



European Commission

The European Commission's Policy on Cartels

Fines, Leniency and Settlements

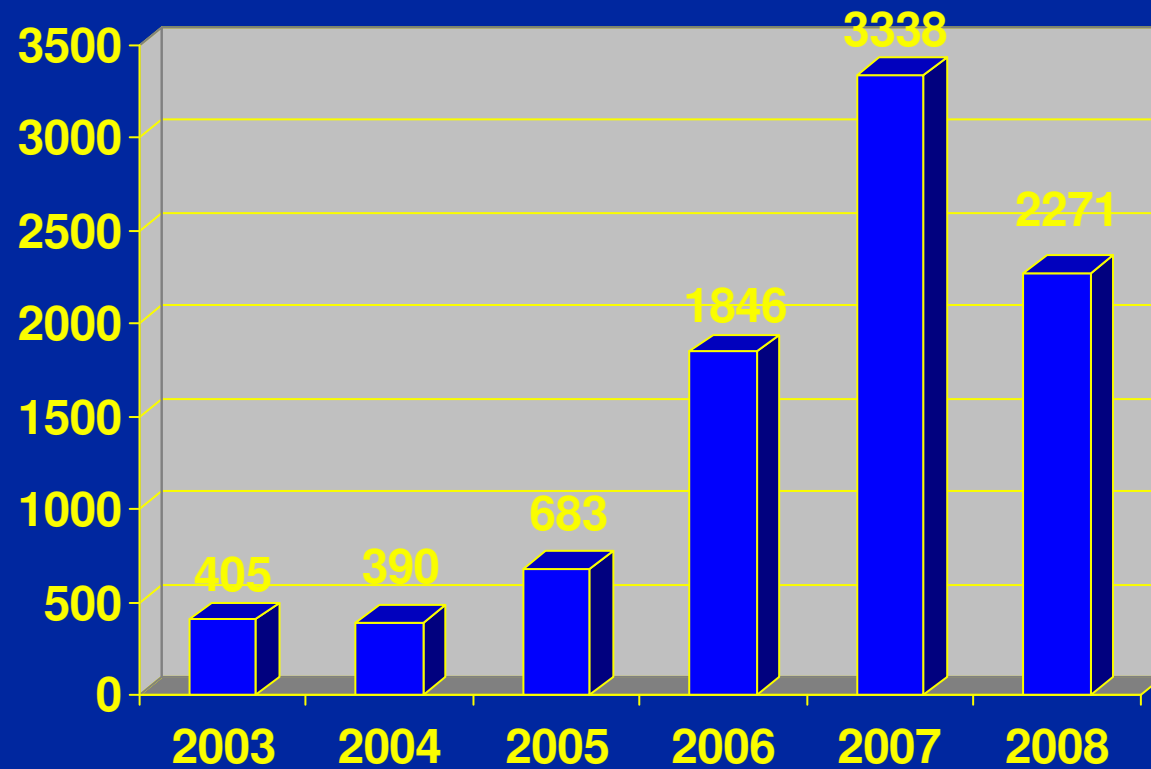
**Donncadh Woods, European Commission, DG
Competition**

**All views expressed are personal and do not necessarily
reflect the official position of the European Commission**



European Commission

Fines – Development 2003 - 2008





European Commission

Fines - Objectives

- ◆ **Punishment**
 - ◆ **Special deterrence**
 - ◆ **General deterrence**
-



Fines – Legal basis

Council Regulation

- Regulation 1/2003, Articles 23 and 24 (since 1 May 2004)
 - ◆ Guidelines on the method of setting fines
 - 2006 edition (as of 1/09/2006)
 - Not legal basis but self-binding administrative practice. Commission may not depart without giving reasons (e.g., ECJ in *Danone* for 1998 GL)
 - Commission may change its fining methodology (e.g., ECJ in *Dansk Rorindustri* for 1998 GL)
-



European Commission

Fines – No sanctions against individuals

- ◆ **Article 23(1)(2): “fines on *undertakings*”**
 - ◆ **Article 23(5): “not of a criminal nature”**
 - ◆ **Some Member States provide for criminal sanctions (e.g. UK, Ireland)**
-



Fines – Criteria and upper limit in Reg 1

- When fixing the amount of the fine regard must be had to the gravity and duration of the infringement
(Article 23(3), Regulation 1/2003)
 - The fine shall not exceed 10% of the sum of the total turnover in the preceding business year
(Article 23(2), Regulation 1/2003)
-



European Commission

Fines – Methodology of setting the fine

- ◆ **Calculation of the basic amount**
 - ◆ **Adjustments to the basic amount**
 - ◆ **Turnover cap of 10%**
 - ◆ **Leniency Notice**
 - ◆ **Inability to pay**
-



European Commission

Fines – 2006 GL: Objectives

- ◆ **Enhance transparency**
 - ◆ **Ensure consistency and legal certainty**
 - ◆ **Ensure sufficiently deterrent fines**
-



Fines – 2006 GL: Key changes

◆ Calculation of the basic amount

- Basic amount is directly related to the companies' sales in the market and reflects the economic importance of markets and companies
- The impact of duration on the level of fines is increased (from 10% to 100% per year)
- Entry fee (increase deterrence)

◆ Repeat offenders (tougher approach)



Fines – 2006 GL: Methodology (1)

Calculation of the Basic Amount:

1. “Variable amount”

- Calculation of the value of sales directly or indirectly related to the infringement
- Fixing a percentage between 0-30% depending on the gravity of the infringement (in particular the nature) – for cartels “at the higher end”
- Multiplication with the number of years

2. “Entry fee”

- 15-25% of the value of sales
 - No multiplication with the number of years
 - Always for cartels, optional for other infringements
-



Fines – 2006 GL: Methodology (2)

Adjustments of the Basic Amount:

◆ Aggravating circumstances:

- Repeat offences (recidivism), see next slide
- Refusal to co-operate or attempts to obstruct the investigation - *Videotapes*
- Role of leader (operation) or instigator (establishment) – *Candle waxes*

◆ Mitigating circumstances:

- Termination of infringement as soon as Commission intervenes (not cartels)
- Negligence (not cartels, rare)
- Limited involvement (“adopt competitive conduct”)
- Intervention by public authorities or legislation

◆ Multiplier (deterrence)

- For companies with “a particularly large turnover beyond the sales of goods/services to which the infringement relates”
-



Fines – 2006 GL: Methodology (3)

Adjustments of the basic amount (recidivism):

■ Recidivism - Two changes:

- Increase of up to 100% per prior decision (1998 GL: 50% even for several prior findings)
 - Decisions by NCAs (under 81+82) also relevant
-



Fines – 2006 GL: Methodology (4)

Final Considerations

- ◆ **10% TURNOVER CAP**
 - Preceding business year (unless not representative)

 - ◆ **APPLICATION OF THE LENIENCY NOTICE**

 - ◆ **INABILITY TO PAY**
 - Only examined “upon request” of undertaking
 - Only “exceptionally”
 - Must “irretrievably jeopardise economic viability”
 - ”Specific social and economic context”
-



European Commission

Fines – 2006 GL: Cases

- ◆ 10 cartel cases to date under the 2006 GL
 - ◆ Almost €2.9 bio. in fines
 - ◆ Highest fine in *Car Glass* (€1.38 bn)
 - ◆ *Videotapes* and *Flat Glass* decisions published on DG COMP website
-



European Commission

Fines – Review by Community Courts

- ◆ **Unlimited discretion (Art 31 Reg 1/2003)**
 - ◆ **In December 2007 the CFI for the first time increased a Commission fine (*Choline Chloride*)**
-



European Commission

10 Largest cartel fines/undertaking

◆ 2008 Saint-Gobain (Car Glass)	896.000.000
◆ 2007 ThyssenKrupp (elevators and esacalators)	479.669.850
◆ 2001 Hoffmann-La Roche AG (vitamins)	462.000.000
◆ 2007 Siemens AG (gas insulated switchgear)	396.562.500
◆ 2008 Sasol (Candle waxes)	318.200.000
◆ 2006 Eni SpA (synthetic rubber)	272.250.000
◆ 2002 Lafarge SA (plasterboard)	249.600.000
◆ 2001 BASF AG (vitamins)	236.845.000
◆ 2007 Otis (elevators and escalators)	224.932.950
◆ 2007 Heineken (dutch beer market)	219.275.000



European Commission

Overall cartel fines imposed in € + number of decisions

◆ 2001	(10)	1 837 823 000
◆ 2002	(9)	944 871 000
◆ 2003	(5)	404 781 000
◆ 2004	(6)	390 209 000
◆ 2005	(5)	683 029 000
◆ 2006	(7)	1 846 385 500
◆ 2007	(8)	3 338 427 700
◆ 2008	(7) so far	2 271 232 900
◆ TOTAL		11 716 759 100



5 Highest Cartel Fines per case

◆ 2008	Car Glass	1 383 896 000
◆ 2007	<i>Elevators</i>	992 312 200
◆ 2001	<i>Vitamins</i>	790 505 000
◆ 2007	<i>GIS</i>	750 712 500
◆ 2008	<i>Candle waxes</i>	676 011 400
◆ 2006	<i>Synth. Rubber</i>	519 050 000



Leniency – Introduction (1)

What is a leniency programme?

- **offers either full immunity or a significant reduction in penalties**
 - which could otherwise have been imposed on a **cartel** participant
 - **in exchange for the freely volunteered disclosure of information**
 - which satisfies specific criteria
 - prior to or during the investigative stage of a case
-



Leniency – Introduction (2)

◆ Basis for Commission's leniency programme

- Commission notice on immunity from fines and reduction of fines in cartel cases (*2006/C 298/11*)
- Replaces prior notices introduced in 1996 and 2002
(*1996/C 207/04; 2002/C 45/03*)

◆ Background and objectives of 2006 Leniency Notice

- Clarify criteria and conditions + reinforce procedure
 - Protection from discovery
 - Put the Commission's leniency policy in line with the ECN Model Leniency Program.
-



Leniency – Rationale (1)

- ◆ **Very serious nature of cartel infringements**

 - ◆ **Difficulty of proving cartels in the absence of cooperation**
 - **secretive nature**
 - **absence of/difficulty in finding evidence of concertation**
-



European Commission

Leniency – Rationale (2)

“The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices”

2006 Leniency notice



Leniency – Qualifying criteria (1)

◆ Conditional immunity (“Thresholds”)

- **Before any inspection: first to submit evidence which may enable the Commission to carry out a targeted inspection – “8(a)”**
 - 2002 Notice: enable the Commission to adopt an inspection decision -
 - **After inspection: provided immunity has not already been granted, first to submit evidence which may enable the Commission to find an infringement – “8 (b)”**
 - **in each case, the Commission must not already have sufficient evidence, as the case may be, to adopt an inspection decision or to find an infringement**
 - **Undertaking must disclose its participation in the cartel**
-



Leniency – Qualifying criteria (2)

◆ **Additional conditions for immunity**

- **full continuous and expeditious cooperation throughout the Commission's procedure**
 - provision of all evidence coming into the undertaking's possession
 - remaining at the Commission's disposal to answer any questions
 - Not destroying, falsifying or concealing evidence
 - Non-disclosure obligations
 - **end to the applicant's involvement**
 - **Undertaking must not have taken any steps to coerce other undertakings to participate**
-



Leniency – Qualifying criteria (3)

◆ Reduction of a fine

- where immunity is not available
 - undertaking must provide the Commission with evidence representing “significant added value” and disclose its participation in the cartel
 - subject to the same conditions as immunity applicants, except for the coercer test.
 - level of reduction dependent on order in which undertakings meet the requirement
 - first: reduction of 30-50%
 - second: reduction of 20-30%
 - Subsequent: reduction of up to 20%
-



Leniency – Qualifying criteria (4)

- ◆ **Level of reduction granted within each band**
 - time at which evidence submitted
 - extent to which evidence represents significant added value
 - extent and continuity of cooperation
 - ◆ **Evidence of previously unknown facts with a direct bearing on gravity or duration**
 - no account taken of those elements when setting the fine
-



Leniency – Further issues

- **Oral corporate statements (“paperless procedure”)**
 - risk that corporate statements may be discoverable in (notably) US civil proceedings
 - 2006 Leniency Notice introduced special procedure to protect corporate statements
 - **Marker system**
 - Introduced under the 2006 Leniency Notice
 - Applicant must give justifications
 - Minimum information to be perfected within a specified time limit
-



Leniency – Examples of reductions

◆ *Candle waxes (2008)*

- More than €420 mio. reduction in total
- €96 mio. for 1st, €318 mio. for 2nd

◆ *Gas Insulated Switchgear (2007)*

- €215 mio. for 1st

◆ *Butadiene Rubber (2006)*

- €240 mio. for 1st, €43 mio. for 2nd
-



Leniency – ECN (1)

◆ Basic principles

- system of parallel competences
 - no harmonisation of procedures or sanctions
 - no common leniency programme
 - explosion of number of national leniency programmes
-



Leniency – ECN (2)

◆ ECN Model Leniency Programmes

- **Designed to address the multiple filing issue**
 - Discrepancies between the programmes
 - Overly burdensome application system
 - **Solutions: soft harmonization of key provisions**
 - **Political commitment to align all EU programmes on the basis of the ECN Model Leniency Programme (programme published DG COMP webpage)**
 - **State of convergence to be checked in 2008**
 - Alignment process well underway
-



Settlements

- ◆ **Settlements package adopted in June 2008**
 - ◆ **Objective: procedural efficiencies**
 - ◆ **Applicable only to cartels**
 - ◆ **No investigative tool to gather evidence**
 - ◆ **10% reduction in return for acknowledgment of liability for the infringement and involvement**
 - ◆ **Reduction cumulative with Leniency Notice**
 - ◆ **Rights of defense remain the same**
 - ◆ **No obligation for parties or the Commission**
-



European Commission

Thank you!
