

Reduction of Fines - Economic recession – Not at the Commission - Cartel fines cross €1.4 billion at the end of June 2010

The financial crisis has not too surprisingly increased the number of applications claiming inability to pay (“ITP”) the fines imposed by the European Commission (“Commission”). Firms reeling from the effects of the downturn in the market find it difficult to pay for breaches of EU competition law. Condemning cartels engaged in by some of the bathroom equipment manufacturers and prestressing steel producers, the Commission adopted fines but allowed some of the ITP applications by granting reductions in fines. However the difficulty involved in satisfying the criteria for upholding such claims of ITP and the high fines imposed are a reminder to companies that cutting corners is not an option even during a financial crisis.

The EU’s Fining Guidelines of 2006 contain only a single paragraph relating to ITP applications. It states that such a relief would be granted only on the basis of objective evidence that would prove that imposition of the fine would irretrievably jeopardise the economic viability of the undertaking after taking into account its specific social and economic context.

In the bathroom equipment manufacturers cartel dated 23 June 2010 there were seventeen companies involved and ten ITP applications had been submitted. In view of their difficult financial situations the fines relating to three companies were reduced by 50% and fines relating to two were reduced by 25%. Seventeen producers were fined in the prestressing steel producers cartel decision dated 30 June 2010 and the Commission had received 13 ITP applications. The Commission granted reductions of 25%, 50% and 75% respectively to three companies.

Although the Commission has not published a revised guideline in relation to its fining policy, in the press release accompanying the decisions (the non-confidential version of which has not been published) it has attempted to provide some clarity as to the evidence that would be considered when assessing ITP

applications. In addition to the social and economic context of individual companies involved it would inter alia include evidence relating to:

- Financial statements for recent years;
- Provisional current year statements and future projections;
- Financial ratios that measure a company’s solidity, profitability, solvency and liquidity;
- Relations with banks and shareholders;
- Claims of significant loss of value of the company’s assets were it to be liquidated as a result of the fine.

In a recent speech, the European Commissioner for Competition Joaquín Almunia has assured that the Commission would not want to provoke a company’s bankruptcy and that claims of ITP would be carefully assessed. He has also made it clear the substantial fines are necessary to preserve the deterrence aspect of the fines.

In France, on 19 January 2010, the Paris Court of Appeal reduced a €575 million fine imposed by the French Competition Authority on steel companies involved in cartel activities (some being also involved in the EU pre-stressing steel case) to less than €72 million (approximately). One of the grounds for grant of reduction was that the Authority had failed to consider the major effect that the economic crisis had on the steel industry. In the UK too, the position regarding claims of ITP is under review, with a number of appeals pending before the Competition Appeal Tribunal. The appeals have been launched against the decision of the OFT in September 2009 levying fines totalling £129.2 million for bid-rigging in the construction sector.

If there was any doubt that Commissioner Joaquín Almunia may be more lenient than his predecessor, it has been dispelled with cartel fines crossing €1.4 billion at the half year mark when the total fines imposed in 2009 was €1.6 billion. As to ITP applications at the

time of an economic crisis it seems that the Commissioner might agree with the following statement of Neelie Kroes, Former Commissioner for Competition:

“If we were to encourage cartelists and others at this point we would be guaranteeing disaster... No-one wins – today’s softness is tomorrow’s nightmare.”

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