



# Fines - Time for a re-think?

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Jacques-Philippe Gunther, Willkie Farr & Gallagher

Marc Hansen, Latham & Watkins

Maria Jaspers, DG Competition, European Commission

Nicole Kar, Linklaters

Dr Gunnar Niels, Oxera (chair)

# Cartel fines in numbers

- €8.5 billion since 2006 Fining Guidelines
  - 200 undertakings
  - €33 billion total EU + NCA fines, 1998-2010
- Main adjustment factors
  - Gravity multiplier (range 15-25%; average 18%)
  - 14% got mitigation reductions (18-70%)
  - 10% got aggravation increases (10-110%)
    - Mostly recidivism (50-100%); obstruction (10-30%)
  - 7% got inability to pay reductions (20%-70%)
  - Leniency: 18% reduction in total fines

Sources: DG Competition, John Connor, Case Associates, Oxera

# How is a fine calculated?

## *(Chloroprene example)*

### 1. Basic amount:

- Value of sales = €28m
- Gravity factor: 21% = €5.88m
- Duration: 9 years (5.88 X 9) = €52.9m
- Additional amount ('entry fee'): + 20% or €5.6m (€52.9m + €5.6m)

Basic amount = €59m

### 2. Adjustments:

- Aggravating circumstances: 2 counts of recidivism
- €59m + 60% (€35.4m) = €94.4m
- Attenuating circumstances: none
- Increase for deterrence: + 40% (€37.8m)

Adjusted amount = €132.16 m

### 3. Final steps:

- 10% ceiling: not applicable
- Leniency reduction: not applicable (other undertakings did get 25-100% reductions)
- Inability to pay: not applicable

Final amount = €132.16m

# Issues since the 2006 Guidelines

- Relevant turnover
- Duration and SCCI test
- Reporting turnover and equal treatment
- 10% limit and monoline issues
- Leniency reductions
- Cooperation outside leniency
- Joint and several liability
- Cartel conduct effect and gravity multiplier
- Inability to pay

# The General Court's approach

(with thanks to Judge van der Woude)

- 75 rulings re 13 decisions (March 2011-2012)
  - 40 upheld, 27 partially annulled, 8 totally
  - €3.6 billion in fines reduced by €0.6 billion
- Commission got facts wrong
  - Duration (14 cases), participation (5), no SCCI (3)
- Application of Guidelines
  - Degree of participation (4), equal treatment (4), recidivism (3), multiplier (2)

# The General Court's approach

## *Update (September 2011- October 2012)*

- 55 rulings re 16 decisions
  - 40 upheld, 15 partially or totally annulled (27%)
  - €1.4 billion in fines reduced by €0.55 billion
- Grounds for reduction/annulment of fines
  - Duration (8 cases => **53%**)
  - Joint and several liability (5 cases => **33%**) (+ Case *Elf Aquitaine*)
  - Aggravating circumstances / Role as Instigator (1 case)
  - Degree of Cooperation (1 case)

# The General Court's approach

- **Joint and several liability issue:**
  - a recurrent ground for annulment in several cartel cases
  - Case *Elf Aquitaine* (C-521/09P)
- **General Court's unlimited jurisdiction =>**  
*towards further unpredictability of the fines?*
  - Case *GDF Suez v. Commission* (T-370/09) and *E.ON v. Commission* (T-360/09)

# Road Map of Issues

- Is predictability good?

- BPB v Commission (T-53/03)

*336 Moreover, it is important to ensure that fines are not easily foreseeable by economic operators. If the Commission were required to indicate in its decision the figures relating to the method of calculating the amount of fines, the deterrent effect of those fines would be undermined. If the amount of the fine were the result of a calculation which followed a simple arithmetical formula, undertakings would be able to predict the possible penalty and to compare it with the profit that they would derive from the infringement of the competition rules.*

- Why may a ‘predictability gap’ be a problem?

- Cooperation incentives

- Effective deterrence

- Effects analysis and private enforcement

# The Predictability Gap

- Is there a ‘predictability gap’?
- Is it a problem?
  - Leniency system requires some predictability
  - Cooperation incentives and predicted outcomes
  - The EU system in relation to global enforcement
  - Financial risk assessment and business decisions
    - Predicting the fine
    - Predicting the value of cooperation
    - Predicting the impact of cooperation on litigation

# What must be predictable?

- Perhaps not all elements need to be equally predictable?
- Where is predictability required?
  - **Basis for fine** (turnover, duration, etc.)
  - Elements that have bearing on **deterrence**
  - **Who** will bear the fine?
- Less need for predictability on ‘deductions’?

# Effects analysis and private enforcement

- Effects analysis in Commission decisions?
  - Effects and the gravity multiplier
  - *KME*, the French, and the Germans
  - Link with private enforcement?

# The way forward

- What is the Commission's view?
- What could the Commission do better in terms of predictability?
  - Effects analysis beyond the gravity factor?
  - More engagement with the companies?
  - More disclosure of fine bases? When?
  - Separate hearing on fines?