



**BDI**

Law and  
Public Procurement

## **Opinion**

by Sir Jeremy Lever KCMG, QC

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Whether, and if so how, the EC Commission's 2006 Guidelines on setting fines for infringements of Articles 81 and 82 of the EC Treaty are fairly subject to serious criticism

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## Executive Summary

(1) The EC Commission's 2006 »*Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003*« (»**the 2006 Guidelines**«) were published in the Official Journal on 1 September 2006 ([2006] OJ C 210/2).

(2) The Guidelines claim that the Commission's policy is to set fines for infringements of Articles 81 and 82 of the EC Treaty (anti-competitive agreements, concerted practices and decisions of associations of undertakings, and abuse of dominant position, respectively) so as to deter unlawful conduct; to that end the Guidelines refer to the combination of the value of the sales to which the infringement relates and to the duration of the infringement; and the Guidelines state that reference to those factors »provides a good indication of the order of magnitude of the fine«.

(3) That statement turns out to be somewhat misleading since:

(a) there is added to the amount that is determined by reference to the value of the sales affected by the infringement and the duration of the infringement an *entry fee* which may be significant relative to the element of the fine determined by the value of affected sales/duration of infringement; and the resulting »basic fine« may be increased severalfold by reason of the existence of *earlier infringements* and *other aggravating circumstances*;

(b) at the same time, the Guidelines are in many important respects *imprecise* and leave the Commission with a *very wide discretion*, without giving any indication as to how the Commission will exercise that discretion;

(c) most importantly, in many, and probably in most cases of serious infringements of Articles 81 and 82 EC the *actual fine* will then *equate to 10 per cent of the worldwide turnover in all products* of the corporate entity or group of which the infringing undertaking forms part; and

(d) even when estimating what the »basic fine« will be »reference to [the value of sales affected by, and the duration of, the infringement] should not be regarded as the basis for an automatic and arithmetical calculation method«, and the Commission reserves a general discretion to depart from the Guidelines.

(4) The *utility* of the 2006 Guidelines may therefore be doubted; and, of even greater importance it may be seriously doubted whether *in practice* the fines *actually imposed* by the Commission will be determined by it having »regard to« the *gravity* and *duration of the infringement*, as required by Article 23(3) of Council Regulation No. 1/2003.

(5) Although, for better or worse, Article 23(2) of Council Regulation No.1/2003 provides that the fine on an infringing undertaking »shall not exceed 10 % of its total turnover in the preceding business year« (emphasis added), use of turnover (or »value of sales«, to use the terminology adopted in the Guidelines) to *determine the amount of a fine* is fundamentally flawed; and that is so whether the turnover used for the purpose is the turnover of the legal entity that committed the infringement or is the turnover of the corporate group of which that legal entity is part. Thus, for example, 10 per cent of the turnover of a capital-intensive undertaking which turns over its capital once a year equates to 10 per cent of the capital of that undertaking. By contrast 10 per cent of the turnover of an intermediary, such as a wholesaler or retailer, that turns over its capital five times a year equates to 50 per cent of its capital; a fine of 10 per cent of its turnover is therefore of far greater significance for the second undertaking than it is in the case of the capital-intensive undertaking.

(6) There is, so far as I have ascertained, no evidence to substantiate a conclusion that the marginal utility of money to a business varies in inverse proportion to the aggregate turnover of that business, so that e.g. for a group with a global turnover of  $\approx 10$  billion a fine needs to amount to as much as  $\approx 1$  billion in order for the fine to be as significant for it as is a fine of  $\approx 100$  million to a group with a global turnover of  $\approx 1$  billion. Yet such an assumption is necessary to justify the actual fines that can be expected often to be imposed in practice where the infringement is committed by a subsidiary company, applying the 2006 Guidelines, even disregarding the unsatisfactory nature of turnover as a relevant parameter (see (5) above).

(7) Use of global turnover in all products as a determinant of a fine may work particularly unfairly if the infringement affected turnover outside the EU and the group of which the infringer is a part has been or is to be fined for infringement in non-EU jurisdictions. Yet the 2006 Guidelines give no indication that fines imposed outside the EU for the same conduct outside the EU are to be taken into account.

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(8) Commission of the »same or similar« infringements by the current infringer or by another member of the group of which the current infringer is a part can have a disproportionately great effect on the amount of a fine imposed on the current infringer. The extent of this problem in practice will depend on the interpretation given by the Commission to the expression »same or similar«, with regard to which the Guidelines are regrettably silent.

(9) In any event, corporations (*personnes morales*) are by their nature not recidivist in the kind of way in which individuals (*personnes physiques*) are recidivist. In many, if not most, cases the relevant question in this connection should concern the steps taken by the control group of the undertaking to prevent the commission of infringements whether or not an earlier infringement has been detected and the subject of a decision by the competent authorities. Yet the Guidelines nowhere expressly identify that as a relevant consideration.

(10) The failure in the Guidelines to recognize the relevance of facilitation/non-facilitation by infringers of compensation of victims is to be regretted.

(11) Having published Guidelines, the Commission is in some degree constrained by them. The Guidelines therefore have a normative, and hence quasi-legislative, character. One may therefore particularly regret that the Commission did not, so far as appears from public records, consult with the Council or the relevant Advisory Committee or within the Competition Network, let alone with representatives of commerce and industry, before publishing the 2006 Guidelines. Nor has the Commission indicated any intention to report in due course to either the Council or the Parliament as to how in practice the Guidelines have operated. Especially in those circumstances it is greatly to be hoped that the Commission will now review the Guidelines in the light of comments on them made by third parties, including, in particular, representatives of European commerce and industry. Undertakings that are the victims of infringements of Articles 81 and 82 EC very probably outnumber those who commit infringements. The representatives of commerce and industry have a strong interest in the deterrence of infringements as well as in the deterring penalties not operating irrationally, disproportionately and inequitably.

## Introduction

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1. I have been asked by the Bundesverband der Deutschen Industrie (»**the BDI**« or Federation of German Industries) to advise whether, in my opinion, the *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003* issued by the Commission of the European Communities (»**the Commission**«) on 1 September 2006 ([2006] OJ C 210/2, »**the Guidelines**«) can fairly be criticized as being seriously unsatisfactory.

2. In that connection the BDI sent me a copy of an English language translation of a Paper by Dr Eckhart Sünnner, Chairman of the BDI Legal Affairs Committee that was published by *Europäische Zeitschrift für Wettbewerbsrecht* in January 2007. I am firmly of the opinion that Dr Sünnner's conclusion is correct, namely that:

»The expansion and, in part, very stringent stipulation of the regulations for setting fines bind the Commission in such a way that it can no longer take account of the principles of proportionality and justice in the individual case.«

3. If and to the extent that the Commission claims that the Guidelines leave it with such a wide discretion that the Commission can in practice take account of the principles of proportionality and justice in the particular case, the Guidelines fail to fulfill the function of enabling one to predict *how* the Commission will in fact set fines for infringements of Articles 81 and 82 of the EC Treaty (»**Article 81 EC**« and »**Article 82 EC**«) and with *what result*. And unless the Guidelines give one a fair idea of how the Commission in practice calculates fines and within reasonable limits their likely magnitude in commonly encountered circumstances, it is difficult to see what useful purpose the Guidelines serve.

4. Having said that, I am conscious of the fact that it is, no doubt, a great deal easier to criticize such Guidelines drafted by someone else than oneself to draft criticism-proof Guidelines. But that, in turn, leads me to express regret that the Commission promulgated the 2006 Guidelines without, so far as I can tell, having engaged in any consultation process. Since the Guidelines are quasi-legislative (they in fact create legally important norms that are more significant than many 'Regulations') one may particularly regret that, so far as the public record discloses, not even the Advisory Committee referred to in Article 14 of Regulation 1/2003 was consulted with regard to the Guidelines (contrast Articles 41 and 42 of Regulation 1/2003; and in the United Kingdom, the Office of Fair Trading, the national competition authority (»**the NCA**«), is under a statutory obligation to consult when preparing or altering guidance on penalties).

5. For the convenience of the English-speaking reader, I annex to this Opinion a summary of Dr Sünnner's criticisms of the 2006 Guidelines. This Opinion should be seen as complementary and supplementary to Dr Sünnner's paper.

## 10 per cent of total turnover as a general norm for hard core infringements

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6. It is, as Dr Sünner correctly assumes, important that groups of what an English lawyer would call »interconnected bodies corporate« will generally fall to be treated in this respect (as in other respects for the purposes of EC competition law) as a single undertaking. Therefore, for example, if the German subsidiary of a multinational group has a turnover of €100 million a year and has participated for five years in a cartel that has affected the whole of its turnover and if a small French subsidiary of the group was involved in a »similar« infringement 15 years earlier, the fine on the infringing undertaking may amount to as much as €350 million unless the turnover of the group in all products worldwide is less than €3.5 billion. Putting the matter more generally, unless the turnover affected by an infringement constitutes only a small, and in many circumstances very small, proportion of the global turnover in all products of the group of which the infringer is part, the fine for »hard core« infringements will in the majority of cases equate to 10 per cent of the group's worldwide turnover in all products.

7. Therefore, one may question whether, *irrespective of the methodology described in the Guidelines*, fines will in *practice* be determined by the gravity and duration of the infringements to which »regard shall be had« »in fixing the amount of the fine«: Article 23(3) of Council Regulation (EC) No. 1/2003.

8. In saying this I have not overlooked the observations of the European Court of Justice (»the ECJ«) in Case C – 189/02 *Dansk Rorindustri v Commission* (Pre-Insulated Pipes) [2005] ECR I-5425 at paragraph 272 – 323 where the ECJ observed, with reference to the Commission's earlier 1998 Guidelines, in effect that the 10 per cent ceiling merely prevented the fine from fully reflecting the gravity and duration of the infringement, the ceiling having a distinct and autonomous objective of preventing fines from exceeding an amount that an undertaking with a turnover such as the infringing undertaking is likely to be able to pay. However, it may be doubted whether Guidelines such as the 2006 Guidelines that *systematically result* in the imposition of fines that equate to 10 per cent of the infringing undertaking's global turnover in all products can be said to result in the setting of fines that have regard, *on the facts of the individual case*, to the gravity and duration of the infringement.

9. In a further respect the use of turnover, even if confined to the turnover affected by the infringements, as the touchstone for computing fines is fairly to be criticized. Neither the marginal utility to the undertaking nor its ability to pay a fine of any given amount is determined by the undertaking's turnover.

## The unsatisfactory nature of turnover as a primary determinant of fines

10. I have given as an example at paragraph (5) of the Executive Summary the fact that 10 per cent of the turnover of one company may equate to 10 per cent of its capital whereas in the case of another company it may equate to 50 per cent of *its* capital.

11. Another way of making a closely related point is to note that 10 per cent of the turnover of an undertaking, typically an intermediary that adds little value to the products that it handles and that therefore operates on a 2.5 per cent net return on sales, equates to four years' profit whereas 10 per cent of the turnover of an undertaking that operates on a 30 per cent net return on sales equates to only four months' profit.

12. In this connection it is useful to refer to Commission Regulation (EC) No 1725/2003 of 29 September 2003, adopting certain international accounting standards in accordance with Regulation (EC) No 1602/2002 of the European Parliament and Council ([2003] OJ L261/1 of 13 October 2003 and [2002] OJ L243/1 of 11 September 2002, respectively). The Commission Regulation indicates that a true representation of the financial position of an undertaking must take account of the following factors:

- assets
- liabilities
- equity
- income and expenses, including gains and losses; and
- cash flows.

13. Given that the turnover is only a reflection of the gross sales of the undertaking concerned, it cannot be said to reflect the size or financial position of that undertaking, or the deterrent effect of a fine of any given magnitude. In particular turnover does not adequately reflect the ability of an undertaking to pay a certain sum; and the fact that the contrary has been widely assumed in this connection does not mean that the assumption is correct. Thus, Article 23(3) of Council Regulation (EC) No. 1/2003 does not provide that, in setting fines, regard shall be had *only* to the gravity and duration of the infringement; and a »rational« determination of a fine would have regard *also* to the »financial position« of the undertaking and, at least *grosso modo* where reasonably practicable, the extent to which the undertaking's financial position had been affected by the infringement and the impact of a fine of any given magnitude on its financial position. Such an approach would also be more transparent as well as more sophisticated than the previous »lump sum approach« under the 1998 Guidelines.

14. Put bluntly, but not I hope discourteously, any policy of calculating and imposing fines by a mechanistic process that treats the size of turnover as a determinant is irrational and is bound to lead to the imposition of fines without regard to the principles of proportionality and justice in the individual case, to use Dr Sünnner's words (see paragraph 2 above).

15. The mechanistic calculation of fines is liable to lead to a lack of proportionality in other ways also. I have in mind in particular that a fine is mechanistically calculated for each »infringement«. Yet what is treated as »an infringement« rather than two or more infringements may be at best fortuitous and at worst arbitrary. Thus, a cartel may set prices for several products eg. for screws ranging in size from very small to very large, and not all the cartellists may make screws of every size. The Commission may treat the resulting situation as »an infringement«. But if there are separate »sections« of the cartel or separate groups, that set the prices for eg. small screws, medium-sized screws and large screws, and each section or group comprises the undertakings that make screws in the size band in question, there will be three infringements. In the result, if the 10 per cent of overall turnover cap is applied, an undertaking that supplies ⇔100 million of small screws, ⇔100 million of medium-sized screws and ⇔100 million of large screws is liable to be fined three times more than a firm that supplies ⇔300 million of medium-sized screws. The application of mechanistic formulae can lead to arbitrary and disproportionate fines in such circumstances.

16. I also have real disquiet about the fact that turnover in the same products outside the EU that was affected by the same conduct which constituted an infringement of a similar but non-EU antitrust law and has attracted a fine on that account, is nevertheless included in the turnover base used by the Commission in its calculation of the fine for the infringement of EC competition law. Although such treatment does not *technically* infringe the *non bis in idem* rule, it seems to me to be contrary to the spirit of that rule.

## The obscurity of the way in which the Commission defines the undertaking concerned

17. Moreover, the Guidelines are silent with regard to a question that may be of critical importance in determining the amount of a fine. That question is in what circumstances an infringement committed by a subsidiary will not be »attributed to« the subsidiary's parent company so that only the turnover of the subsidiary will be used in computing the 10 per cent ceiling. In this connection it is unenlightening to refer to the Commission's Decision 2003/569/EC *Groupe Danone* where, in the case of one cartel infringement, the Commission treated the parent as responsible so that the group turnover was relevant and, in the case of another cartel infringement, the Commission treated the subsidiary alone as responsible since there was »no evidence that the parent was actually involved« (paragraph 280 of the Commission's Decision), so that only the subsidiary's turnover was relevant. It is no more helpful to refer in this connection to the CFI's judgment on appeal from that decision in Case T-38/02 *Groupe Danone v Commission* (Belgian Beer), judgment of 25 October 2005, or the ECJ's judgment on appeal from the CFI in Case C-3/06 P (judgment of 8 February 2007).

18. Given the huge importance of the answer to the question of »attribution« or »non-attribution«, or »involvement« or »non-involvement«, the Guidelines can fairly be criticized for their silence on the issue. One is left in doubt as to whether, even though a parent had control of the subsidiary at the time of the infringement, only the subsidiary is liable and only its turnover is taken into account if the parent did not know of or acquiesce in the infringement; or whether, if the parent had the ability to control the infringing undertaking at the time of the infringement because the parent-subsidiary relationship then subsisted, the parent is responsible because of its failure to exercise its power of control to prevent the infringement.

19. It appears from the cases that the Commission adopts the former approach when identifying the undertaking that is to be found guilty of the infringement, 10 per cent of the global turnover of which in all products sets the ceiling on the fine, but adopts the latter approach when identifying earlier infringements, commission of which may inflate the fine (subject to the 10 per cent ceiling) by 100 per cent. Which approach is adopted may, in each case, hugely affect the amount of the fine ordered to be paid; it is therefore very unsatisfactory if the Commission is indeed adopting different approaches with regard to, on the one hand, the current infringement and, on the other hand, earlier infringements especially since the different approaches are *prima facie* inconsistent and, if there is a rationale for the difference, it is unexplained. If and in so far as the Commission retains an unprincipled discretion as to how it approaches the fining of infringements by members of corporate groups, the existence of such a discretion is objectionable.

## General observations

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20. It may be useful here to interject two general observations:

(1) Recognition of the Commission's discretion

21. Any system of fines for infringement of Article 81 EC and Article 82 EC that satisfied the test of being sufficiently deterrent but also proportionate having regard to the relevant circumstances would necessarily be more complex than the present largely mechanistic application of simplistic rules (cf. especially the conclusion, at pages 102-103 to Chapter 4 of Karen Leung, *Securing Compliance, A Principled Approach*, Hart Publishing, 2004). But I am certainly not suggesting that, to avoid criticism, a system would need to be exact in the sense of depriving the Commission of a substantial margin of discretion in making sensible estimates, as best it could, on the basis of the reliable evidence before it. However, one cannot justify doing injustice because it is easier than doing justice. The magnitude of the fines now being levied by the Commission will in due course lead to reasonable criticism that the Commission is doing injustice and doing it on a massive scale.

(2) The responsibility of the Commission if the system needs to be reformed

22. I do not think that it would be an adequate answer for the Commission to say that:

- it is constrained by Article 23(4) of Council Regulation 1/2003 (the ceiling of 10 per cent of turnover);
- the Community Courts enjoy *pleine jurisdiction* with regard to the amount of fines; and
- the Community Courts have largely acquiesced in the Commission's fining policies

The Commission was the primary source of Council Regulation 1/2003 (as it had been of the antecedent Regulation 17) and, if I am right that the present system is seriously flawed, the primary responsibility for remedying the flaws lies with the Commission which remains free to propose amendments to Council Regulation 1/2003. Moreover, there is at least a risk for the Commission that the point that I have taken at paragraph 7 above with regard to the lawfulness of the Guidelines (*lex lata* as opposed to *lex ferenda*, with which this Opinion is primarily concerned) will eventually be raised successfully before the Community Courts with serious consequences of general significance for the Commission.

## Recidivism

23. The next issue to which this Opinion is addressed is the treatment in the 2006 Guidelines of the effect »where an undertaking continues or repeats the same or similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82« (Point 28 of the Guidelines).

24. Here again the Guidelines raise rather than answer a number of questions which are all the more serious because of the very broad meaning that the Commission attached to the reference in the 1998 Guidelines to infringements of the »same type«. Thus under the 1998 Guidelines the Commission treated an infringement of Article 81 (as it is now) by an undertaking in the *Belgian beer market* as being of the »same type« as an infringement (that had ended over eight years before the infringement in the Belgian beer market) by a company in the same corporate group in the *Benelux flat glass market*. Yet (by implication) it did not treat an Article 81 infringement in the *French beer market* as being of the same type as the contemporaneous infringement in the Belgian beer market even though it did treat it as being of the same type as the infringement in the Benelux flat glass market. Mr Wouter Wils explains this (*The European Commission's Guidelines on Antitrust Fines*, World Competition, Volume 30, No 2, June 2007) by saying that in the *French beer case* »The Commission considered that a price-fixing cartel is not »similar« to a market-sharing cartel«, citing »Commission Decision of September 2004 *French Beer* [2005] OJ L184/57 paragraph 91«, which is very puzzling both because there is no paragraph 91 in the Commission Decision as reported in the Official Journal and because the 1998 Guidelines, which were the operative Guidelines when the French beer decision was taken, referred only to infringements of the »same type«, and did not use the expression »similar« – unlike the 2006 Guidelines which use the expression »same or similar«.

25. Given that a fine may be doubled if the undertaking had earlier committed »the same or similar infringement«, it is profoundly unsatisfactory, especially in the light of the confused state of the decisional practice, that the Guidelines give no indication whatsoever of what is now regarded by the Commission as an infringement that is treated as the same as a later infringement or as similar to a later infringement – and presumably the addition in the 2006 Guidelines of a reference to »similar« infringements was intended to add something to the earlier reference to »same« infringements.

26. More generally the Commission's approach to »recidivism« seems to me to betray a failure to understand the relevant differences between individuals (*personnes physiques*) and corporate undertakings (*personnes morales*). Individuals can certainly have a propensity to commit offences, usually of a particular kind (e.g. the serial rapist, the »professional« burglar). But corporations as such do not have propensities. The »control group« of a corporation may have a propensity (e.g. the senior executives may be habitual fraudsters who systematically commit frauds to inflate the corporation's profit and the executives' earnings). But if an infringement was committed in, say, 1980, when A, B and C comprised the control group, and a further infringement was committed in 2005, when the control group comprised X, Y and Z, who may never have met A, B and C, in what sense can the corporation be said to have a propensity to commit infringements? And the same question may validly be asked where an infringement is committed by, say, the Hungarian soap-making subsidiary of a multinational group and another infringement is committed, say, by the German food subsidiary of that group, in each case without the knowledge of the control group and without the knowledge of the other subsidiary. In this connection one can sensibly consider the case where multinational X acquires e.g. the Hungarian subsidiary from multinational Y and the subsequent infringement is committed by the German convenience food subsidiaries of X and Y. Is X or Y the recidivist or are they both of them, or neither of them, recidivists?

27. I draw the conclusion, first, that where the same executives have a significant degree of responsibility for serial infringements of a serious nature, the subsequent fine(s) need to be sufficiently heavy to make it quite likely that the executives will lose their jobs, but that otherwise recidivism as a concept is inapplicable to corporate undertakings.

## The relevance of compliance programmes, whether or not an earlier infringement has been committed by the »undertaking«

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28. The existence and operation of a compliance programme or not as the case may be will often be relevant in assessing the gravity of an infringement. Thus, where senior management have taken all reasonable steps to put in place a well structured compliance programme and to ensure that it is effective, but the rules have been unforeseeably broken by an employee, the infringement is clearly less grave than where senior management have taken no steps to prevent such an infringement or even worse have been complicit in it. Undertakings need to be encouraged to do their best to avoid infringing the Rules on Competition as well as to be aware of the condign consequences of infringements if they occur. My conclusion is that the Guidelines are defective in omitting any mention of compliance programmes and in mistakenly relying instead on a concept of corporate recidivism. If the Guidelines are intended to have an educative and psychological effect, it would be no answer to my criticism for the Commission to say that in setting fines it does take into account the position with regard to compliance programmes, if such is the case, even though the Guidelines contain no mention of that fact.

29. There is a further anomaly that the effect of prior infringements on the total of fines imposed on an undertaking may be heavily dependent upon the size of the most recently affected turnover relative to the size of the turnover affected by earlier same or similar infringements. *Relatively* insignificant earlier infringements may hugely inflate the fine imposed for a later infringement if *it* affected a large turnover. That consequence may be particularly disturbing where the earlier infringement attracted the attention only of an NCA, perhaps in a country where the relevant group had only a very minor presence or if it was dealt with otherwise than by way of a fine, such as by a commitment. Yet the 2006 Guidelines give no indication that the Commission treats as relevant such *particular* features of what are surely relevant considerations.

## Compensation of victims

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30. My last serious criticism of the Guidelines, also refers to an omission from them.

31. Undertakings are liable to be deterred from committing infringements of Articles 81 and 82 EC by a consideration of the *total cost* to them if the infringement is detected (this leaves aside the deterrent effect of the consequences for executives in the infringing undertaking). The *total cost* includes not only any fine (and the fees of the lawyers, economists, etc., engaged by the undertaking) but also any damages that are recovered by persons (individuals and corporate undertakings) who have suffered loss as a result of the infringement.

32. It is well arguable that the greater the proportion of the total cost that is accounted for by compensatory damages the better since the damages contribute not only to effective deterrence but also to restoration of the situation that would have prevailed if competition had not been prevented, restricted or distorted.

33. This is not simply an idea of my own. It was enunciated as a relevant consideration by Sir Christopher Bellamy, a former judge of the EC Court of First Instance, in his capacity as President of the UK Competition Appeal Tribunal (*Argos Limited v Littlewoods Limited* (Judgment on Penalty) [2005] CAT 13 paragraph 238; and *JJB Sports Plc v Office of Fair Trading* (Judgment on Penalty) [2005] CAT 22 paragraphs 201 and 265).

34. It would therefore, in my opinion, be desirable for the Commission to divide the administrative procedure in competition cases into two stages – the first would determine liability and, if any, its extent; the second would relate to remedies and, in particular, fines. It would be open to undertakings at the second stage to come forward with proposals for facilitating recovery of compensation by victims of the established infringements. Here again a change in the Commission's publicly declared practice could have a valuable educative function.

35. In my opinion, therefore, the failure in the Guidelines to recognize the relevance of facilitation/non-facilitation of compensation of victims is particularly regrettable.

## Conclusion

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36. I hope that it will be clear from the foregoing that I do not criticize the 2006 Guidelines, or indeed the overall system of which the Guidelines form part, on the ground that they are likely to give rise to fines which in the aggregate are excessive. I criticize them because they can be expected to give rise to irrational and disproportionate fines in particular cases. Under a rational and proportionate system the aggregate fines imposed might indeed *in some cases* be *higher* than under the present system; and if as, somewhat to my surprise, even in recent years hard core infringements continue to flourish, it is quite possible that a rational and proportionate system would give rise to a higher aggregate sum of fines and compensatory damages than will result under the present system. This Opinion is not, therefore, the work of an »infringer-lover«; and I believe that it is not in the interest of the BDI to favour a reduction of deterrence *per se*. However the present system seems to me to be so conceptually flawed that recovery, for the Community budget, of very large sums from undertakings will in due course attract severe and justified criticism that would militate against the effective securing of compliance with EC competition law and would be liable to bring the Community institutions into disrepute.

## Annex

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### A summary of the criticisms of the 2006 Guidelines made by Dr Eckart Sünner in a Paper published by Europäische Zeitschrift für Wettbewerbsrecht in January 2007.

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Dr Sünner's criticisms may be summarised as follows:

(1) Hard core infringements are unreasonably lumped together so far as their gravity is concerned and there is no, or no sufficient, recognition that their gravity may be affected by the level within the undertaking at which the infringement was authorized and with what appreciation of its consequences, and by the measures taken, and by whom, to make the infringing conduct effective and with what success.

(2) »Duration« is similarly classified in a very crude way by the Guidelines, without consideration of differences as between different periods of time, with a crude multiplier of 100 per cent for each »year«.

(3) The »entry fee« results in a heavy »basic fine« for single product SMEs that have been involved in an infringement for only a year or two (but the ceiling of 10 per cent of one year's sales generally protects them). For longer term infringements the entry fee is equivalent to only a short prolongation of the duration of the infringement but those are generally the more serious cases.

(4) The multiplier for past »same or similar« infringements can have disproportionate effects, equivalent to at least doubling the duration of the infringements. »Repeat offenders have to pay the entry fee for past infringements again«. No distinction is drawn by reference to the length of time that has elapsed since the past infringements. Large, multi-product/multi-national undertakings are at disproportionate risk. And there is a disproportionate discretion as to the extent to which past infringements increase a fine for a new infringement.

(5) In view of the drastically increased level of fines overall and the increased likelihood of civil actions for recovery of compensation from infringers, there is now no need or justification for increasing fines yet further to seize gains »estimated« by the Commission to have been made as a result of the infringement.

(6) Disregard by the Commission of mitigating factors, even if known to the Commission, if they are not proved by the undertaking concerned is unfair and legally objectionable.

(7) Increasing the fine simply because the undertaking overall is a large one is indefensible.

(8) There is a risk that the 10 per cent ceiling will become the norm.

(9) The absence of any consideration of »proportionality« and justice in the individual case is objectionable.

(10) There was no consultation prior to the introduction of the 2006 Guidelines and there is no explanation of why the 1998 Guidelines needed to be amended as they have been, or indeed at all.

## Imprint

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