National Development

Significant Reduction of a Dutch Cartel Fine due to Exceptional Circumstances, Including the Duration of the Procedure, the Appealing Party’s Financial Situation and the Covid-19 Crisis

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I. Introduction

Judgments on a party’s inability to pay a cartel fine are relatively rare. If such a judgment is issued, it often raises many questions, in part because the actual assessment of the undertaking’s inability to pay request is generally marked as confidential. That is true of this Dutch case, in which the Dutch Trade and Industry Appeals Tribunal (CBB) significantly reduced a cartel fine imposed on an unknown entity (the Appealing Party) that lodged a higher appeal before the CBB based on the exceptional circumstances of the case, including the Covid-19 crisis.  

This article describes the case (Section 2) and briefly reiterates the legal framework for an inability to pay request under EU and Dutch law (Section 3). Section 4 discusses the cautious approach of the competition authorities to undertakings’ inability to pay requests, including the aim of a fine cap to prevent the imposition of excessive fines. The last three sections discuss questions that the CBB’s judgment raises:

- why was the Appealing Party’s inability to pay request rejected (Section 5)?
- why was the Appealing Party granted a significant reduction of the fine, despite the rejection of its inability to pay claim (Section 6)?
- what options do undertakings have when they have been fined, but are also confronted with financial difficulties due to the Covid-19 crisis (Section 7)?

II. Description of the case

In its decision of 17 February 2017, the Netherlands Authority for Consumers and Markets (ACM) (the Dutch competition authority) established that several undertakings infringed Article 101(1) TFEU and Article 6(1) of the Dutch Competition Act (Mededingingswet). 2 The ACM imposed a total fine of €2,798,000 on the Appealing Party’s group. The ACM held the Appealing Party jointly and severally liable for €2,060,000 of the fine and the Appealing Party’s parent company (the Parent Company) liable for the total amount of the fine. In its decision on an objection, the ACM reduced the fine for the Appealing Party to €1,935,000 and renounced the fine imposed on the Parent Company due to its inability to pay. 3 The Parent Company and the Appealing Party each separately lodged an appeal before the Rotterdam District Court.

Key Points

- The Dutch Trade and Industry Appeals Tribunal (CBB) significantly reduced the cartel fine of an appealing party based on the exceptional circumstances of the case, including the duration of the procedure, the appealing party’s financial situation and the Covid-19 crisis.
- Even though the appealing party’s inability to pay request was rejected, the fine was nevertheless significantly reduced based on the principle of proportionality.
- The reason for rejecting the appealing party’s inability to pay request was that it did not meet the required causality condition: It was the Covid-19 crisis that would likely result in the bankruptcy of an economically viable undertaking, rather than the fine.

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1 CBB 18 August 2020, ECLI:NL:CBB:2020:559.
2 The ACM’s decision of 17 February 2017 has not been published. The facts presented here are derived from the CBB judgments of 18 February 2020, ECLI:NL:CBB:2020:91 and 18 August 2020, ECLI:NL:CBB:2020:559.
3 Unfortunately, the ACM’s decision on an objection has not been published. It is therefore unclear on which grounds the ACM allowed the inability to pay request of the Parent Company.
The Rotterdam District Court confirmed the Appealing Party’s participation in the competition law infringement but decided that the fine imposed by the ACM was not proportionate. The Rotterdam District Court therefore reduced the Appealing Party’s fine from €1,935,000 to €1,000,000. On higher appeal before the CBb, the Appealing Party argued that its current financial capacity was limited to such an extent that a fine of €1,000,000 was no longer proportionate and could lead to imminent bankruptcy. The ACM did not agree with the interpretation and assessment of the Appealing Party’s inability to pay. The ACM nevertheless found a fine of €10,000 more proportionate considering the exceptional circumstances, in particular:

- the duration of the procedure: in view of the Parent Company’s ongoing proceedings before the Rotterdam District Court, there was no possibility of expediting the Parent Company’s proceedings thereby causing uncertainty about the Appealing Party’s fine for too long;
- the Appealing Party’s current financial situation and the stated urgency; and
- the Covid-19 crisis and its alleged consequences for the Appealing Party.

In the view of these current circumstances, the CBb concluded that a fine of €10,000 was proportionate and appropriate and annulled the €1,000,000 fine imposed by the Rotterdam District Court.

III. Legal framework from an EU and Dutch law perspective

A. Legal framework from an EU perspective

Pursuant to point 35 of the 2006 Fining Guidelines the Commission may:

> 'In exceptional cases, (…) upon request, take account of the undertaking’s inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

The wording of point 35 emphasises the high threshold for an undertaking to successfully invoke an inability to pay claim. The Commission will only reduce the fine due to an undertaking’s inability to pay in exceptional circumstances:

- The undertaking concerned should submit a request, sufficiently substantiated with objective evidence, including financial statements from the previous five years (consisting of (i) a balance sheet, (ii) an income statement, (iii) a statement of changes in equity, (iv) a cash flow statement), as well as forecasts for the current year and next two years.
- The request should substantiate that the fine imposed ‘would irretrievably jeopardise the economic viability’ of the undertaking, i.e. there should be a risk of bankruptcy. Based on the financial data submitted, the Commission will consider the financial position of the group as a whole, thereby assessing indicators such as profitability, capitalisation, solvency, and liquidity. The Commission also seems to take into account whether an undertaking is forced to terminate its economic activities or to exit the market due to the level of the fine imposed.
- There is a causal link between the fine and the risk of bankruptcy.
- It is not sufficient if a measure adopted by a (European Union) competition authority leads to the insolvency or liquidation of an undertaking: ‘Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors, or shareholders, it does not mean that the personal, tangible, and intangible elements represented by the undertaking would also lose their value.’ The imposition of the fine should therefore cause the ‘loss of value of the assets’, meaning that there should be a situation in which it seems unlikely or impossible that the undertaking would be acquired and that it is unlikely that the assets could be sold individually or would only be sold at a heavily reduced price.\(^{10}\)

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4 The Rotterdam District Court’s decision of 6 December 2018 has not been published.
5 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/02, point 35 (2006 Fining Guidelines).
6 Commission, Questionnaire regarding inability to pay, (7 October 2015), <https://ec.europa.eu/competition/antitrust/itp2015questionaire.pdf> accessed 8 October 2020
7 Commission, Information Note by Joaquin Almunia and Janusz Lewandowski ‘Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines’, SEC (2010) 737/2, para 7.
8 Judgment of 12 December 2012, Garantovana a.s v Commission, T-392/09, ECLI:EU:T:2012:673, paras 121–136.
9 Judgment of 12 December 2012, Novácke chemické závody a.s v Commission, T-352/09, ECLI:EU:T:2012:673, paras 186–187; Judgment of 12 December 2012, Garantovana a.s v Commission, T-392/09, ECLI:EU:T:2012:674, para 119.
10 Judgment of 12 December 2012, Novácke chemické závody a.s v Commission, T-352/09, ECLI:EU:T:2012:673, paras 189–190.
• The ‘specific social and economic context’ requires that payment of a fine could lead to ‘an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned (…)’. The Commission particularly considers the specific situation of the sector concerned, for example overcapacity, a significant drop in demand, falling prices etc.

B. Legal framework from a Dutch perspective
The Dutch Supreme Court clarified that the ACM, when imposing a fine, should make sure that the fine does not have disproportionate consequences, considering the financial capacity of the undertaking involved. According to the ACM’s inability to pay policy—which the Dutch courts found reasonable—an undertaking’s financial position does not play a role when establishing the amount of the fine, provided that it is unlikely that imposing the fine would bankrupt an economically viable undertaking. The ACM therefore requires the following to reduce a fine due to an undertaking’s inability to pay:

• The undertaking concerned should submit sufficient actual and verifiable information, including financial statements for the previous three years, the balance sheet, income statement and cash flow overview of the last month of the current financial year and projections for the next financial year.

• The undertaking should sufficiently substantiate a risk of bankruptcy: the starting point for the ACM’s assessment of an inability to pay request is the liquidity and the financial solvency of an undertaking, but other factors may play a role as well, such as the effect of a fine on the undertaking’s cash flows and the excess value of the assets etc. If an undertaking’s financial means are insufficient to pay the fine, the ACM might expect an economically viable undertaking to be able to attract equity or loan capital to finance paying the fine.

• There is a causal link between the fine and the risk of bankruptcy.

If the ACM considers the undertaking’s position when imposing the fine, the ACM should take into account the financial situation of the undertaking at the time the fine is imposed. On appeal, the Dutch courts have a legal duty to fully assess whether a fine imposed by the ACM is proportional, taking into account the undertaking’s current financial capacity (ex nunc). A fine could therefore be reduced at every further step in the appeal proceedings if the financial situation of an undertaking deteriorates.

IV. Competition authorities are cautious about reducing a cartel fine
One of the primary objectives of the fining policy of both the Commission and the national competition authorities is deterrence: ‘(…) Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles [101 and 102 TFEU] (general deterrence).’ Reducing the fine may diminish the deterrent effect of the Commission’s fines, potentially resulting in under-enforcement in competition law and making it more attractive for undertakings to participate in an infringement. In addition, reducing a fine may give rise to concerns about equal treatment, as it is quite paradoxical for a competition authority to spare an undertaking that would only be viable during the cartel but would exit the market if it did not have the benefit of the cartel. In this regard, settled case law shows that taking into account the critical financial situation of an undertaking can carry...
the risk of ‘giving unjustified competitive advantages to undertakings least well adapted to the market conditions’.23

However, if competition authorities never significantly reduced fines due to an undertaking’s inability to pay, this would increase the number of companies going bankrupt after being fined, which would lead to substantial social costs. It may also result in competitive undertakings leaving the market, which the Commission seeks to avoid.24 Competition authorities therefore treat undertakings’ inability to pay requests with great caution, in order to balance deterrence and the avoidance of abuse and favouritism of cartel participants on the one hand versus the social costs of bankruptcies and the exit of competitive undertakings on the other hand.

A. Fine caps to ensure that fines are not excessive?

The 10 per cent fine cap of an undertaking’s annual turnover in the preceding business year, provided by Article 23 (4) of Regulation 1/2003, also aims ‘to protect undertakings against excessive fines which could destroy them commercially’.25 The 10 per cent fine cap ‘seeks to prevent fines being imposed which it is foreseeable that the undertakings will not be able to pay, having regard to their size, as determined, albeit approximately and imperfectly, by their total turnover’.26 The idea is therefore that the Commission’s fines are unlikely to reach a level that would jeopardise a company’s existence and that the inability to pay claim can only be successfully invoked in exceptional circumstances.

In 2016, the Dutch legislation on cartel fines became far more severe than the European fining system. For cartels that started after 1 July 2016, the maximum statutory fine that the ACM may impose is 10 per cent of an undertaking’s annual worldwide turnover in the preceding financial year, multiplied by the amount of years that the infringement lasted up to a maximum of four years, i.e. a maximum of 40 per cent of the annual turnover.27 In the case of a repeated offence, the fine could even be doubled, resulting in a maximum fine of 80 per cent of the annual turnover.28 The Dutch legislature, however, set out that the ACM, when imposing a fine, should take into account the general principles of proper administration.29 These general principles could support reducing the fine, for example if the fined undertaking is threatened in its existence.30 According to the legislature, the starting point should always be that the ACM imposes a proportional fine.31

The increased fine caps under Dutch law mean that the fine cap for the ACM may in principle be significantly higher than the 10 per cent fine cap of the Commission. The Dutch fine cap will therefore be less likely to prevent excessive fines that undertakings will foreseeably be unable to pay. The only corrective mechanism that the ACM could apply when imposing a fine is the principle of proportionality. The legal basis of such a corrective mechanism is weaker than the prevention that follows from a limited fine cap provided by law. It also results in less legal certainty for the undertakings involved. In addition, the former ACM chairman warned that he expected that this increase of fine maximums would result in an increase in requests to reduce fines due to an undertaking’s inability to pay, in particular for mono product suppliers. He considered this even more pressing because Dutch law requires an undertaking to pay the imposed fine within 6 weeks as from the moment the cartel decision is issued, or within 24 weeks if the undertaking involved appeals the decision.32 So far, the ACM has not yet applied the increased fine maximums, or if it has, this decision has not yet been published. It therefore remains to be seen (i) whether the number of inability to pay requests will increase due to the application of these increased fine caps in the Netherlands and (ii) whether the deterrent effect of high fines outweighs the social costs of bankruptcy or vice versa.

23 Judgment of 29 June 2006, SGL Carbon v Commission, C-308/04 P, ECLI:EU:C:2006:433, para. 105. See also: Judgment of 28 June 2005, Dansk Rørindustri A/S v Commission, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECLI:EU:C:2005:408, para 327; Judgment of 8 November 1983, NV IAZ International Belgium v Commission, joined cases 96 to 102, 104, 105, 108 and 110/82, ECLI:EU:C:1983:310, para 55.
24 Commission, Information Note by Joaquin Almunia and Janusz Lewandowski ‘Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines’, 12 June 2010, SEC (2010) 737/2, para 4.
25 Judgment of 15 June 2005, Tokai Carbon v Commission, joined cases T-71/03, T-74/03, T-89/03, and T-91/03, ECLI:EU:T:2005:220, para 389.
26 Judgment of 26 November 2013, Groupe Gascogne SA v Commission, C-58/12 P, ECLI:EU:C:2013:770, para 48; Judgment of 28 June 2005, Dansk Rørindustri A/S v Commission, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECLI:EU:C:2005:408, para 280.
27 Article 57 (2) Dutch Competition Act (Mededingingswet). For cartels that are found to have been started before 1 July 2016 a fine maximum of only 10 per cent of the undertaking’s annual turnover may be imposed.
28 Article 57 (4) Dutch Competition Act (Mededingingswet).
29 Article 34 (2) and Article 5:46 (2) of the General Administrative Law Act (Awb).
30 Dutch parliamentary document 2014/15, 34 190, no 3, p. 5 (Explanatory Memorandum).
31 Dutch parliamentary document 2014/15, 34 190, no 3, p. 6 (Explanatory Memorandum).
32 Speech by Chris Fonteijn at the conference ‘Developments in competition Law 2014’, 3 October 2014, <https://www.acm.nl/nl/publicaties/publicatie/13381/Speech-Chris-Fonteijn-bij-congres-Ontwikkelingen-Mededingingsrecht-2014-Apolohotel-Amsterdam> accessed 8 October 2020.
V. Why was the Appealing Party’s inability to pay claim rejected?

Generally, the Commission and the ACM’s main reason for rejecting an inability to pay request is either substantive (the undertaking’s financial situation is not sufficiently critical or not caused by the fine imposed) or procedural (the undertaking has not provided sufficient evidence). Given that the Commission also requires (i) the loss of asset value and (ii) a specific social and economic context, the lack of one or both of these circumstances could also be a substantive reason for rejecting an undertaking’s inability to pay defence.

Other than the consideration that the ACM does not agree with the Appealing Party’s interpretation and assessment of the inability to pay standard, the CBb judgment does not provide any reasoning as to why the Appealing Party’s inability to pay request has been rejected. However, during a recent conference, an ACM representative noted the following concerning the reasons for the ACM to reject the Appealing Party’s inability to pay defence:

- The Appealing Party’s request did not meet the required causality condition. It was not the fine that would likely result in bankruptcy of an economically viable undertaking; it was the Covid-19 crisis that occurred a few years later that ran the Appealing Party into financially heavy weather.
- During the hearing before the CBb, the ACM and the Appealing Party came to an agreement. The ACM agreed to reduce the fine in light of the Appealing Party’s critical financial position and the ongoing proceedings before the Rotterdam District Court in relation to the Parent Company causing uncertainty for the Appealing Party’s fine for too long. The ACM did so, provided that the Appealing Party would waive its substantive objections to the infringement decision, maintaining the substantive judgment of the Rotterdam District Court that competition law had been infringed.

Although the comments of the ACM’s representative are clarifying and it is understandable that the CBb judgment does not provide any details of the agreement that the ACM and the Appealing Party reached, it would have been helpful if the judgment had elaborated on the causality requirement, in particular for the ex nunc assessment that the CBb should apply. It is a missed opportunity from a legal certainty perspective that the CBb judgment lacks further reasoning. As decisions or judgments on an undertaking’s inability to pay are relatively scarce and the actual assessment of the conditions for such a claim is often marked as confidential or not published at all, the actual assessment largely remains a mystery. Further clarification would have been helpful for other undertakings preparing an inability to pay request, particularly in times of crisis such as the current Covid-19 crisis. Lastly, the lack of reasoning regarding the rejection of the inability to pay request in the CBb decision itself, whilst the reasoning behind the CBb judgment is mentioned by an ACM representative during a conference, could involve the risk of misrepresentation or misinterpretation of the case at hand.

VI. A significant fine reduction, despite rejecting the inability to pay claim

The CBb judgment makes it clear that, notwithstanding the rejection of the inability to pay defence, the ACM and the CBb found a fine of €10,000 proportionate considering the exceptional circumstances of this case. As noted above, the procedural issue regarding the ongoing proceedings for the Parent Company before the Rotterdam District Court appeared to be decisive. The ACM agreed to reduce the fine based on the principle of proportionality because (1) these proceedings led to uncertainty for the Appealing Party’s fine, (2) these proceedings could not be expedited and (3) the Appealing Party was under time pressure given its critical financial position.

The ACM’s approach, which is followed by the CBb, seems comparable to the option that the Commission has pursuant to point 37 of the 2006 Fining Guidelines. Applying point 37 allows the Commission to depart from the methodology for calculating fines considering ‘the particularities of a given case’. The outcome of the application of either point 35 or point 37 can be similar: a reduction of the fine imposed. The difference is, however, that pursuant to point 37, circumstances other than the financial position of an undertaking can be determinative for reducing the fine. Another difference is that if an undertaking meets the requirements of point 35, the

33 Conference ‘Developments in Competition Law 2020’, 1 October 2020.
34 The Rotterdam District Court judgment has not yet been published.
35 See for example Heat stabilisers (Case COMP/38.589) Commission Decision [2009] OJ C 307/05, paras 779 et seq; Prestressing Steel (Case COMP/38.344) Commission Decision [2010] OJ C 339/06, paras 1141 et seq; TV and computer monitor tubes (Case AT.39.437) Commission Decision [2012] OJ C 303/07, paras 1174 et seq.
36 When applying point 37, the Commission does not necessarily have to reduce the fine. It could also decide to increase the amount of the fine, see for example Car battery recycling (Case COMP/AT.40018) Commission Decision [2017], paras 364 and 376.
Commission must grant a reduction\textsuperscript{37}, whereas an undertaking is dependent on the Commission's discretion for the application of point 37 of the 2006 Fining Guidelines. Case law nevertheless shows that point 37 often serves as a safety net, allowing the fine be reduced even if the Commission rejects an inability to pay request pursuant to point 35:

- In Electrical and mechanical carbon and graphite products, SGL was granted a 33 per cent fine reduction as SGL was both undergoing serious financial constraints and had relatively recently incurred two other significant cartel fines. The Commission reasoned that 'in these particular circumstances, imposing the full amount of the fine (…) does not appear necessary to ensure effective deterrence'\textsuperscript{38}
- In International Removals, the Commission granted a 70 per cent reduction considering the individual situation of Interdean and its parent companies.\textsuperscript{39} Unfortunately, the specific circumstances on which Interdean relied have been marked as confidential.
- In Calcium Carbide, the Commission rejected Almamet's claim based on point 35, but nevertheless granted a 20 per cent fine reduction pursuant to point 37, given the fact that (i) Almamet is a very small independent trader that does not belong to a large group of companies, (ii) it trades in high value materials with a rather low margin and has a relatively focused product portfolio, (iii) the imposed fine would have had a relatively high impact on the financial situation of this type of company.\textsuperscript{40}

\textbf{VII. Options for reducing a fine during the Covid-19 crisis}

During the current Covid-19 crisis, we may see the number of requests for a reduced fine increase significantly. In addition to submitting an inability to pay request at the ACM and requesting a fine reduction based on the principle of proportionality (as discussed above), an undertaking can request a deferred payment plan from the ACM. The deferred payment plan begins by deferring the payment of the part of the fine that can be paid at once. The ACM maintains a minimum amount of 10 per cent of the fine for the first instalment in these cases. The remaining fine and statutory interest must be subsequently paid in instalments, with a maximum payment plan duration of two years.\textsuperscript{41} Clearly, the disadvantage of this option is that the absolute amount of the fine remains the same and statutory interest is due.

ACM representatives have emphasised several times that the ACM’s would prefer if undertakings communicated their payment problems sooner rather than later in the proceedings. Despite detracting from the deterrent effect of a high fine, the ACM seems to be willing to assess these requests at an early stage in the proceedings.

If an undertaking’s financial position worsens during the appeal proceedings, the undertaking can still submit a request to reduce the fine based on the inability to pay or exceptional circumstances of the case. The Dutch CBB judgment however makes it clear that an undertaking is then still obliged to demonstrate a causal link between the imposition of the fine and the likely bankruptcy of an economically viable undertaking. The mere existence of an economic crisis that brings a fined undertaking into financial difficulties seems insufficient.

On a European level, the Commission has shown it will consider a sectoral or general economic crisis relevant in assessing an undertaking’s inability to pay request. For example, in Prestressing steel, the Commission considered the following, eventually reducing the fines for three undertakings by 75 per cent, 50 per cent, and 25 per cent, respectively:

‘The Commission also attempts to take into account the impact of the global economic and financial crisis (hereinafter "the economic crisis") affecting the steel sector, and the expected consequences for the undertaking concerned in terms of, for instance, falling demand and falling prices, but also in terms of access to finance.’\textsuperscript{42}

A similar consideration can be found regarding the bathroom fitting sector in the Commission’s decision in Bathroom Fitting and Fixtures, where the Commission reduced the fines of three undertakings by 50 per cent and two other undertakings by 25 per cent.

In addition, in French beef, the Commission applied point 37 of the 2006 Fining Guidelines in relation to a

\textsuperscript{37} Judgment of 12 December 2012, Ecka v Commission, T-400/09, ECJEU:T:2012:675, para 48. The Commission nevertheless has a wide discretion with respect to setting the amount of the fine.
\textsuperscript{38} Electrical and mechanical carbon and graphite products (Case COMP/E02/38.359), Commission Decision [2003] OJ L 125/45, para 360.
\textsuperscript{39} International Removal services (Case 38.543), Commission Decision [2008] OJ C 188/07, para 662.
\textsuperscript{40} Calcium Carbide (COMP/39.396), Commission Decision [2009] OJ C 301/14, para 372.
\textsuperscript{41} The ACM ‘Information for companies and individuals on how to pay fines’ <https://www.acm.nl/en/about-acm-mission-and-strategy/information-companies-and-individuals-how-pay-fines> accessed 8 October 2020.
\textsuperscript{42} Prestressing steel (COMP/38.344), Commission Decision [2010] OJ C 339/06, para 1137.
sectoral crisis. The Commission considered the economic context at hand that was characterised by:

‘(…) first, the drop in the consumption of beef as a result of the “mad-cow” crisis, which affected a sector already in a difficult situation; second, intervention measures taken by the Community and national authorities aimed at restoring balance in the beef market; third, the loss of consumer confidence, linked to the fear of “mad cow” disease; fourth, the situation of farmers who, despite Community adjustment measures applied by France, were faced with slaughterhouse entry prices for cows which were falling again, while consumer prices remained stable.’

Moreover, the Commission also looked at other factors such as the applicants’ functions, their respective spheres of activity, as well as the fact that it was the first time that the Commission sanctioned this particular type of anticompetitive conduct. The General Court confirmed that the Commission rightly identified exceptional circumstances but found that these circumstances justified a 70 per cent fine reduction instead of the 60 per cent reduction granted by the Commission.

VIII. Conclusion

The CBb judgment on the Appealing Party’s inability to pay request raises many questions, especially because the judgment does not explain why the Appealing Party’s inability to pay request was rejected. An ACM representative, however, made it clear that the reason for the rejection was the absence of a causal link between imposing the fine and the risk of bankruptcy.

As decisions or judgments on an undertaking’s inability to pay are relatively rare and the actual assessment of the conditions for such a claim is often marked as confidential, the ACM and Commission assessments largely remain a black box. Further clarification in the CBb judgment, particularly regarding the required causal link and the CBb’s *ex nunc* assessment, would have been helpful for other undertakings preparing an inability to pay request. This is also particularly relevant as we may see the number of requests for a reduced fine increase significantly because of the Covid-19 crisis and the increased fine caps that apply to cartel fines in the Netherlands.

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43 This case has been assessed under Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty [1998] OJ C9/3, Section 5(b), the predecessor of the 2006 Fining Guidelines.

44 Judgment of 13 December 2006, *French beef*, joined cases T-217/03 and T-245/03, ECLI:EU:T:2006:391, para 356.

45 Judgment of 13 December 2006, *French beef*, joined cases T-217/03 and T-245/03, ECLI:EU:T:2006:391, para 359–361.