main objectives of fines is to prevent infringements by deterring undertakings from engaging in anticompetitive behaviour:

> "Fines are one of the means to ensure that companies do not engage in anticompetitive behaviour. To that end, fines must be set at a level that ensures sufficient deterrence. This implies that fines should not only punish past behaviour, but also that their level will deter that particular company, or any other, from entering into illegal behaviour in the future."[131]

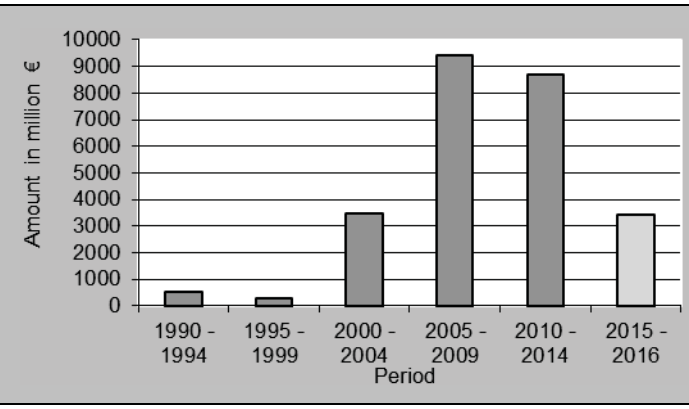
To increase deterrence, the Commission has gradually stepped up the level of corporate fines imposed for violation of Articles 101 and/or 102 TFEU. The total amount of cartel fines has risen from around EUR 500 million in the period 1990-1994 to almost EUR 9.5 billion in the period 2005-2009. Total fines slightly decreased to EUR 8.7 billion during 2010-2014, but has started strong in 2015-2016 notably due to the heavy fines imposed in the trucks cartel. Given that the number of cases in which a company was fined has increased at a much slower pace than

[130] Only 17 and 18 appeals were filed in the field of competition law before the GCEU respectively in 2015 and 2016. See Court of Justice of the European Union, *supra* note 4.

[131] EU Press Release IP/06/857, "Competition: Commission revises guidelines for setting fines in antitrust cases", 28.06.2006 (emphasis added).

the level of fines, the amount of fine per case has thus increased considerably over the years (See Figure 2).

Figure 2: Cartel fines imposed by the Commission - period 1990 - 2016[132]



Period	Amount in million €	No of cases[133]
1990 - 1994	539.691.550	10
1995 - 1999	292.838.000	10
2000 - 2004	3462.664.100	30
2005 - 2009	9414.012.500	33
2010 - 2014	8712.512.674	30
++2015 - 2016++	3440.210.000	9

Source: Commission

Admittedly, the level of fines imposed at different points in time – and thus in different cases – cannot be meaningfully compared without accounting for case-specific circumstances such as the nature of the infringement, the impact of the infringement on the market, the duration of the infringement, the size of the undertakings involved, etc. Therefore, fines may be higher today than they used to be because recent cases may simply be different.[134] In this respect, figures 3 and 4 below show that the level of fines imposed in recent years has increased in part due to the imposition of sky-high fines in some particularly large and damaging cartels. For instance, the level of fines imposed in the TV and computer monitor tubes in 2012 amounted to no less than EUR 2.4 billion, closely followed by the EUR 2.3 billion fines imposed in the trucks cartels.

[132] Amounts as imposed by the Commission (incl. corrections following amendment decisions) and not corrected for changes following judgments of the Courts (GCEU and Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Article 81 resp. 85 of the Treaty). Wherever prohibitions and fines concern infringements of Article 101 TFEU and of Article 102 TFEU (previously Articles 81 resp. 85 and Article 82 resp. Article 86 of the Treaty), only those amounts have been considered which concern the Article 101 TFEU.

[133] A cartel case concerns a single proceeding against various undertakings concerned, and may involve more than one infringement. Only those cartel cases where a fine was imposed were considered for the purpose of that table.

[134] Moreover, when comparing old cases with recent ones, inflation must be taken into account. It is therefore not sufficient to simply compare the nominal amount of the fines imposed.

Figure 3: Ten highest cartel fines per case[135]

Year	Case name	Amount in €
++2016++	Trucks	2 296 499 000
2012	TV and computer monitor tubes	2 409 588 000
2008	Carglass	1 185 500 000
2014	Automotive bearings	953 306 000
2007	Elevators and escalators	832 422 250
2013	Euro interest rate derivatives (EIRD)	824 583 000
2001	Vitamins	790 515 000
2013/2015	Yen interest rate derivatives (YIRD)	684 679 000
2007/2012	Gas insulated switchgear (incl. re-adoption)	675 445 000
2009	E.ON/GDF collusion	640 000 000

Source: Commission

Figure 4: Ten highest cartel fines per undertaking[136]

Year	Undertaking	Case	Amount in €
2016	Daimler	Trucks	1 008 766 000
2016	DAF	Trucks	752 679 000
2008	Saint Gobain	Carglass	715 000 000
2012	Philips	TV and computer monitor tubes	705 296 000 of which 391 930 00 jointly and severally with LG Electronics
2012	LG Electronics	TV and computer monitor tubes	687 537 000 of which 391 940 000 jointly and severally with Philips
2016	Volvo/Renault Trucks	Trucks	670 448 000
2016	Iveco	Trucks	494 606 000
2013	Deutsche Bank	Euro interest rate derivatives (EIRD)	465 861 000
2001	F. Hoffmann-La Roche	Vitamins	462 000 000
2007	Siemens	Gas insulated switchgear	396 562 500

Source: Commission

The fines imposed following the abuse of dominant position have also been significant. Intel was for instance, imposed by the Commission EUR 1.06 billion fine for engaging in exclusionary pricing. Microsoft paid an equivalent amount for its refusal to license and tying infringement in 2004 and its failure to implement the Commitments Decision adopted by the Commission in the *Browser Tying* case a decade later.

[135] Amounts adjusted for changes following judgments of the Courts (GCEU and Court of Justice) and / or amendment decisions.

[136] Amounts adjusted for changes following judgments of the Courts (GCEU and Court of Justice) and / or amendment decisions.

Figure 5: Five highest abuse of dominance fines per undertaking[137]

Year	Undertaking	Case	Amount in €
2009	Intel	Intel	1 060 000 000
2013	Microsoft	Microsoft Tying	561 000 000
2004	Microsoft	Microsoft	497 196 304
2007	Telefónica	Wanadoo España vs. Telefónica	151 875 000
2011	Telekomunikacja Polska	Telekomunikacja Polska	127 554 194

Source: Own Calculations

An important question is whether the steep growth in the level of corporate fines that has been observed during the last decades has resulted in increased deterrence. Measuring the effects of sanctions on deterrence is not an easy matter as their apparent lack of impact on the level of cartel activity may be due to greater detection and enforcement. Even so, the high level of recidivism in cartel activities seems to suggest that increased corporate fines did little to deter a firm from infringing EU competition law.[138] A recent study shows that 24 per cent of the cartel decisions adopted by the Commission between 1969 and 2009 condemned at least one repeat offender. From 2006 to June 2011, the rate of cartel recidivism is even higher, with more than 40 per cent.[139] As seen above, our own analysis has shown that recidivism is the most prevalent aggravating circumstance identified by the Commission in its infringement decisions.

Of course, it is possible that the high percentage of repeat offenders results from the fact that fines remain below the optimal level to achieve effective deterrence. It is generally considered that to achieve effective deterrence, the corporate fine multiplied by the risk of detection and punishment must exceed the gain resulting from the infringement.[140] Applying this formula, some authors argue that the actual level of fines would be around 10 times lower than the level required to achieve effective deterrence.[141]

However, there is no evidence that increasing the level of fines will necessarily deter infringements of competition rules, given the fact that infringements are often committed by

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137 Amounts as imposed by the Commission (incl. corrections following amendment decisions) and not corrected for changes following judgments of the Courts (GCEU and Court of Justice).

138 See *supra* note 2.

139 M. Barennes and G. Wolf, "Cartel Recidivism in the Mirror of EU Law", (2011) 2 *Journal of European Competition Law & Practice* 423.

140 See G.S. Becker, "Crime and Punishment: An Economic Approach", (1968) 76 *Journal of Political Economy* 169.

141 W. Wils, "Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings, But also Individual Penalties, and in Particular Imprisonment?" in C.D. Ehlermann/ I. Atanasiu (*eds*), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland Oregon: Hart Publishing, 2003, 409.

individuals whose interest may not necessarily be aligned with the interest of their employer and whose behaviour may be hard to detect by their employer. In addition, by the time the cartel is discovered, these individuals may no longer be part of the firm and thus be immune from internal sanctions. In such cases, higher fines will have no impact on the behaviour of these individuals.

Moreover, imposing even higher corporate fines may not be appropriate because this would entail substantial social costs.[142] These costs will often be felt by three groups of stakeholders which are not involved in the infringing behaviour at all: the undertaking's employees, shareholders, and even the undertaking's customers.[143] High corporate fines can harm the workforce by inducing companies to adopt cost-cutting campaigns, which will affect employees who have not participated in the infringement.[144] High corporate fines may also affect shareholders and deter investments by affecting the value of the shares of the company that has been fined while shareholders generally have not participated in – or had knowledge of – the infringement, and could not have done anything to prevent or deter it.[145] This is particularly so in the case of firms with widely dispersed shareholding effectively controlled by the management.[146] The potentially harmful effect of high fines is also reflected in the resultant hike in prices which, depending on the circumstances, the sanctioned company may be able to impose.[147]

B. Does the effective enforcement of EU competition law require the introduction of sanctions against individuals?

Corporate fines certainly contribute to deterrence, but they may not be sufficient to ensure the effective enforcement of antitrust rules. Without corporate sanctions, firms would have no incentive to discourage violations by their employees (they could even have the incentive to

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142 As observed by D. Ginsburg and J. Wright: "If the best way to deter price-fixing is to increase fines, then we should expect the number of cartel cases to decrease as fine increase. At this point, however, we do not have any evidence that still a higher corporate fine would deter price-fixing more effectively. It may simply be that corporate fines are misdirected, so that increasing the severity along this margin is at best irrelevant and might counter-productively impose costs upon consumers in the form of higher prices as firms pass on increased monitoring and compliance expenditures." (D. Ginsburg and J. Wright, "Antitrust Sanctions", (2010) 6 *Competition Policy International* 3, 12); See also W. Wils, *supra* note, 420 *et seq.*

143 J.M. Folz, C. Raysseguier and A. Schaub, Report on assessing penalties for infringements of competition law, 2010, 36, available at http://www2.economie.gouv.fr/services/rap10/100920rep-competition.pdf.

144 W. Wils, *supra* note 142, 425-426.

145 See D. Ginsburg and J. Wright, *supra* note 142, 18 ("[i]t is the shareholders, not the abstraction called "the corporation," who bear the economic burden -- such as it is -- of corporate sanctions. It was their agents, however, in management and on the board of directors who violated the law or who may have been in a position to prevent the violation; they should be the focus of the law's efforts to deter price-fixing.")

146 *Id.*

147 *Id.*

encourage violations). The risk of corporate sanctions encourages companies to monitor, detect, and prevent their employees from infringing antitrust rules. Even so, corporate sanctions may not sufficiently deter competition law infringements because the ability of firms to prevent or deter its employees from committing infringements is limited.[148] The current EU fining system presupposes that the management necessarily controls, or at least should be able to control, what happens within the company. While this may be true in most situations, it is not always the case. It is particularly difficult for the management of large multinational companies to prevent individuals from committing infringements that further their personal interest, especially when they go to great length to dissimulate their anticompetitive actions.[149]

The ability of firms to impose sanctions on employees that have committed infringements is also limited. One reason is that the individuals that have infringed competition law rules are not identified in Commission decisions. This can increase the burden of proving the liability of individuals in labour courts.[150] In many cases, the threat of dismissal (arguably the harshest sanction) is also unlikely to deter individuals from breaching competition rules. This is especially so if the likelihood of detection is low and employees can draw significant benefits from breaching the law (in terms of obtaining promotions, higher compensation, etc.). It may also be that the adverse consequences of not committing the infringement are higher than that of engaging in illegal conduct.[151]

Effective deterrence thus requires a combination of corporate sanctions and individual penalties.[152] The Commission's tendency in recent years to increase the level of the fines imposed on undertakings is not the appropriate means to increase deterrence as fines often have little or no impact on the very people who engage in anti-competitive behaviour. In contrast, sanctions that directly hurt these people are likely to make them think twice before breaching competition rules. In some circumstances, the risks of such sanctions may also lead employees to reject orders to engage in anti-competitive behaviour coming from their superiors and even encourage them to blow the whistle.

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148 See Wils, *supra* note 142, 427 *et seq*.

149 See A. Stephan, "Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels", *CCP Working Paper* 09-09, 6.

150 See K. Hofstetter and M. Ludescher, "Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practices Compliance'", (2010) 33 *World Competition*, 55, 69.

151 For instance, in order to improve the financial results of its department and avoid being fired, an employee may decide to engage in cartel activities.

152 See W. Wils, *supra* note 141, 433 *et seq*.

Over the past few years, Member States' enforcement authorities, such as for instance in the United Kingdom,[153] have become increasingly willing to impose individual sanctions. It would go beyond the scope of this paper to discuss the extent to which the Commission could impose individual sanctions, although one of us has shown elsewhere that the imposition of such sanctions by the Commission would be desirable, but also feasible provided some legislative modifications.[154]

VII. Conclusion

The calculation of the fines by the Commission for the violation of Articles 101 and 102 TFEU involves a complex assessment, which is based on the consideration of a variety of factors. Although the Fining Guidelines adopted by the Commission provide some welcome transparency into the way in which fines are calculated, the process still leaves significant discretionary power to the Commission, subject to the control of the EU courts.

In this paper, we have looked at all the decisions adopted by the Commission during the period January 2000 to March 2017, analysing the factors considered by the Commission in its determination of the fines contained in its decisions. The data also shows that both the Leniency Notice and the cartel settlement procedure have been real game changers in the field of cartels, and that these tools have been largely used by infringers to reduce the amount of the fines to be imposed as a penalty for their infringement.

The continued existence of cartels and presence of recidivism raises the question of whether high fines are an effective tool to deter violations of competition law. Although we think that corporate fines are necessary, we believe that they have a high social cost in that they will probably do not deter individuals that engage in cartelistic activities for their own profit and, in some instances, against the explicit policy of their employers. In such cases, personal sanctions may be more appropriate, although they have not been yet used by the Commission.

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[153] Competition and Markets Authority, Press Release "CMA secures director disqualification for competition law breach", 01.12.2016, available at https://www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach

[154] Damien Geradin et al., supra note 10.

Annex

Table of fines imposed in Article 101 cartel cases (2000-2016)[155]

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
FETTCSA	16 May 2000	€6.932 million	serious infringement			termination of infringement on Commission intervention						✓					
Amino Acids	07 June 2000	€109.9 million	very serious infringement		leading role	termination of infringement on Commission intervention						✓					Yes (7 ap.)
Soda Ash-Solvay, CFK	13 December 2000	€3 million	serious infringement														Yes (1 ap.)
JCB	21 December 2000	€39.614 million	very serious infringement		retaliatory/ threatening measures taken against another entity												Yes (1 ap.)
Volkswagen	29 June 2001	€30.96 million	serious infringement		retaliatory/ threatening measures taken against another entity												Yes (1 ap.)
Graphite Electrodes	18 July 2001	€218.8 million	very serious infringement		leading role, obstruction of Commission investigation,	passive role, non-implementation of infringement					✓	✓					Yes (7 ap.)

[155] The table includes fines as set by the Commission in its prohibition/settlement decisions and not corrected for changes following judgments of the Courts. Wherever prohibitions and fines concern infringements of Article 101 TFEU and of Article 102 TFEU (previously Articles 81 resp. 85 and Article 82 resp. Article 86 of the Treaty), only those amounts have been considered which concern the Article 101 TFEU. *T/O*: turnover, *ITP*: inability to pay, *96 LN*: Leniency Notice 1996 (sections B, C, D), *02 LN*: Leniency Notice 2002 (sections A, B), *06 LN*: Leniency Notice 2006 (sections II, III). The section "Appeals" includes only the appeals from the first Commission's decisions and does not comprise the appeals following the re-adapted decisions; *ap.*: appellant(s).

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
					continuation of infringement after Commission investigation													
SAS Maersk Air	18 July 2001	€52.5 million	very serious infringement									✓					Yes (2 ap.)
Interbrew/Alken Maes	5 December 2001	€91.655 million	serious infringement		leading role							✓					Yes (2 ap.)
Luxembourg Brewers	5 December 2001	€0.448 million	serious infringement			existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement				✓							Yes (3 ap.)
Vitamins	21 November 2001	€855.23 million	very serious infringement		leading role	passive role						✓					Yes (4 ap.)
Citric Acid	5 December 2001	€135.22 million	very serious infringement		leading role			✓		✓		✓					Yes (2 ap.)
German Banks	11 December 2001	€100.8 million	very serious infringement														Yes (11 ap.)
Zinc Phosphate	11 December 2001	€11.95 million	very serious infringement									✓					Yes (4 ap.)
Carbonless Paper	20 December 2001	€313.99 million	very serious infringement		leading role			✓		✓		✓					Yes (9 ap.)
Sodium Gluconate I	19 March 2002	€ 37.13 million	very serious infringement		leading role					✓		✓					
Austrian Banks	11 June 2002	€124.26 million	very serious infringement									✓					Yes (8 ap.)
Methionine	2 July 2002	€127.125 million	very serious infringement							✓		✓					Yes (1 ap.)
Industrial and Medical Gases	24 July 2002	€25.313 million	serious infringement			passive role		✓				✓					Yes (2 ap.)
Video Games	30 October	€ 18.72	very serious		leading role;	passive role;											Yes (4 ap.)

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
	2002	million	infringement		continuation of infringement after Commission's commencement of investigation; refusal to cooperate with Commission	termination of infringement on Commission's investigation; compensation for third parties; cooperation outside the scope of the Leniency Notice											
Auction Houses	30 October 2002	€20.4 million	very serious infringement					✓		✓		✓					
Methyl-glucamine	27 November 2002	€2.85 million	very serious infringement							✓		✓					
Plasterboard	27 November 2002	€478 million															Yes (4 ap.)
Nucleotides	17 December 2002	€20.56 million	very serious infringement					✓		✓		✓					
Speciality Graphite	17 December 2002	€60.62 million	very serious infringement			limited participation; no need to ensure deterrence				✓		✓					Yes (4 ap.)
Italian Concrete Bars	17 December 2002	€84.94 million															
French Beef	2 April 2003	€16.68 million	very serious infringement		leading role, retaliatory/ threatening measures taken against another entity, continuation of infringement after Commission investigation	passive role, non-implementation of infringement											Yes (5 ap.)
Sorbates	1 October 2003	€138.4 million	very serious		leading role, recidivism					✓		✓					Yes (1 ap.)
Carbon/Graphite Products	3 December 2003	€101.44 million	very serious infringement					✓		✓		✓					Yes (4 ap.)
Organic Peroxides	10 December 2003	€70 million	very serious infringement		recidivism	cooperation outside the scope of the Leniency Notice		✓		✓		✓					Yes (1 ap.)

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
Industrial Tubes	16 December 2003	€78.63 million	very serious infringement		recidivism	cooperation outside the scope of the Leniency Notice						✓					Yes (5 ap.)
Belgian Architects	24 June 2004	€0.1 million	very serious infringement			existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement											
Copper Plumbing Tubes	3 September 2004	€222.3 million															Yes (15 ap.)
French Beer	29 September 2004	€2.5 million	very serious infringement		recidivism												
Sodium Gluconate II	29 September 2004	€37.13 million															
Spanish Raw Tobacco	20 October 2004	€20 million															Yes (5 ap.)
Needles	26 October 2004	€60 million	very serious infringement.							✓							Yes (4 ap.)
Choline Chloride	9 December 2004	€66.34 million	very serious infringement.		recidivism	cooperation outside the Leniency Notice								✓			
MCAA	19 January 2005	€216.91 million	very serious infringement.		recidivism	cooperation outside the Leniency Notice							✓	✓			Yes (2 ap.)
Thread	14 September 2005	€43.497 million	very serious infringement.			limited participation		✓						✓			
Italian Raw Tobacco	20 October 2005	€60.042 million	very serious infringement.			limited participation, cooperation outside the Leniency Notice		✓						✓			Yes (4 ap.)
Industrial Bags	30 November 2005	€290.710 million	very serious infringement.		recidivism, obstructing the investigation			✓									Yes (15 ap.)

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
Rubber Chemicals	21 December 2005	€75.860 million	very serious infringement.			passive role		✓					✓	✓			
Hydrogen Peroxide	3 May 2006	€388.128 million	very serious infringement.		recidivism	passive role		✓					✓	✓			Yes (11 ap.)
Methacrylates	31 May 2006	€344.563 million	very serious infringement		recidivism	passive role							✓	✓			Yes (11 ap.)
Dutch Bitumen	13 September 2006	€266.717 million	very serious infringement		recidivism, refusal to cooperate, instigator role, leadership role			✓					✓	✓			Yes (23 ap.)
Copper Fittings	20 September 2006	€222.3 million	very serious infringement		recidivism	cooperation outside the scope of the Leniency Notice				✓	✓						Yes (20 ap.)
Butadiene Rubber	29 November 2006	€519.050 million	very serious infringement		recidivism			✓					✓	✓			Yes (12 ap.)
Gas Insulated Switchgear	24 January 2007	€750.713 million	very serious infringement		recidivism, ring-leader			✓					✓	✓			Yes (17 ap.)
Elevators	21 February 2007	€992.312 million	very serious infringement		recidivism								✓	✓			Yes (23 ap.)
Dutch Brewers	18 April 2007	€273.783 million	very serious infringement					✓		✓							Yes (4 ap.)
Fasteners	19 September 2007	€328.644 million	very serious infringement			cooperation outside the Leniency Notice					✓	✓	✓	✓			Yes (5 ap.)
Bitumen Spain	3 October 2007	€183.651 million	very serious infringement		ring leader	passive role		✓					✓	✓			Yes (10 ap.)
Professional Videotape	20 November 2007	€74.790 million	18% of sales	✓	refusal to cooperate		✓							✓			
Flat Glass	28 November 2007	€486.9 million	18% of sales	✓	(…)	(…)	(…)							✓			Yes (4 ap.)
Chloroprene Rubber	5 December 2007	€243.210 million	21% of sales	✓	recidivism		✓						✓	✓			Yes (6 ap.)
Nitrile Butadiene Rubber	23 January 2008	€79.121 million	16% of sales	✓	recidivism		✓							✓			
International	11 March	€32.756	17% of sales	✓				✓	✓					✓			Yes

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
Removals	2008	million															(9 ap.)
Sodium Chlorate Paper Bleach	11 June 2008	€79 million	19% of sales	✓	recidivism		✓						✓				Yes (4 ap.)
Aluminium Fluoride	25 June 2008	€4.97 million	17% of sales	✓									✓				Yes (3 ap.)
Candle Waxes	1 October 2008	€676.011 million	(…)	✓	recidivism, leading role		✓	✓					✓	✓			Yes (21 ap.)
Bananas	15 October 2008	€60.3 million	15% of sales	✓		special regulatory status, negligence							✓				Yes (3 ap.)
Carglass	12 November 2008	€1.383896 billion	16% of sales	✓	recidivism									✓			Yes (11 ap.)
Marine hoses	28 January 2009	€131.510 million	25% of sales	✓	ring-leadership								✓	✓			Yes (5 ap.)
French & German Gas	8 July 2009	€1106 million	15% of sales	✓													Yes (3 ap.)
Calcium carbide and magnesium based reagents	22 July 2009	€61.120 million	17% of sales	✓	recidivism								✓	✓			Yes (12 ap.)
Power Transformers	7 October 2009	€67.64 million	16% of sales	✓	recidivism	compliance programmes	✓						✓	✓			Yes (3 ap.)
Heat Stabilisers	11 November 2009	€173.8604 million	*no public version of the decision available*														Yes (13 ap.)
DRAMs	19 May 2010	€331.2738 million	*settlement*										✓	✓			
Bathroom Fittings	23 June 2010	€622.034024 million	*no public version of the decision available*														Yes (44 ap.)
Pre-stressing Steel	30 June 2010	€269.872 million	16%; 18% and 19% of sales	✓	recidivism	minor and/or passive role, cooperation outside the Leniency Notice, non-implementation/ substantially limited role	✓ (2 pt.)		✓				✓	✓			Yes (20 ap.)

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
Animal Feed Phosphates	20 July 2010	€115.797 million	*settlement*										✓	✓			Yes (4 ap.)
Airfreight	9 November 2010	€799.445 million	16% of sales		recidivism	passive and/or minor role and/or limited participation, regulatory regimes		✓	(…)				✓	✓			Yes (19 ap.)
LCD	8 December 2010	€648.925 million	16% of sales	✓			✓						✓	✓			Yes (3 ap.)
ONP	8 December 2010	€5 million	NG (para. 37 of the 2006 Guidelines applied).														Yes (3 ap.)
Consumer Detergent	13 April 2011	€315.2 million	*settlement*												✓	✓	
Exotic Fruit (Bananas)	12 October 2011	€8.919 million	15% of sales	✓		regulatory regimes							✓				Yes (3 ap.)
CRT Glass	19 October 2011	€128.736 million	*settlement*												✓	✓	
Refrigeration Compressors	7 December 2011	€161.198 million	*settlement*												✓	✓	
Window mountings	28 March 2012	€85.876 million	15%, 16% of sales	✓		cooperation outside the Leniency Notice	✓	✓	(…)						✓	✓	
Freight forwarding	28 March 2012	€136.652 million	15%, 16% of sales	✓			✓								✓	✓	Yes (19 ap.)
Water Management Products	27 June 2012	€13.661	*settlement*												✓		
TV and computer monitor tubes	5 December 2012	€1.409588 billion	18%, 19% of sales	✓			✓		✓						✓	✓	Yes (5 ap.)
Telefonica/ Portugal Telecom	23 January 2013	€79.184 million	2% of sales			termination of the infringement											Yes (2 ap.)
Lundbeck	19 June 2013	€161.538 million	10, 11% of sales	✓		length of the Commission's investigation		✓									Yes (10 ap.)

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
Automotive Wire Harnesses	10 July 2013	€953.306 million	*settlement*												✓	✓	
Shrimps	27 November 2013	€28.716 million	(…)	✓	previous conviction by a national competition authority for a similar infringement yet no influence on the level of fine	limited participation, cooperation outside the Leniency Notice	✓	✓							✓		Yes (4 ap.)
Yen and Euro interest rate derivatives	4 December 2013	€1.494302 billion	*settlement*												✓	✓	Yes (1 ap.)
Fentanyl	10 December 2013	€16.291 million	16% of sales	✓			✓										
Polyurethane foam	29 January 2014	€114.078 million	*settlement*												✓	✓	
Power exchanges	5 March 2014	€5.979 million	*settlement*														
Automotive Bearings	19 March 2014	€953.306 million	*settlement*												✓	✓	
Steel Abrasives	2 April 2014	€30.707 million	*settlement*														Yes (1 ap.)
Power Cables	2 April 2014	€280.898 million	*no public version of the decision available*														Yes (19 ap.)
Canned Mushrooms	25 June 2014	€32.225 million	*settlement*												✓	✓	Yes (1 ap.)
Smart Card Chips	3 September 2014	€138.048 million	*no public version of the decision available*														Yes (3 ap.)
Swiss Franc LIBOR	21 October 2014	€61.676 million	*settlement*												✓	✓	
Swiss Franc Interest Rate Derivatives	21 October 2014	€32.355 million	*settlement*												✓	✓	
Envelopes	10 December 2014	€19.485 million	*settlement*													✓	Yes (5 ap.)

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
Yen interest rate derivatives	4 February 2015	€14.960 million	*no public version of the decision available*														Yes (3 ap.)
Parking heaters	17 June 2015	€68.175 million	*settlement*												✓	✓	
Retail Food Packaging	24 June 2015	€115.865 million	*no public version of the decision available*														Yes (10 ap.)
Blocktrains	15 July 2015	€49.154 million	*settlement*												✓	✓	
Optical Disk Drivers	21 October 2015	€116.377 million	*no public version of the decision available*														Yes (9 ap.)
Alternators and Starters	27 January 2016	€137.789 million	*settlement*												✓	✓	
Canned mushrooms	6 April 2016	€5.194 million	*settlement, no public version of the decision available*														Yes (1 ap.)
Steel abrasives	25 May 2016	€6.197 million	16% of sales	✓	-	cooperation with Commission	✓										Yes (1 ap.)
Trucks	19 July 2016	€2.93 billion	*settlement, no public version of the decision available*														
Euro Interest Rate Derivatives	7 December 2016	€485 million	*no public version of the decision available*														Yes (8 ap.)
Car battery recycling	8 February 2017	€67.61 million	*no public version of the decision available*														
Thermal systems	8 March 2017	€155.58 million	*settlement, no public version of the decision available*														

Table of fines imposed in Article 102 decisions (2000-2016)[156]

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
United Parcel Service / Deutsche Post AG	20 March 2001	€24 million	serious infringement														
PO/Michelin	20 June 2001	€19.76 million	serious infringement		recidivism	termination of infringement on Commission intervention											Yes (1 ap.)
British Post / Deutsche Post	25 July 2001	€1000	symbolic fine			regulatory regimes; existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement											
De Post / La Poste	5 December 2001	€2.5 million	serious infringement														
Deutsche Telekom AG	21 May 2003	€12.6 million	serious and minor infringement			regulatory regimes											Yes (1 ap.)
Wanadoo	16 July 2003	€12.6 million	serious infringement														Yes (1 ap.)
Microsoft	24 March 2004	€497.2 million	very serious infringement big economic capacity														Yes (1 ap.)

[156] The table includes fines as set by the Commission in its decisions and not corrected for changes following judgments of the Courts. T/O : turnover, ITP : inability to pay, 96 LN : Leniency Notice 1996 (sections B, C, D), 02 LN : Leniency Notice 2002 (sections A, B), 06 LN : Leniency Notice 2006 (sections II, III). The section "Appeals" includes only the appeals from the first Commission's decisions and does not comprise the appeals following the re-adapted decisions; *ap.*: appellant(s).

Case	Date	Fines	Gravity	Entry Fee	Aggravating Circumstances	Mitigating Circumstances	Deterrence Increase	10% T/O Cap	ITP	96 LN			02 LN		06 LN		Appeals
										B	C	D	A	B	II	III	
CEWAL & autres Conférences africaines	30 April 2004	€3.4 million	serious infringement														Yes (1 ap.)
PO/Clearstream	2 June 2004	€0				existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement											Yes (2 ap.)
Generics/Astra Zeneca	15 June 2005	€60 million	serious infringement														
Prokent/Tomra	29 March 2006	€24 million	serious infringement														Yes (7 ap.)
Telefonica S.A.	4 July 2007	€151.9 million	very serious infringement + deterrence														Yes (1 ap.)
Morgan Stanley /Visa	3 October 2007	€10.2 million	serious infringement														Yes (2 ap.)
Intel	13 May 2009	€1 060 million	5% of sales														Yes (1 ap.)
Telekomunikacja Polska	22 June 2011	€127.6 million	(…) of average annual sales														Yes (1 ap.)
Microsoft (tying)	6 March 2013	€561 million	not established (finally 1,02% turnover)				✓										
Romanian Power Exchange / OPCOM	5 March 2014	€1 million	10% of sales														
Slovak Telekom	15 October 2014	€69.9 million	(…) of sales		recidivism of mother company		✓										Yes (2 ap.)
ARA Foreclosure	20 September 2016	€6 million	2% of sales			cooperation with Commission											