

AML Competition Week March 2012

Fining Policy **How to set the fine right?**

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Elevators

Vitamines

Liquid Crystal Display

Graphite
electrodes

Flour

All around the world, fines imposed by competition agencies
often result in front page news

Tobacco

Ophthalmic lenses

Bananas

Air transportation

Glass

Competition & fining

Outline

1. Competition & fining: introduction
2. Competition & fining: key policy issues
3. Some facts & figures: US, EU, some EU states
4. Effective fining – setting the level of the fine
5. Fining & the Courts
6. Payment of fines
7. Developing a fining policy: essential & critical issues
8. Fines and some related issues
9. Fine setting example

Competition & fining

Focus

- o Focus on **fining** imposed on **companies** for infringement of competition rules: **cartels** and **abusive behaviour**
- o Primary **focus** therefore not on:
 - **individuals** (competition rules may include possibility of fines or jail sanctions for individuals)
 - **procedural infringements** (competition rules may provide for sanctions for failing to comply with procedural rules)

Competition & fining

Introduction

- Competition agencies seek for **compliance: promotion** of competition rules
- **Risk of sanctions** is an important instrument to create an **incentive** to comply with competition rules
- **Deterrence** is crucial (both special and general)
- Purpose of fining is **not compensation** of harm suffered

Competition & fining

Key policy question

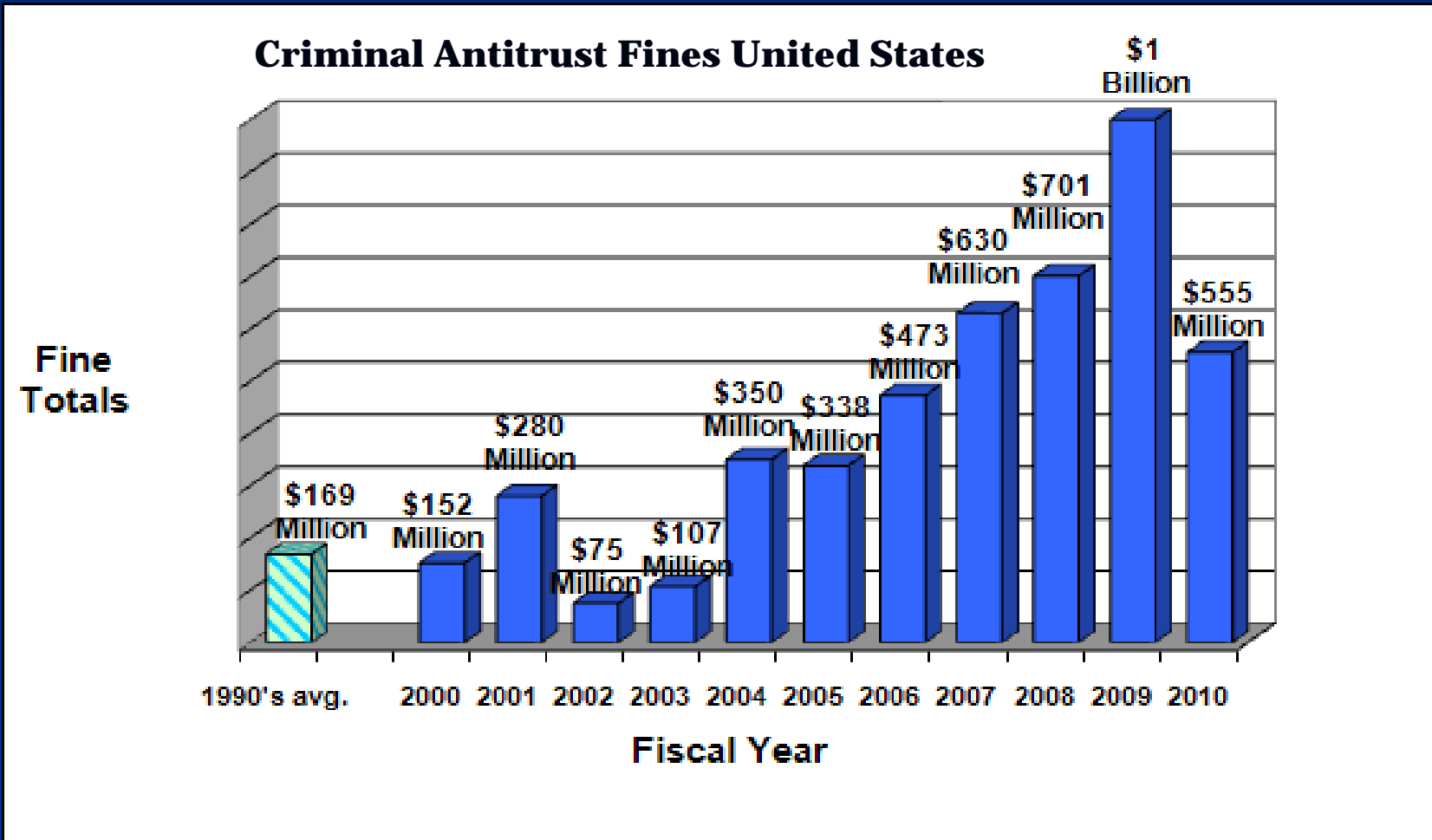
- What drives **deterrence**? Payment of civil damages, pecuniary fines, criminal sanctions, reputation (naming & shaming)?
- General approach: **competition rules** apply to **companies**. Breach thereof should, therefore, lead to a sanction for the company => **pecuniary sanction (fine)**
- Fines on **individuals** only **in addition** to fines on companies

Competition & fining

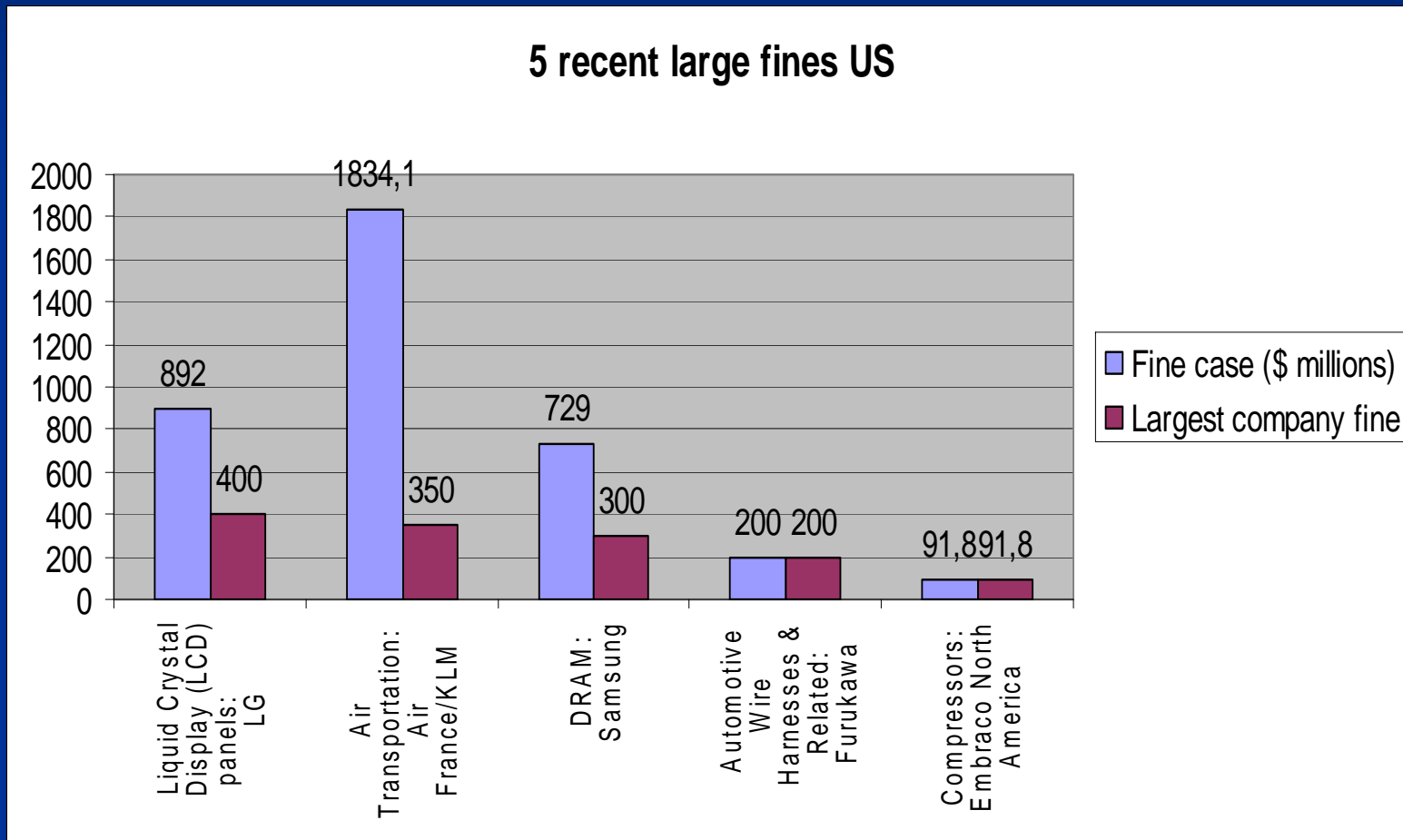
Key policy issues

- Who? **National legal framework** determines **who** sets the fine in individual cases
- How? Competition agency **imposes** the fine (administrative enforcement system) or **applies to the court** for imposition of a fine (judicial/criminal law system)
- **Key question** in all cases: **how** to set the **right level** of the fine

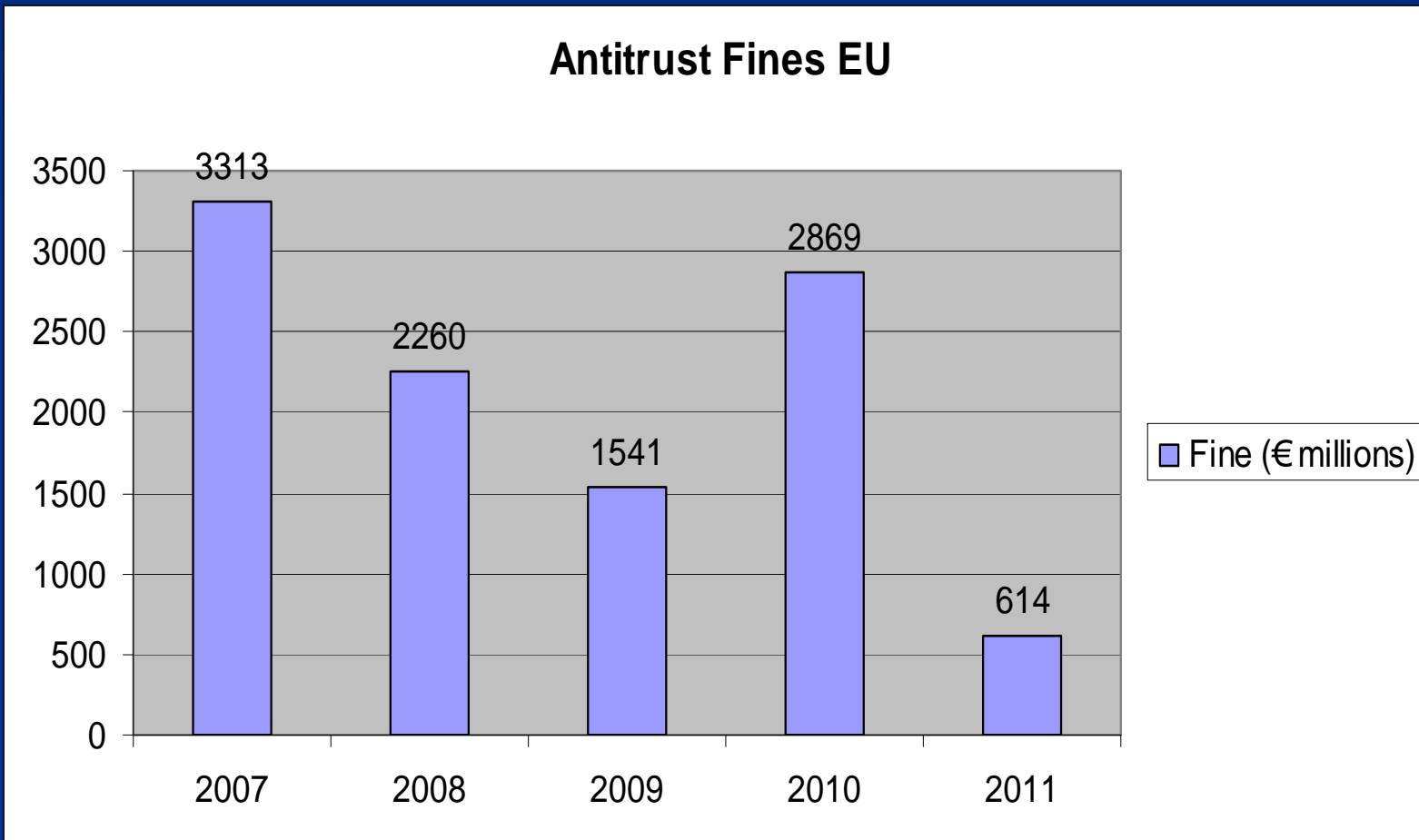
Finning: facts & figures



Fining: facts & figures

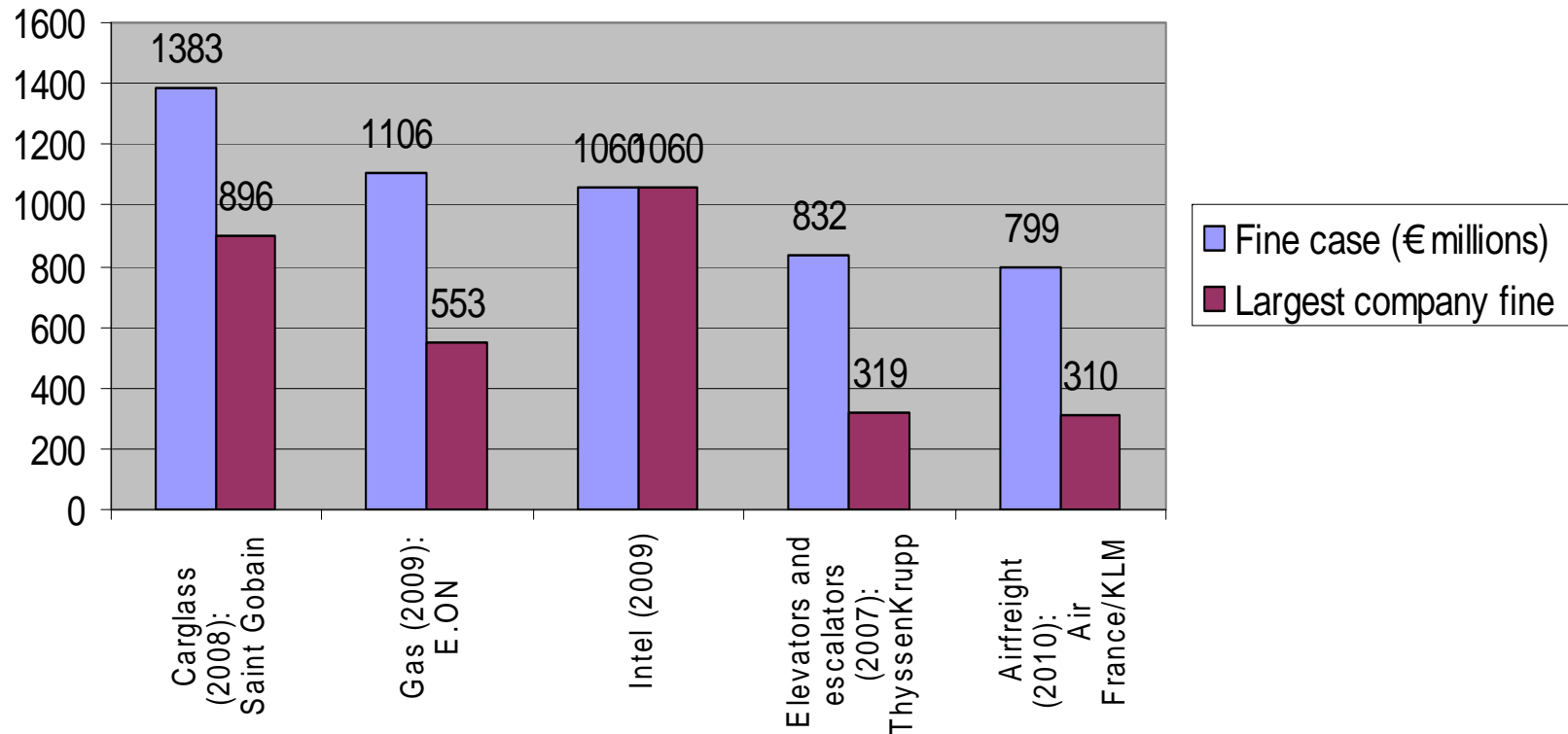


Finings: facts & figures



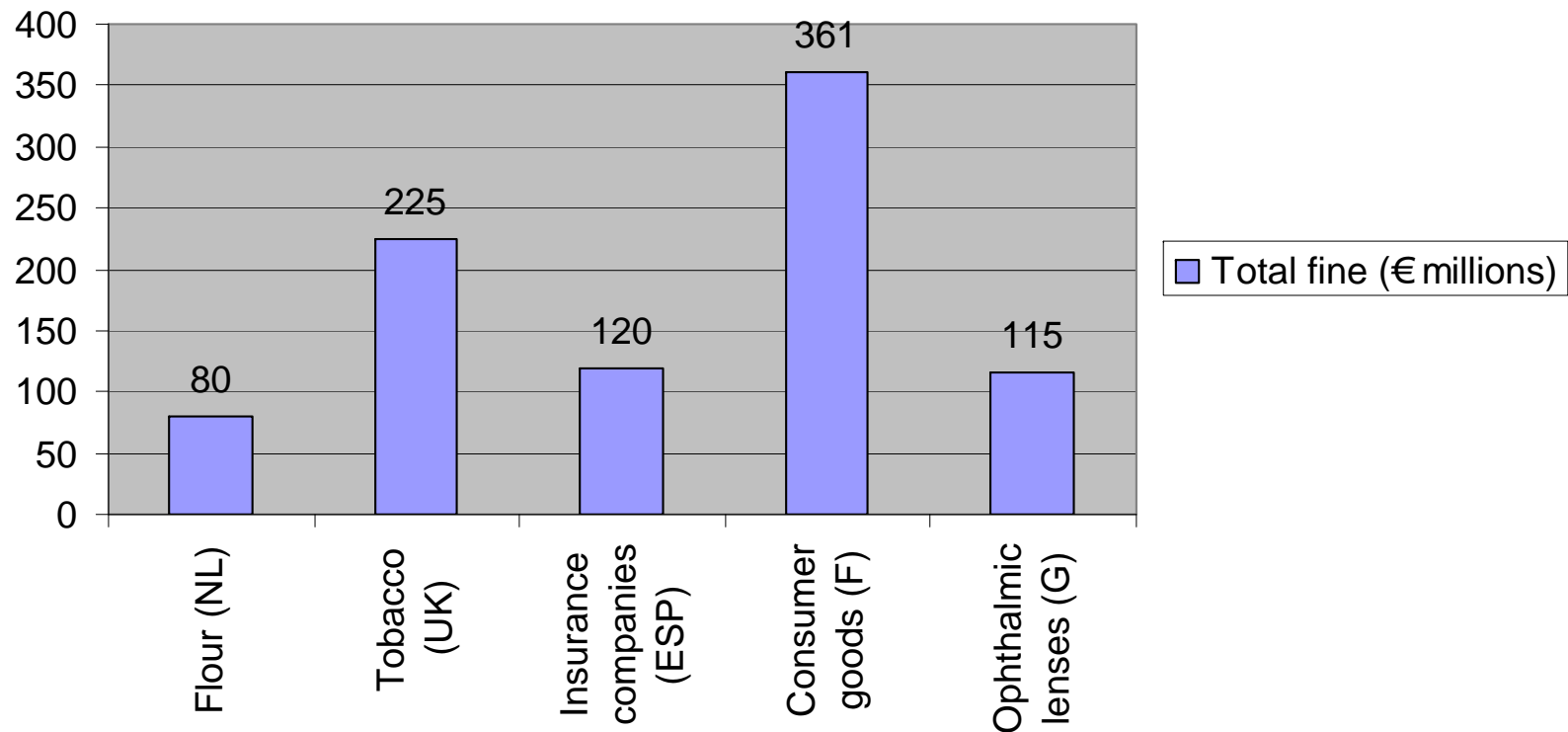
Finning: facts & figures

5 recent large fines EU



Finning: facts & figures

Recent large fines in EU member states



Effective fining

Common framework

- Nowadays, **administrative systems** (as opposed to judicial/criminal law systems) are **most common** for the enforcement of competition rules (EU, most EU member states, many young competition agencies). **Judicial system** applied in ao US, Canada and Ireland
- How to develop a **fining practice and policy** under an **administrative enforcement** system?

Effective fining

Common framework

- National law determines maximum fine, leaving the competition agency with (substantial) discretionary power to set the level of the fine in individual cases
- Competition agency to develop a fining practice and/or establishes fining guidelines
- To date, many competition agencies have adopted fining guidelines > transparency contributes to consistency, deterrence and considered a precondition for a successful leniency program

Effective fining

Fine setting (1)

- Key issues for fine setting are:
 - maximum fine
 - operationalisation of deterrence
 - affected commerce (or ‘relevant turnover’)
 - duration of the infringement
 - seriousness of the infringement
 - aggravating and mitigating circumstances
 - proportionality

Effective fining

Fine setting (2)

- Maximum fine: **fining policy** is limited by **maximum fine** – determined by national law (common: 10% of annual consolidated turnover or a multiple of the financial gains obtained)
- Maximum fine related to **annual turnover** justified on basis of general concept of **financial capacity of company**
- EU, US and **many** other **jurisdictions** use concept of worldwide **turnover**; some jurisdictions limit the fine to 10% of the national annual turnover

Effective fining

Fine setting (3)

- o **Legal-economic theory of deterrence**: the level of the fine should exceed any potential gain that may be expected from the infringement
- o If **one out of three** cartels gets **detected** and potential **gain** is **G %** of turnover, **fine** imposed on company detected should be (more than) **3 x G %** of its turnover

Effective fining

Fine setting (4)

- Anti-competitive behaviour is triggered by **expected gains**. The expected gains are in general **related to the commerce affected** by the infringement
- For many competition agencies, the value of **the affected commerce** (or 'relevant turnover') is, therefore, an important **parameter** for determining the level of the fine. Some agencies take the annual turnover as their starting point.
- The starting point for competition agencies is often **a percentage of the value of the affected commerce** (somewhere between 15 and 30% - often 10%)

Effective fining

Fine setting (5)

- The level of the fine should reflect the **seriousness and duration** of the forbidden anti-competitive behaviour
- By taking 'affected commerce' as a starting point, the factor **duration** is **automatically** taken into account (>the longer an anti-competitive practice lasts, the higher the value of the affected commerce)
- In general, the **seriousness** of the infringement is **more difficult** to determine than its duration.

Effective fining

Fine setting (6)

- Assessing **seriousness** includes assessment of **the nature** of the infringement (**ability to affect competition**) and **the economic context**, including the combined market share of the companies and the extent to which the infringement has been implemented
- In general, **horizontal infringements**, in particular when related to prices or market shares, and **exclusionary practices** (abuse) are **more serious** than vertical restrictive arrangements. However, there are **no hard and fast rules**
- **Assessment of the significance** of the infringement and economic context does **not** imply a **precise determination** of 'gains' or 'harm suffered'

Effective fining

Fine setting (7)

Summary, so far, when setting the fine:

- using **affected commerce** = taking into account potential **gains** and **duration**
- using **a variable percentage** of the affected commerce = allows to take into account the **seriousness** of the infringement

Challenge is setting the right percentage.

Effective fining

Fine setting (8)

- o Many national competition agencies in the EU work with a **starting percentage** of **10%** of the **affected commerce** which is then **multiplied** with a factor of up to 3 or 5, depending on the seriousness of the infringement. This leads to an initial fine (or: **basic fine amount**) up to 30 or 50% of the affected commerce
- o The **European Commission** works along the same lines and **adds** an **'entry fee'** of **15 to 25%** of the yearly relevant sales to increase deterrence

Effective fining

Fine setting (9)

- Setting the right fine also requires taking into account **aggravating** and **mitigating circumstances**
- **Examples of aggravating** circumstances:
 - playing a leading role or being the instigator of a cartel
 - attempting to obstruct the investigations
 - repeat offences (recidivism)
- **Examples of mitigating** circumstances:
 - early termination of the behaviour
 - substantially limited role of company in total context
 - encouragement of the behaviour by the public authorities

Effective fining

Fine setting (10)

- o **Setting the definite fine** requires the competition agency to **check** whether the fine setting process has led to a fine which is:
 - deterrent
 - proportional
 - not exceeding the legal maximum fine
- o This **last step** may lead to a fine **decrease** but can also lead to an **increase** of the fine (depending on specific facts of the case)

Financing & the courts

Review of fining decisions (1)

- **Courts** are **involved** in the fining process because they set the fines or review the fining decisions of the competition agency
- The competition agency must, therefore, take into account the **relevant jurisprudence** of the authorized courts
- The **national legal framework** will **determine the intensity** of the involvement of the courts. In most European jurisdictions, the courts have **full jurisdiction**
- Recently, the **European Court of Human Rights** has ruled that when fines may be imposed in an administrative procedure, the decision of the competition agency should be subject to **full review** (including the setting of the **level of the fine**)

Financing & the courts

Review of fining decisions (2)

- So far, the **European courts** have **not** seriously **reduced** high fines imposed by the European Commission – may become more critical in the future?
- **Also in the US**, high **fining** imposed on companies (and individuals) have **been upheld**
- **Courts** in individual **EU member states** seem to be more critical (e.g. UK courts annulled various fining decisions which has led the competition agency to re-evaluate its fining policy)

Payment of fines

Payment of fines

- **Fines** imposed must be **paid** – the competition agency should dedicate time and resources to the actual collection of fines
- Details of related **national regulations** (or a lack thereof) can have a serious (negative) **impact** on the effectiveness of fines. For example: is interest due (and against which rate) if the fine is not paid on time? Can a fine be declared as a cost for tax purposes (tax deductible)? Who pays the fine when a company is taken over by another company or liquidated? Should fines be paid (or a bank guarantee submitted) when challenged before the courts? etc. etc. The competition agency should look for the answer to these questions.

Development of a fining policy

Critical and essential issues (1)

- The fining policy of a competition agency must comply with, and **fit into** the applicable **national legal framework**.
- **Developing** a fining policy **takes time**, and cannot be done without dealing with concrete cases and gaining **experience on the job**.
- Setting a fine is a case-by- case exercise and does **not** allow for **a mathematical approach**.

Development of a fining policy

Critical and essential issues (2)

- **Transparency** (e.g. by developing **guidelines** or a legal decree) is a **helpful** tool but should not go as far as enabling companies to **calculate** the precise amount of **their (risk) fine**.
- As an important purpose of fining is general **deterrence**, the competition agency should also develop a **policy on publicity** (are fining decisions made public, also when challenged in court? If this is not possible (because of legal restraints) how can the envisaged general deterrence then be reached?)

Development of a fining policy

Critical and essential issues (3)

- For a fining policy **based** on 'affected commerce', **means to obtain** the relevant information are **crucial**: the companies should keep **records** and have a legal **obligation to provide** the relevant information and the competition agency should have **means to verify** such information.
- As it is **not always possible** to determine the **precise amount** of the affected commerce a fining policy (fining guidelines) should allow the competition agency to make **fair estimates** if necessary.

Development of a fining policy

Critical and essential issues (4)

- For the **development** of its policy and the **defense** of its cases before the courts, it is crucial for the competition agency to build its own overview of data used in its cases (database). **Overview and consistency** are **crucial** for success.
- If the infringement of the competition rules may also involve infringement of other (criminal) regulations, it may be wise for the competition agency to look for **cooperation arrangements** with the related enforcement agency.

Finning - related issues

Related issues for discussion (1)

- Over the years, fines of competition agencies all over the world have gone up. High fines have been justified by the harm done. Can fines (n)ever be too high?
- A fine may never lead to the bankruptcy of a company. Or is bankruptcy the ultimate price a company may have to pay?
- Should sanctions (including jail sanctions) not rather be imposed on individuals than on companies as fines imposed on companies will ultimately result in a cost which is paid for by the public (customers/consumers)?
- High fines may frustrate possible damage claims by customers and consumers of the companies that breached the competition rules?

Fining - related issues

Related issues for discussion (2)

- Should companies that were not aware of the risk they were running under the competition rules *not* be fined? The competition agency may give the company a (serious) warning instead.
- In times of (economic) crisis, should the competition agency re-evaluate its policy (moderated the level of sanctions)?
- When a company is (partly) owned by the state, should it (not) be subject to fines or fines should be mitigated?

Fining - example

Cartel

Price-fixing cartel for vitamin z : duration 3 years

A (annual turnover 100; z-turnover \$10 p.y) : affected commerce 30

B (annual turnover 500; z-turnover \$ 15 p.y) : affected commerce 45

C (annual turnover 150; z-turnover \$ 20 p.y) : affected commerce 60

Basic fine amount: percentage of affected commerce

Percentage depending on seriousness:

in case of cartels often between 15 en 30%; EU adds entry fee of 15 to 25% of annual sales

Basic fine amount when the percentage for seriousness is set at 30%:

A : \$ 9

B : \$13,5

C : \$18

Finning - example

Cartel

Aggravating circumstances may lead to increase. Nowadays, in Europe and US, recidivism results in large increase (up to 100%)

Fine level after taking into account aggravating and mitigating circumstances should be deterrent, proportional, and may not exceed legal maximum

In case of long-lasting cartels (and/or in case of recidivism), the legal maximum (if, for example, 10% of annual total turnover) may be reached in particular if the company's involvement in the cartel concerns its full product range. For example: fine of C exceeds legal maximum.

All over the world, there are cases where competition agencies reach the legal maximum (happens with 10% ceiling in EU but exceptional)

QUESTIONS?

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Useful websites with useful links:

- US: <http://www.usdoj.gov/atr>
- EU: http://ec.europa.eu/competition/index_nl.html
- France: http://www.autoritedelaconcurrence.fr/doc/notice_antitrust_penalties_16may2011_en.pdf
- UK:
<http://www.offt.gov.uk/OFTwork/consultations/penalties-guidance/>
- Netherlands:
(Fining Code 2007)
<http://www.nma.nl/en/images/NMa%20Fining%20Code%20200723-196203.pdf>
- (Policy Rules 2009)
<http://www.nma.nl/en/images/Policy%20rules%20on%20the%20imposition%20of%20administrative%20fines%20200923-196200.pdf>

Useful background material

- ECA Working Group on Sanctions - Pecuniary sanctions imposed on undertakings for infringements of antitrust law - Principles for convergence
<http://www.nma.nl/en/images/ECAWorkingGroupSanctions23-191770.pdf>
- Fighting Hard-Core Cartels - Harm, Effective Sanctions and Leniency Programmes (OECD, 2002),
<http://www.oecd.org/dataoecd/49/16/2474442.pdf>
- Remedies and sanctions in Abuse of Dominance cases (OECD, 2007),
<http://www.oecd.org/dataoecd/20/17/38623413.pdf>
- The Evolution of Criminal Antitrust Enforcement Over The Last Two Decades (U.S. Department of Justice, presentation of the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education February 25, 2010)
<http://www.justice.gov/atr/public/speeches/255515.htm>

Useful background material:

- Optimal Antitrust Fines: Theory and Practice (Journal of Competition Law & Economics Vol 1, No. 4, December 2005, p. 1-32), Wouter P.J. Wils
- The Netherlands Competition Authority and its policy on fines and leniency (World Competition Law and Economics Review Vol. 26 No. 1, March 2003, p. 25-52), Monique van Oers and Bernd van der Meulen
- The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis (World Competition Volume 30, No. 2, June 2007, p. 1-40), Wouter P.J. Wils
- The 2006 Guidelines on Fines: Reflections on the Commission's Practice (World Competition 33 No. 3 2010, p. 359-416), Fernando Castillo de la Torre
- Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines (European Competition Law Review Issue 1 2011, p.27-36), John M. Conner
- Fines under article 102 of the Treaty on the Functioning of the European Union (European Competition Law Review Issue 2 2011, p. 86-98), Frances Dethmers and Heleen Engelen
- Modernising Cartel Sanctions: Effective Sanctions for Price-fixing in the European Union (European Competition Law Review Issue 11 2011, p. 551-563), prof. Alan Riley
- Article 102 TFEU and Sanctions: Appropriate When? (European Competition Law Review Issue 11 2011, p.573-579), Bo Vesterdorf