

# Kluwer Competition Law Blog

## “Inability to pay” – how final is a fines decision?

Jessica Walch (Sidley Austin LLP) · Thursday, January 31st, 2013

In these difficult economic times, companies caught up in EU competition enforcement proceedings now regularly claim that the imposition of heavy fines could put them out of business. “Inability to pay” (ITP) arguments have therefore become regular features of fines assessments and appeals.

Naturally, the European Commission is focussed on deterrence and on imposing headline grabbing fines. It does not accept ITP arguments lightly, in part to avoid any suggestion that infringements will go unpunished. However, once a decision imposing fines has been published and the financial distress of the company concerned makes any payment unlikely, the Commission can be open to further discussion. First, it is possible to get a fine reduced even after the Commission has published its infringement decision.<sup>[1]</sup> Second, instead of reducing fines outright (which requires a new decision), the Commission may allow the quiet negotiation of deferred payment schedules or other negotiated payment terms (which requires no public decision, and may therefore be preferable for the Commission).

It seems plausible that the Commission will have an incentive to sweep aside ITP arguments at decision stage in favour of imposing newsworthy fines, safe in the knowledge that for genuine inability to pay cases it can always negotiate payment terms or reduce the impact of its sanctions once the headlines have moved on.

### Principles applied by the Commission to ITP claims

According to point 35 of the Commission’s fining guidelines, “the Commission may in exceptional cases, and upon request, take account of a company’s inability to pay in a specific social and economic context provided that the imposition of the fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value”.<sup>[2]</sup> After its first decision in 2009 to reduce a fine on the basis of ITP,<sup>[3]</sup> the Commission had to refine its fining policy and adopted a very restrictive approach in response to the increasing number of ITP claims raised by companies.<sup>[4]</sup>

Since 2010, the Commission’s interpretation of point 35 of its fining guidelines has included the following principles. First, the company is required to provide detailed financial data (for the last five years as well as projections for the current and next two years) to allow the Commission to examine the likely future development of key factors such as solvency, liquidity and profitability.

Second, a fine reduction may be granted only if the fine will threaten the economic viability of a company, including by causing the company's assets to lose all or most of their value. A direct causal link between the value loss and the fine must be shown. There is no automatic acceptance that bankruptcy or insolvency will necessarily result in significant loss of asset value.<sup>[5]</sup> Furthermore, the General Court has ruled that there could be no question of the fine having threatened the economic viability of an undertaking when that company had itself decided to terminate its activities and to realise all its assets.<sup>[6]</sup> In fact, the company must prove that it will likely exit the market, and its assets will be dismantled or sold at a price under their value with no alternatives for the company to maintain its business. In one of the few cases on the topic, the General Court clarified that this meant that the Commission should require proof that the company's assets would not "continue to be used in the manufacture of goods" concerned.<sup>[7]</sup>

Finally, the Commission will take account of the social and economic context and, in particular will consider whether any insolvency and bankruptcy, due to the imposition of a fine, will lead to redundancies and/or restructuring plans at the individual level of the company, in the sector concerned or more generally in the region or country where the company is located

### **Room for discussion – even after the fine has been imposed**

The Commission's practice and General Court rulings raise some noteworthy points. Clearly the company claiming ITP must be able to demonstrate that the effect of any fine will force its assets to lose significant or total value to the extent that market exit is inevitable. However, in practice, it is very difficult for an undertaking to demonstrate such a deterioration of its financial situation before the fine is actually imposed, not least because the amount of the proposed fine is not known at that stage.

Since 2010, the Commission has indicated its willingness to consider further requests for fine reduction after the fine has already been imposed.<sup>[8]</sup> Consequently, whilst pursuing its primary objective of deterrence by imposing a high fine, the Commission may give a financially distressed undertaking a "second chance" to argue ITP.

Final decisions imposing fines can earn the Commission much publicity and political credit, which explains why the Commission will understandably be reluctant to enter into negotiations too readily after imposing fines. However it can – and does – show some sympathy for the plight of endangered companies by negotiating new payment terms without reducing the absolute amount. This also has the advantage – from the perspective of the Commission which is determined to maintain its deterrence threat – of not requiring any new public decision by the Commission, and therefore no publicity.

When it is required to consider reducing its fine after it has been imposed, the Commission will apply the conditions mentioned above strictly when adopting a new public decision. However, it seems very reluctant to set any precedents which might encourage new applications. This is evident from the lamentable lack of transparency in the Commission's approach when it does decide to reduce fines. The non-confidential versions of previous Commission decisions provide almost no detail on how the criteria were applied (treating all information about the condition of the undertaking in question as confidential). Instead the decisions simply recall the principles of the Commission's guidelines. This approach leaves potential applicant companies in the dark about what kind of reductions may be achievable in practice.

## Concluding remarks: towards more transparency?

In its *Heat stabilisers* decision in 2009, the Commission had rejected an ITP claim by the company Reagens but had granted a fine reduction to other companies involved in the proceedings. In an access to document request based on Regulation No 1049/2001, the company Reagens has sought the disclosure of the criteria applied by the Commission, arguing at the Hearing that the Commission could do so without disclosing any commercially sensitive information.<sup>[9]</sup> The case is now before the General Court, and could potentially force some degree of greater transparency in the future.

Aspects of the ITP procedure are a work in progress and show the Commission struggling with the competing demands of tough regulation and the ability to throw a life-line when needed. However, companies in this situation may at least take heart that final decisions imposing fines might not be as final as they used to be.

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