Calculating fines: Practical problems

The fight against hard core cartels in Europe

Madrid, 27 November
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Agenda
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- Binding nature of the Fining Guidelines?
- Same percentage (of the annual turnover) for ALL the infringing companies to start calculating the basic amount of the fine?
- Aggravating circumstances
- Mitigating circumstances
- Extension of liability to other companies within the Group
- Leniency Program
Are the Fining Guidelines binding?
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Situation in Spain

Spanish NCA (CNC) adopts Fining Guidelines

National Court: Spanish NCA must explain reasons to deviate from Guidelines

October 2009

October 2014

Supreme Court: non-binding nature

National Court:
- New doctrine 10% turnover maximum amount of the fine
- Fining Guidelines ignored

5 March 2013

6 March 2013

New NCA: CNMC Fining Guidelines ignored

New NCA: CNMC Fining Guidelines are applied again

October 2013

July 2014

NCA applies Fining Guidelines

NCA does not apply Fining Guidelines

NCA applies Fining Guidelines

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Are the Fining Guidelines binding?

Situation in Spain

- CNMC and Supreme Court → Non-binding
- National Court:
  - Judgment 5 March 2013 → Binding
    - When the NCA applies its Fining Guidelines, it cannot impose higher fines than the amount resulting from the strict application of its criteria
  - Judgments from 6 March 2013 onwards → Non-binding
    - Fining Guidelines are ignored
    - Graduation of the fine taking into account that the 10% annual turnover in the affected market is the maximum amount of the fine
To start calculating the basic amount of the fine:

Should the Competition Authority use the same percentage (of the turnover) for ALL the infringing companies?
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Basic amount of the fine
• starting point: percentage of the turnover generated in the affected market

The fine will be different for each infringing company as it will depend on
• individual turnovers, specific duration, etc.
• attenuating/aggravating circumstances of each infringing company

But the initial percentage, should it be the same for all?
• Usual practice (not always) of the Spanish NCA and European Commission: Yes
• Recent judgments of the National Court: Not necessarily
To start calculating the basic amount of the fine: Should the Competition Authority use the same percentage (of the turnover) for ALL the infringing companies?

Recent judgments of the National Court (21 and 23 July 2014)
- The Spanish NCA should have applied different percentages to each of the infringing companies taking into account
  - Market shares
  - Number of agreements that they joined

• As a consequence, the basic amount of the fine is reduced for specific infringing companies
  - From 10% to 8%
  - From 15% to 5%
Aggravating circumstances
Aggravating circumstances

- Recidivism
  - + 5% (Resolution Shipping Companies 2012)
  - European Commission + 50%
- Cartel leader / forcing other companies to join the cartel
  - + 15% (Resolution Sintrabi 2011)
  - + 1% / + 2% (Resolution Fire Extinguishing Equipment Manufacturers 2014)
  - European Commission + 20% / 50%
- Refusal to respond to requests for information
  - + 5% (Resolution Bitumen 2011)
  - European Commission + 10% / 30%
Mitigating circumstances
Mitigating circumstances

- Collaboration with the Authority outside the Leniency Program
  - 15% (Resolution Public Works – 2011)
  - European Commission - 10%

- **National Court** reduces the amount of the fines:
  - Confusing regulatory framework (-30%)
    - Sherry wines
    - Shipping companies
    - European Commission – 15% / - 40%
  - Non implementation of the infringement
    - Flex (no specific indication of the % of the reduction)
Compliance programs

- Spanish NCA (like the European Commission) does not accept compliance programs as a mitigating circumstance

- **National Court**

  ✓ **STANPA (2014)**
  - Fine reduction (-50%)
  - Self-assessment report and putting an end to the infringement before the investigation started

  ✓ **RHENUS (2014)**
  - Acquisition of a company that had been involved in a cartel
  - The new parent company carries out an internal investigation
    - The managers that attended the cartel meetings are removed
    - The company abandons the cartel before the investigation had started
  - The NCA had only fined the subsidiary (not the parent company)
  - The National Court annuls the fine imposed on the subsidiary
Compliance programs

- In Australia, Canada, Chile, France, India, Israel, Italy, Singapore and the UK, Competition Authorities are able to treat the existence of a compliance program as a mitigating factor in so far as it evidences a genuine compliance culture.

- In France, a reduction (typically 5%; exceptionally 10%) is available for settling companies that either did not have a program but commit to setting one up, or which commit to upgrading an existing program according to best practice.
Extending liability to other companies within the Group
Extending liability UPWARDS (from the subsidiary to the parent company)

- If the liability is extended to the parent company, the theoretical maximum amount of the fine will be higher
- Rebuttable presumption that the subsidiary is actually influenced by the parent company if the parent company owns all the shares of the subsidiary (100% share capital)
- Below 100%
  - European Commission - at least 97%
  - National Court – overwhelming majority of the share capital
  - Spanish NCA – sufficiently high stake (73% of the share capital is enough)
Extending liability UPWARDS (from the subsidiary to the parent company)

- The parent company can also be fined without taking into account this rebuttable presumption if it is proved that the parent company
  - exercised decisive influence or
  - was aware / participated in the cartel

**Resolution Envelops (2013)**
- 50% shareholding
- The managers of the parent company knew about the subsidiaries’ infringement

**Resolution Concrete (2012)**
- Minority shareholdings
- Direct involvement of the parent company
Extending liability DOWNWARDS (from the parent company to the subsidiary)
Extending liability to sister companies

Common shareholders

Company A
Infringer

Company B
(Sister Company)

Extension of Liability
Subsidiaries / sister companies

- The National Court has annulled in three cases (2012 / 2013) the fines imposed by the Spanish NCA on subsidiaries (upholding the fine imposed on the infringing parent company) because the NCA had no evidence that the subsidiary also participated in the cartel

- The evidence regarding the involvement in the cartel of the parent company is not sufficient to fine the subsidiary

- The same applies to sister companies (National Court judgments of 2013 / 2014)
Leniency program

- Resolution Archive Material (initial fining Decision - 2012)

**DOHE cooperates in the framework of leniency program**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
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<tbody>
<tr>
<td>50% reduction</td>
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<tr>
<td>DOHE’s annual turnover</td>
<td>5,763,460 €</td>
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<tr>
<td>Maximum amount of the fine (10% annual turnover)</td>
<td>576,346 €</td>
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<tr>
<td>Fine calculated under the Fining Guidelines</td>
<td>795,813 €</td>
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<tr>
<td>50% reduction under the Leniency Program</td>
<td>397,900 €</td>
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- Ad hoc Resolution reducing the fine imposed on DOHE (2013)
  - Final fine: 288,173 €
  - 50% of 576,346 € (10% annual turnover)
Leniency program

– Initial Fining Decision (2012)

- 795,813 € → 50% → 397,900 € → Check 10% annual turnover limit (576,346 €) → 397,900 €

– Ad hoc Resolution reducing the fine imposed on DOHE (2013)

- 795,813 € → Check 10% annual turnover limit (576,346 €) → 576,346 € → 50% → 288,173 €
Thank you very much