The FCO’s new fining guidelines – not much guidance after all

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The FCO published new fining guidelines on June 25, 2013, which have been applied for several months now. However, the guidelines as well as the recent practice do not provide a lot of guidance.
The previous fining guidelines followed a similar methodology as those of the European Commission: the FCO first determined a base amount as a percentage of the turnover affected by the infringement, which could subsequently be increased due to aggravating circumstances, as well as reduced due to mitigating circumstances. As a final step, the FCO would cap the fine at 10% of the companies’ total worldwide group turnover in the year preceding the decision, if necessary.

This approach was quashed by the Federal Court of Justice (“FCJ”) in its *Grauzement* decision (KRB 20/12, of February 26, 2013). The FCJ confirmed that sanctions need to have a clearly defined upper limit, and that a cap could not satisfy this requirement. It thus re-interpreted the existing 10%-cap (Section 81(4) GWB), turning it into the statutory upper limit of a possible fine. This means that a fine amounting to 10% of the total group turnover should be the worst sanction possible and can thus only be imposed in the worst possible infringement scenario.

This is a fundamental change. It could easily happen under the old regime that one-product companies hit the 10%-cap, in particular if the cartel lasted several years. This will rather be the exception now, as the 10% is reserved for the worst possible cartel scenario, meaning that for this type of company the fines will likely be lower now than under the previous guidelines.

Following the publication of the *Grauzement* decision in April 2013, the FCO had to develop and publish new guidelines within a relatively short period. Admittedly the FCO did not have any experience with the new concept when drafting the guidelines. However, it is disappointing that the guidelines focus on how to determine the upper limit of the fine and the fine framework rather than on how to determine the fine itself.

The new guidelines refer to the statutory upper fine limit of 10% of the company’s worldwide group turnover one year prior to the decision. The guidelines also introduce an alternative fine framework, the “gain and harm potential”, which is a percentage of the company’s turnover achieved with the cartelized products. This is not aimed at determining the fine or a base amount, but at providing a lower fine framework, if applicable, within the statutory limit of 10% of the total turnover. The guidelines explain that the sanction should not be disproportionate to the possible competitive advantages the company may have gained through the cartel, as well as to the detrimental effects it may have caused for third parties or for the macro economy as a whole.

The gain and harm potential is determined by taking 10% of the (acting) company’s German turnover with the cartelized products or services for the entire duration of the infringement. The figure is multiplied with a given factor in order to reflect the overall company’s size. (The multipliers range from 2-3 for a total worldwide group turnover below € 100 million to more than 6 for a total turnover exceeding € 100 billion, with different steps in between.) The FCO then compares the gain and loss potential with the amount of 10% of the worldwide total group turnover: the lower amount serves as the upper limit of the fine framework. (In practice, the gain and harm potential will thus likely only play a role for multi-product companies with a high total worldwide group turnover.)

Only then the actual fine determination starts. The new guidelines do not provide much guidance as to how the FCO will do this in practice. This vital topic is covered in a single recital of the new guidelines (out of 18 recitals in total plus four pages additional explanations). The general principle is the need to balance all aggravating and mitigating circumstances of the case.

The guidelines list (non-exhaustive) cartel-specific criteria: the gravity of the infringement, the duration, so-called qualitative effects (the cartel’s geographic scope and the cartelists’ significance in the markets concerned), the significance of the markets concerned (in particular the product type) and the degree of cartel organization. In the case of price or quota fixing, market and customer sharing and other serious horizontal infringements, the fine will usually be set in the upper range.

There are also (non-exhaustive) company-specific criteria: the company’s role in the cartel, its market position, particularities related to the depth of added value, degree of intent/negligence, previous infringements and the company’s economic/financial capacity. (Reduction for cooperation under the leniency program and possible reduction in the context of a settlement will be taken into account separately.)

These criteria are not new. They are contained in the statutory provisions or have been used by courts or by the FCO under the previous fining guidelines as aggravating and mitigating circumstances. However, it remains unclear how these criteria will be quantified in the balancing exercise under the new guidelines. In other words: we know which type of criteria the FCO will use, but we still do not know how the FCO will weigh these criteria or what the possible outcome may be.

By way of example, if 10% of the total group turnover is the limit, the new guidelines do not explain at which amount within this framework the FCO will now set the fine, other than that it will be in the upper range in case of a hardcore cartel. What that means in practice is unclear. One would expect that for an “average” hardcore cartel with an average duration the fine should range in the average field of the framework, like 50-60% thereof (i.e., of the 10% of the total turnover). However, that is by no means clear.

The recent practice of the courts and of the FCO presents an ambiguous picture. In the case *Silostellgebühren I* (V-1 Kart 1 – 6/12 (OWi) of October 29, 2012) the Düsseldorf Court of Appeals already followed the approach that 10% of the total group turnover was the upper fine limit. The case concerned price increase coordination, with a relatively short duration. The court ultimately set the fines at 20-30% of the upper fine limit (10% of the companies’ total turnover), which was rather low. The FCO tends to aims at an amount exceeding 50% in cases of price coordination/price fixing under the new guidelines, but other than that the calculation is unpredictable: in some cases the fine is reported to range in the area of 50-60%, in some as high as 85% (again, always in relation to the upper fine limit of 10% of the total group turnover), even though the cases may seem largely comparable regarding the criteria listed in the fining guidelines.

Overall, advising clients in cartel cases handled by the FCO these days means that predicting a meaningful fine range is very difficult other than pointing out the upper limit. This is an unsatisfactory situation. It would be very welcome if the FCO could provide further guidance once it has gained sufficient experience with the new guidelines.