

Discounting Fines to Account for Regulation: A Critical Assessment of Commission Practice

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Within EU competition law, the presence of *ex ante* sector-specific regulation does not exclude the concurrent application of competition law unless it precludes any scope for competitive conduct by the regulated firm. Instead, where appropriate, the European Commission discounts the amount of fines imposed for competition violations to reflect the impact of the regulatory regime on the defendant firm's conduct and/or the broader market. This paper provides a critical assessment of the Commission practice of discounting in mitigation for regulation. It argues that current practice fails to reflect accurately the consequent diminished severity of the regulated firm's behaviour, and therefore fails to mitigate other aspects of detriment for firms that follow from a finding of breach. After surveying several far-reaching alternatives to the approach of discounting in mitigation—namely antitrust preclusion in regulated sectors, and competition case theories premised on regulatory gaming—the paper argues that the current approach may be improved by fully and explicitly incorporating a substantive review of the impact of regulation within liability and gravity assessments.