contrast

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Imagine…

Your company recently introduced a fully updated product line, and the initial sales results have been very encouraging. You are confident that for 2016 and 2017 you will be able to submit excellent results to headquarters.

And those positive results were urgently needed, since you had been worrying about the fact that the sales of your most successful product line (which in 2013 were still around 100 million euros) had fallen, due to increasing competition, to around 50 million euros in 2015. The contribution to the overall profit had also fallen significantly: once good for 15 million euros, it now accounts for a mere 5 million euros.

Then, out of the blue, your company receives a visit from the European Commission. The mandate of the inspectors states that an investigation has been initiated on price agreements and customer sharing for products that include your own company´s most successful product line. The suspected agreements might extend to all EU Member States. While the on-site inspection is still in progress, you learn from the press that your competitors and the sector federation are also being investigated.

You call in your European sales manager and he admits that, over a number of years, a certain amount of price information was indeed exchanged in the margins of meetings of the European sector federation. However, he stresses that he personally had never provided such information. He believes

that these practices went on for at most 3 years, and they had already ceased by the end of 2013. So, according to him, there could not really be that much of a problem.

Your lawyers review the information that the Commission’s people took along and quickly come to a different and far more sobering conclusion. They suspect that your company was a member of a price-fixing cartel. You ask your lawyers to estimate the potential exposure. To your great dismay, they come up with a potential fine of more than 100 million euros, and perhaps as high as 150 million euros. You cannot believe your ears: such a fine for a product line that last year generated sales of 50 million euros and a profit of 5 million euros. Headquarters is going to be furious. All that work for nothing.

A brief clarification.

Fines serve a twofold purpose: punishment and deterrence. The competition authorities set fines according to the penalty guidelines it has adopted for this.

The European Commission first determines a basic amount that is calculated on the basis of a percentage of the 'value of the sales', i.e. the value of the sold goods that relate to the violation in the last full year during which the company participated in the violation. That percentage usually amounts to a maximum of 30%. The thus-obtained amount is then multiplied by the number of years that the violation went on.

For our company this is 30% of 100 million euros in 2013, multiplied by 3 (number of years of the violation), resulting in an amount of 90 million euros.

Things do not stop there, however.

In order to dissuade companies from participating in a cartel, the European Commission adds an amount of 15%-25% of the value of the sales. This so-called 'entry fee' thus amounts for our company to a maximum of 25 million euros (25% of 100 million euros in 2013). In this way, the basic amount of the fine comes to 115 million euros (90 million euros + 25 million euros).

This basic amount can be increased in the event of aggravating circumstances (e.g. because the company played a leading role in the cartel, or had already been condemned for the same sort of thing previously). The basic amount can even be further increased specifically with a view to deterrence. This applies above all for especially large companies.

The basic amount can be reduced in the event of mitigating circumstances (e.g. because the cartel agreements weren’t actually carried out in practice).

The legal maximum of the fine that the European Commission can impose amounts to 10% of the group's worldwide revenues in the year prior to the decision. Suppose that our company has a total

turnover of 1.5 billion euros, then the maximum limit is 150 million euros (10% of 1.5 billion euros).

Concretely.

- Companies that participate in a cartel run the risk of incurring very heavy fines.
- Fines are turnover-related: they do *not* take the actually realized profit into account.
- Decisive factors for the level of the fines are: the nature of the violation (cartels are the most heavily fined), the value of the sales of the products or services involved, and how long the violation went on.

- Companies that are involved with cartels can report this within the framework of a leniency programme. In exchange for cooperating with the European Commission, they can obtain fine immunity (only for the first leniency petitioner) or a reduction of fine, depending on the significant added value of the evidence provided (30-50% reduction of fine for the second leniency petitioner, 20-30% for the third; 20% at most for subsequent companies). The percentages can differ in the event of a leniency petition submitted to a national competition authority.
- The fact that a company is making losses is *not* sufficient reason to avoid having to pay a fine. Only in a special social and economic context will account be taken of a company's inability to pay (e.g. when there is objective proof that the imposition of a fine would seriously threaten the company's viability).
- Fines are good for the European or national budget (depending on whether they are imposed by the European Commission or a national competition authority).
- Along with fines for the company, cartel violations under the national competition law can often also lead to fines for the personnel members who set up the violations or who actively participated in their implementation.

Want to know more?

- The fine calculation of the European Commission is based on the Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation (EC) no. 1/2003, Official Journal of the European Union C 210/2 of 1 September 2006.
- The fine calculation of the Belgian Competition Authority is based on the Guidelines of 26 August 2014 on the method of setting fines for companies and company associations referred to in article IV.70, § 1, first paragraph of the Belgian *Wetboek van economisch recht* (WER - Code of Economic Law) for violations of articles IV.1, § 1 and/or IV.2 WER, or of the articles 101 and/or 102 of the Treaty on the Functioning of the European Union.
- The November 2015 'In the Picture' ('A personal look at leniency') reviews the leniency rules.