

EC Cartel Enforcement Developments and Trends

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Outline of the presentation

Four major developments in cartel enforcement:

- First examples of application of 2006 Fining Guidelines
- The EC Settlement Package
- New case law: Complex long lasting cartels
- White Paper on damages actions in antitrust cases

2006 Fining Guidelines

Introduction

Three main innovations:

- **Market impact measured three times!**
 - Fines based on actual sales in market affected
 - Up to 30% of value of sales in last full business year
 - Value is multiplied by duration of cartel (in years)
 - “Entry Fee” 15-25% of sales (but perhaps mainly if short duration)
- **Recidivism: +100% for each past infringement**
- **Deterrence – “top-up” where fine not sufficient**
 - Ensures fines on big conglomerates have “sufficiently deterrent effect” where company has large revenues beyond market affected
 - Fine may be increased to exceed amount of gains improperly made

2006 Fining Guidelines

First cases decided under the Guidelines

- First four cases where Commission applied Guidelines
 - Professional Videotapes – 20 November 2007 (published)
 - Flat Glass Producers – 28 November 2007 (not published)
 - Chloroprene Rubber – 5 December 2007 (not published)
 - Synthetic Rubber – 23 January 2008 (not published)
- Very limited but useful indications
- Compare what seems to be current approach with:
 - 1998 Guidelines
 - Literal enforcement of 2006 Guidelines

2006 Fining Guidelines

First indications on actual enforcement

EXAMPLE 1:

Hardcore cartel. Duration of five years. One previous recidivism (20 years ago). Small turnover, but significant turnover outside the relevant market; Base: 18% of turnover.

1998 Guidelines		
<i>Basic Amount</i>	Range	
	<i>Low</i>	<i>High</i>
Basic Amount	20.00	30.00
Deterrence (+50%)	10.00	15.00
Duration [+50% (+10% per year)]	15.00	22.50
	45.00	67.50
<i>Aggravating/Mitigating Factors</i>		
Recidivism +50%	22.50	33.75
	67.50	101.25
Limit 10% Art. 23(2)	Not met	
<i>Leniency</i>		
Leniency (3rd Applicant: -15%)	-10.13	-15.19
<i>Estimate</i>		
	57.38	86.06

2006 Guidelines		
	Potential	Trend
Turnover on Relevant Market 2007	30.00	30.00
<i>Basic Amount</i>	<i>Estimate</i>	<i>Estimate</i>
% of relevant turnover	9.00	5.40
Duration (Relevant Turnover * 5 years)	45.00	27.00
Entry Fee based of relevant turnover	7.50	5.40
	52.50	32.40
<i>Aggravating/Mitigating Factors</i>		
Recidivism (one past infringement)	52.50	0.00
	105.00	32.40
<i>Specific Deterrence Increase (SDI)</i>	<i>if +50%</i>	<i>if 10%</i>
	157.50	32.72
<i>Limit 10% Art. 23(2)</i>	Not Met	Not Met
<i>Leniency</i>		
15% discount	23.63	4.91
<i>Estimate</i>	133.88	27.82

2006 Fining Guidelines

First indications on actual enforcement

EXAMPLE 2:

Hardcore cartel. Duration of ten years. One prior infringement (five years earlier). Small turnover, but significant turnover outside the relevant market; Base: 18% of turnover; 20% deterrence.

1998 Guidelines		
<i>Basic Amount</i>	Range	
	<i>Low</i>	<i>High</i>
Basic Amount	30.00	40.00
Deterrence (+50%)	15.00	20.00
Duration [+100% (+10% per year)]	45.00	60.00
	90.00	120.00
<i>Aggravating/Mitigating Factors</i>		
Recidivism +50%	45.00	60.00
	135.00	180.00
Limit 10% Art. 23(2)	Not met	
<i>Leniency</i>		
Leniency (3rd Applicant: -15%)	-20.25	-27.00
<i>Estimate</i>		
	114.75	153.00

2006 Guidelines		
	Potential	Trend
Turnover on Relevant Market 2007	100.00	100.00
<i>Basic Amount</i>	<i>Estimate</i>	<i>Estimate</i>
% of relevant turnover	30.00	18.00
Duration (Relevant Turnover * 10 years)	300.00	180.00
Entry Fee based of relevant turnover	25.00	18.00
	325.00	198.00
<i>Aggravating/Mitigating Factors</i>		
Recidivism (one past infringement)	325.00	198.00
	650.00	396.00
<i>Specific Deterrence Increase (SDI)</i>	<i>if +50%</i>	<i>if +20%</i>
	975.00	403.92
<i>Limit 10% Art. 23(2)</i>	Not Met	Not Met
<i>Leniency</i>		
15% discount	146.25	60.59
<i>Estimate</i>	828.75	343.33

2006 Fining Guidelines

First indications on actual enforcement

EXAMPLE 3:

Hardcore cartel. Duration of five years. One past infringement. Significant turnover on relevant market and on other products; Base 18% of turnover; 20% deterrence.

1998 Guidelines		
	Range	
<i>Basic Amount</i>	<i>Low</i>	<i>High</i>
Basic Amount	40.00	50.00
Deterrence (+200%)	80.00	100.00
Duration [+50% (+10% per year)]	60.00	75.00
	180.00	225.00
<i>Aggravating/Mitigating Factors</i>		
Recidivism +50%	90.00	112.50
	270.00	337.50
Limit 10% Art. 23(2)	Not met	
<i>Leniency</i>		
Leniency (3rd Applicant: -15%)	-40.50	-50.63
<i>Estimate</i>		
	229.50	286.88

2006 Guidelines		
	Potential	Trend
Turnover on Relevant Market 2007	250.00	250.00
<i>Basic Amount</i>	<i>Estimate</i>	<i>Estimate</i>
% of relevant turnover	75.00	45.00
Duration (Relevant Turnover * 5 years)	375.00	225.00
Entry Fee based of relevant turnover	62.50	45.00
	437.50	270.00
<i>Aggravating/Mitigating Factors</i>		
Recidivism (one past infringement)	437.50	270.00
	875.00	540.00
<i>Specific Deterrence Increase (SDI)</i>	<i>if +50%</i>	<i>if +20%</i>
	1312.50	550.80
<i>Limit 10% Art. 23(2)</i>	Not Met	Not Met
<i>Leniency</i>		
15% discount	196.88	82.62
<i>Estimate</i>	1312.50	550.80

2006 Fining Guidelines Comments

- 2006 Guidelines may potentially result in huge fines:
 - Predictions: heading towards a 1 billion fine?
 - So far no mechanical application of Guidelines
- Key developments to follow:
 - Determination of % of relevant turnover: 17-25% as a trend?
 - Aggravating circumstances
 - **Increase for recidivism: up to 100% for each infringement?**
 - **Obstruction (see Videotapes for an indication of new practice)**
 - How will deterrence increase be applied / very large companies?
 - Duration – developments in case law on SCCI
- Less legal certainty? More deterrence?
 - Or will the settlement policy require more transparent fining?

EC Settlement Package Introduction

- Public consultation on proposed EC Settlement Package
 - Includes a settlement notice and amendments to procedure
 - Following comments, Commission to adopt package by summer 2008
- The problem with EC cartel enforcement
 - Great success of leniency procedures: more cartels uncovered
 - Commission issues relatively few decisions every year (6-8)
 - Procedural obstacles: SO in many languages, access to file, oral hearing
 - Result: each case lasts 3-5 yrs, higher costs, waste of resources
- A possible solution: streamlining cases ... settlement procedure
 - Acknowledgment of liability by the cartel members...
 - ...and partial waiver of defense rights should allow procedural savings...
 - ... in exchange for a reward (a lower fine and shorter procedure)

EC Settlement Package

Main features

- Settlement procedure:
 - Does not replace traditional investigative tools
 - An additional possibility: no duty or right to settle
 - Not alternative to leniency: Starts when leniency window closes
- Reward remains undisclosed:
 - Rumors: should be around 15-20%
 - Each party would get the same reward
 - Possible to cumulate leniency and settlement discounts

EC Settlement Package (1)

How it will work

A. Initial Stage

- Commission concludes initial investigation (9-12 months):
 - Commission has a draft SO ready
 - Commission considers whether case suitable for settlement
 - Criteria: number of parties willing to settle, languages, time savings
 - Commission indicates that case is open for settlement

B. Settlement Discussions

- Commission discloses essential elements of infringement
 - Facts, legal qualification, evidence, range of likely fine...
 - Parties submit their views on the allegations
 - Discussions on application of fining guidelines
 - Turnover affected; Base % of turnover, Where in leniency band
 - Note deterrence increase capped at 200%
- Not “negotiations” but mutual exchange
- The Commission is “hearing” the parties
- Objective is to reach “common understanding” of the facts / fine

EC Settlement Package (2)

How it will work

- C. Finalization of the Settlement Submission (SS)
 - Parties submit (orally) based on discussions including:
 - acknowledgment of liability
 - indication of maximum fine expected
 - waiver of rights (hearing, access to file and SO in original language)

- D. Commission issues a short SO (15-20 pages)
 - SO reflects the SS - “common understanding”
 - Parties to reply yes/no. No further discussions

- E. Commission adopts decision under Article 7 Reg. 1/2003
 - Short streamlined decision – not much longer than SO
 - Published in OJ
 - Appeal still possible – but of course grounds very limited

EC Settlement Package

Getting the incentives right

- EC Settlement not an investigative tool
 - Different incentives from US system where part of the “race”
 - Efficiencies yes.. But avoid disincentives such as “all or none settling”
- Disclosure has to be sufficient to understand facts
 - Full disclosure of documents – not just inculpatory evidence
- Discussion must be premised understanding the alternatives
 - Understanding what the fine would have been absent settlement
 - Only then is a fixed % discount meaningful
 - And because separate from leniency – need a substantial discount!
- Procedure must not create too much collateral damage
 - If admission of guilt – keep it narrow to avoid use in civil/criminal cases
 - Avoid written submissions if oral submission would do
- If not a “negotiation”, then a meaningful discussion and “hearing”

Doctrine of SCCI in EU Antitrust law

Single **C**omplex **C**ontinuous Infringement:

- **Complex:**
 - includes elements of agreement *and* concerted practice
 - Separate infringements (different times, forms, countries)...
 - ...brought under one encompassing arrangement
- **Continuous:**
 - Different conducts consecutive in time but linked into a single infringement

Impact of SCCI in EU antitrust enforcement

- SCCI is used by the Commission in most complex cartel cases
- Consequences of involving all parties in SCCI are:
 - Parties are liable for the **entire** infringement even if...
 - ...participated to a **portion** of it
 - Statute of Limitation is extended for the entire period by linking the old infringement to the most recent one
- A finding of a SCCI in a cartel case can have a significant impact on **finances**:
 - More products/countries are caught
 - Increased duration

Recent development on SCCI: *BASF* Judgment - December 2007

- So far, Commission applied SCCI in many complex and long lasting cartels:
 - asserting a broad common aim...
 - ...to bring under same infringement different conducts in the same industry
- CFI judgment in *BASF* of December 2007:
 - EU/US market sharing agreement not sufficiently related to a subsequent customer allocation among EU producers alone
 - CFI annulled the Commission decision: two practices not linked in a SCCI
- The CFI rejects in *BASF* overbroad definition of single aim:
 - SCCI not to be used to bring unrelated activities in an industry under common aim
 - To establish SCCI, individual elements should be complementary - they must “interact” to reach an economic objective
- Commission will need to be more careful in future big cartel cases

White Paper: Damages Actions in Antitrust Cases - Background

- Published 3 April 2008, continues debate on 2005 Green Paper
- Compensation for consumers and businesses victims of:
 - Cartels/concerted practices
 - Abuses of dominant position
- Make victims' rights to damages effective
- Legislative measures to achieve the goals of the White Paper (regulation/directive) yet to be determined
- National courts and legislatures to play important role
- Interested parties invited to submit comments until 15 July 2008

White Paper: Damages Actions in Antitrust Cases – Proposals 1/3

- Single, full compensation for actual loss and loss of profit
- Collective redress
 - Representative actions brought by “qualified entities” on behalf of identified or identifiable victims
 - Opt-in collective actions
- Disclosure *inter partes*
 - Improved access to evidence for victims
 - National courts empowered to order parties to the proceedings or third parties to disclose precise categories of relevant evidence
 - Strict conditions for disclosure to be demonstrated by the claimant

White Paper: Damages Actions in Antitrust Cases – Proposals 2/3

- Binding effect of decisions of National Competition Authorities
- Acceptance of pass-on defence
- Rebuttable presumption that the unlawful price increase was passed on to indirect customers
- Fault requirement: infringer liable for damages unless it demonstrates that the infringement followed a “genuinely excusable error”
- Removal of cost-related disincentive to bring a damages claim: early settlement, proportionate court fees and derogation from the “loser pays” principle

White Paper: Damages Actions in Antitrust Cases – Proposals 3/3

- Revision of national limitation periods
 - Start of limitation period (end of infringement or when victim has reasonable knowledge of infringement)
 - Final infringement decision + 2 years
- Protection of leniency applicants
 - Limitation of civil liability to direct and indirect customers
 - Corporate statements excluded from disclosure mechanism

White Paper: Damages Actions in Antitrust Cases – Comments

- Main effect on SMEs and consumers
- "Genuinely European approach": single damages, restricted disclosure
- Some of the policy choices would bring private enforcement in Europe closer to the US system:
 - Representative actions on behalf of "identifiable" victims
 - Cost allocation rules
- Challenge: harmonization of a central area of private law across the 27 EU Member States
- Antitrust damages claims vs other civil claims
- Balance between private and public enforcement

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