



# *DG Comp's Investigative process*

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# EU DG Comp's Investigative Process

0. Preliminary remarks
1. Finding and analysing clues;
2. Determining whether to open a case investigation;
3. Methodology of evidence collection;
4. Inspections and information requests;
5. Interviews of individuals and hearings under oath;
6. Screening evidence;
7. Electronic based evidence handling and analysing;
8. Use of experts (internal and external);
9. Leniency;
10. Settlements;
11. Commitment procedures.



## *0. Preliminary remarks*

A very transparent administrative procedure

- All rules, guidelines and decisions are published
- State of play meetings, access to file, etc.

No criminal sanctions

Parties' extensive rights of defence

- Extensive procedural safeguards
- Right to be heard (contradiction) (in writing+orally)

Hearing officer

Right of appeal against all procedural and final  
Commission Decisions



# *1. Finding and analysing clues - Methods of detecting infringements*

## Proactive detection activities

- Build up sector knowledge
- Outreach/Advocacy/Education > Industry contact
- Monitoring activities > Read the (specialised) press, trade associations' economic and market studies
- Sector inquiries

## Reactive detection activities

- Formal Complaints / Informants / Whistle-blowers
- Leniency applications



## *2. Determining whether to investigate Pre-investigatory phase...*

Formal complainant (Form-C) = complainant has **procedural rights** (access to statement of objections + oral hearing/ state of play meetings+ rejection by appealable decisions)

Informal complaint = Informer no procedural rights

Preliminary investigation to verify allegations:

- Public sources / other authorities
- + (Unless a potential cartel):
- Send a limited number of requests for information
  - Send complaint to undertaking(s) concerned



## *2. Determining whether to investigate*

### *Pre-investigatory phase leads to...*

#### Initial Case Report (within 4 months)

- Preliminarily defines case focus, parties, markets conduct, assesses facts, gravity, theory of harm, suggest priority

#### Case Shaping Meeting (Operations Committee)

- Decide on priority: Consumer & economic impact, strategic significance, seriousness of the conduct risks and resources, international cooperation

Commissioner decides on formal investigation

Parties offered state of play meeting



## *3.a Methodology of evidence collection - ...what to look for?*

Potential information sources: leniency applicants, complainants, parties, competitors, customers, government bodies, trade associations, studies, internet....

Types of evidence:

- *'any books and records related to the business, irrespective of the medium on which they are stored'*
- *Oral statements / interviews*

Preference: direct written document evidence existing prior to investigation (*'smoking guns'*)

2<sup>nd</sup> priority: circumstantial evidence:

- responses to information requests
- oral interviews



## *3.b Methodology of evidence collection ...how to obtain it?*

### Written requests for information

- Simple requests (Reg. 1/2003, Art. 18(2))
- Requests by decision (Reg. 1/2003, Art. 18(3))

### Inspections

- Voluntary (Reg. 1/2003, Art. 20(2))
- Dawn raids – by decision (Reg. 1/2003, Art. 20(4))
  - Oral explanations (Reg. 1/2003, Art. 20(2)e)

### Interviews (Reg. 1/2003, Art. 19)

- Corporate statements





## *4.a Written requests for information*

Typically 3 types or components

- Document requests
- Specific questions
- [Data requests]



## *4.b Written requests for information*

### Important points:

- Cross-check with
  - documents obtained from dawn raids
  - documents obtained from other parties to the case
- Not always clear whether info is incorrect, incomplete or misleading (requirements for liability: intent, negligence)
- No need to show value of information
- No self-incriminatory questions

## *4.c Inspections*

### Business premises (Article 20)

- Commission decision (Article 20(4))
- Simple mandate (Article 20(3))
  - Contrary to an inspection ordered by decision, undertakings do not have to submit to the inspection
  - Simple inspections usually are follow-up inspections or inspections in immunity applicant's premises

### Private premises (Article 21)

Reasonable suspicion of documents present in premises

Court search warrant

No sealing off

No oral statements



## *4.d Inspections - Investigative powers*

- enter any premises, land and means of transport of undertakings and associations of undertakings;
- examine the books and other records related to the business, irrespective of the medium on which they are stored;
- take or obtain in any form copies of or extracts from such books or records;
- seal any business premises and books or records for the period and to the extent necessary for the inspection;
- ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.



## *4.e Inspections -cooperation and obstruction*

Extent of cooperation → active cooperation

Obstruction

- Example: denying/delaying access, destroying documents, breach of seal, breach of 'electronic' seal
- Consequence: stand-alone fine, aggravating circumstance in decision on the substance of a case
- Right to have lawyer present to get advice
  - Review of collected documents
- Legal professional privilege (only for external lawyers)
- Hearing officer (sealed envelope procedure)



## *5. Interviews of individuals and hearings under oath*

Power to take statements during inspections (art. 20)

- Duty to answer

Interview (art. 19)

- Voluntary – no compulsion
- Requirement: link to an investigation
- In person, telephone or other electronic means
- Recorded electronically
- Interview technique (see e.g. ICN document no. 345)



## 6.a Screening evidence

Direct evidence:

- "Smoking gun": a document which clearly proves infringement e.g. meeting notes with names, market shares, target prices.

Circumstantial evidence:

- all other documentation or oral statements corroborating an allegation of an infringement incl. specific dates, locations, content of and participants in meetings
- *Refrigeration compressors: "...a scheme of anti-competitive contact with the aim to limit their individual commercial conduct..." and "...exchanged sensitive commercial information on capacity, production and sales trends..."*
- *CRT Glass: "...marketing departments check...compliance with cartel arrangements (through information obtained from CRT Glass customers)."*



## *6.b Screening evidence*

*What evidence can be accepted as a fact?*

Regulation 1/2003, Art 18(1):

- *"...all necessary information..."* to verify the existence of the alleged infringement
- Commission enjoys a margin of appreciation
  - Principle of proportionality
  - Privilege against self-incrimination
  - Legal professional privilege
- Relevance of the source of the evidence?
- What do to with conflicting evidence?
  - Commission must weigh all facts on the file
  - Contradictory procedure



## *7.a Electronic based evidence handling and analysing*

- Background
  - Trend: More electronic material than paper
  - Electronic material often not fully deleted
- Requires
  - Hardware and software
  - Training/specialised staff
  - Substantial budget



## *7.a Electronic based evidence handling and analysing – during the inspection*

DG Comp systematically takes electronic copies of electronic documents and scans paper

- Searches the IT environment and storage media
- Undertaking obliged to assist on "specific tasks"
  - Block email accounts
  - Disconnect computers
  - Remove and re-install hard drives
  - Provide 'administrator access rights'-support



## *7.b Electronic based evidence handling and analysing – during the inspection*

Documents are 'collected' (no systematic 'imaging' of entire content, but still forensic copy from pcs)

Company receives list + copy of documents

Review done on the spot, on the basis of the content of the individual document (in the presence of company representative)

Sealed envelope (or 'continued inspection') procedure remains exceptional



## 8. Use of experts – in AT investigations

### Economic expertise – in-house - Chief Economist

Scope of involvement (intensity):

- (i) full secondment;
- (ii) data processing and analysis,
- (iii) review and comment of parties' economic submissions,
- (iv) request for opinion,
- (v) request for advice.

### Technical expertise – out-house

- Rare event e.g. Microsoft case (very technical)

Then what?

- Compare complainants/defendants views
- Rely on other Commission services' expertise



## *9. Leniency - key elements*

A tool to uncover and put an end to cartels

Immunity for the first one

Important reductions for subsequent applicants that make decisive contribution to the investigation

- significant added value
- race between applicants
- fixed bands, up to 50% reduction

Marker system

- Time to verify information given



## *10.a Settlements - why?*

*"For us, the fundamental driver of the settlements package is the need to maximise efficiency in order to improve enforcement."*

*"Settlements are an option for companies which, in full knowledge of the strength of the Commission case and having been able to argue their case, prefer to admit liability and qualify for a reduction in the fine."*

(Neelie Kroes, Fiesole, 19 September 2008)



## *10.b Settlements - Incentives to settle*

During the settlement discussion companies will be able to express their views on

- Commission objections and evidence
- Factors to be taken into account for fines calculation

Companies will also benefit from

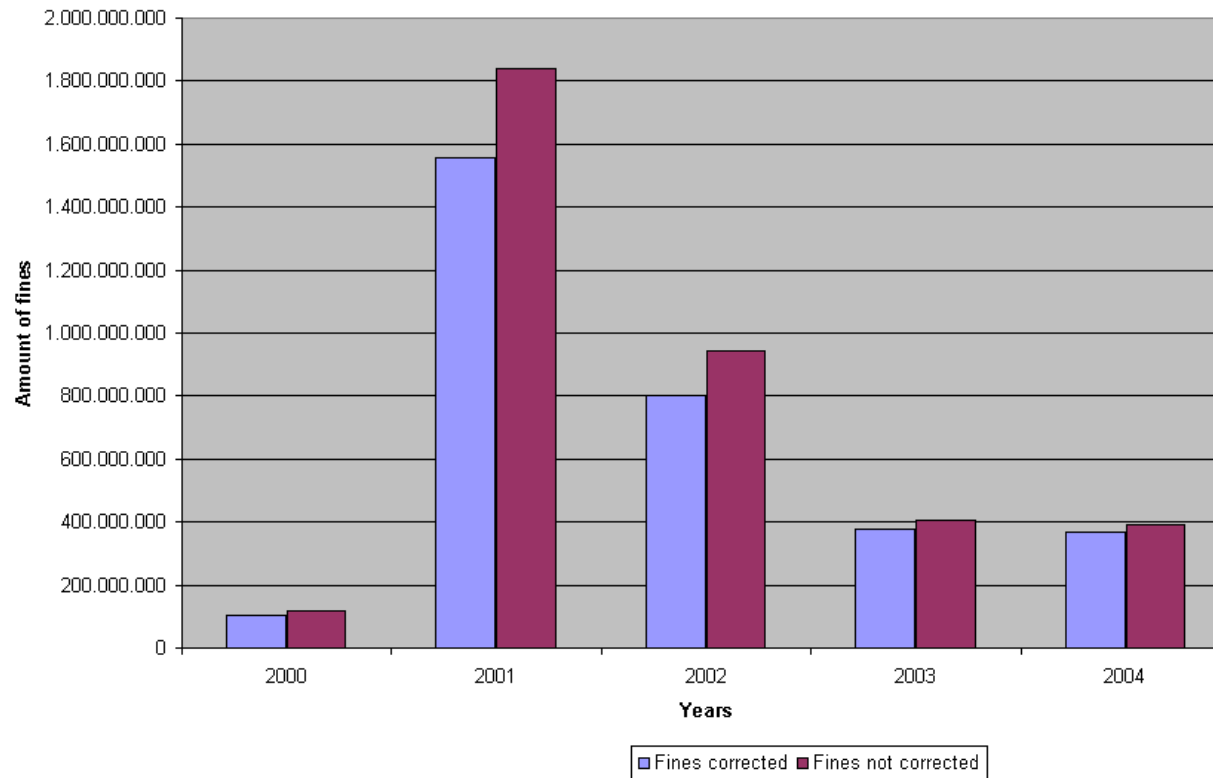
- shorter procedure
- reduction of fine of up to 10 %

Publicity aspect

## 10.c Settlements

### *Cartel fines pre and post appeals*

Fines 2000 - 2004







## *10.d Settlement procedure: key elements*

Full investigation

Exploring the parties interest to settle

Bilateral settlement discussions

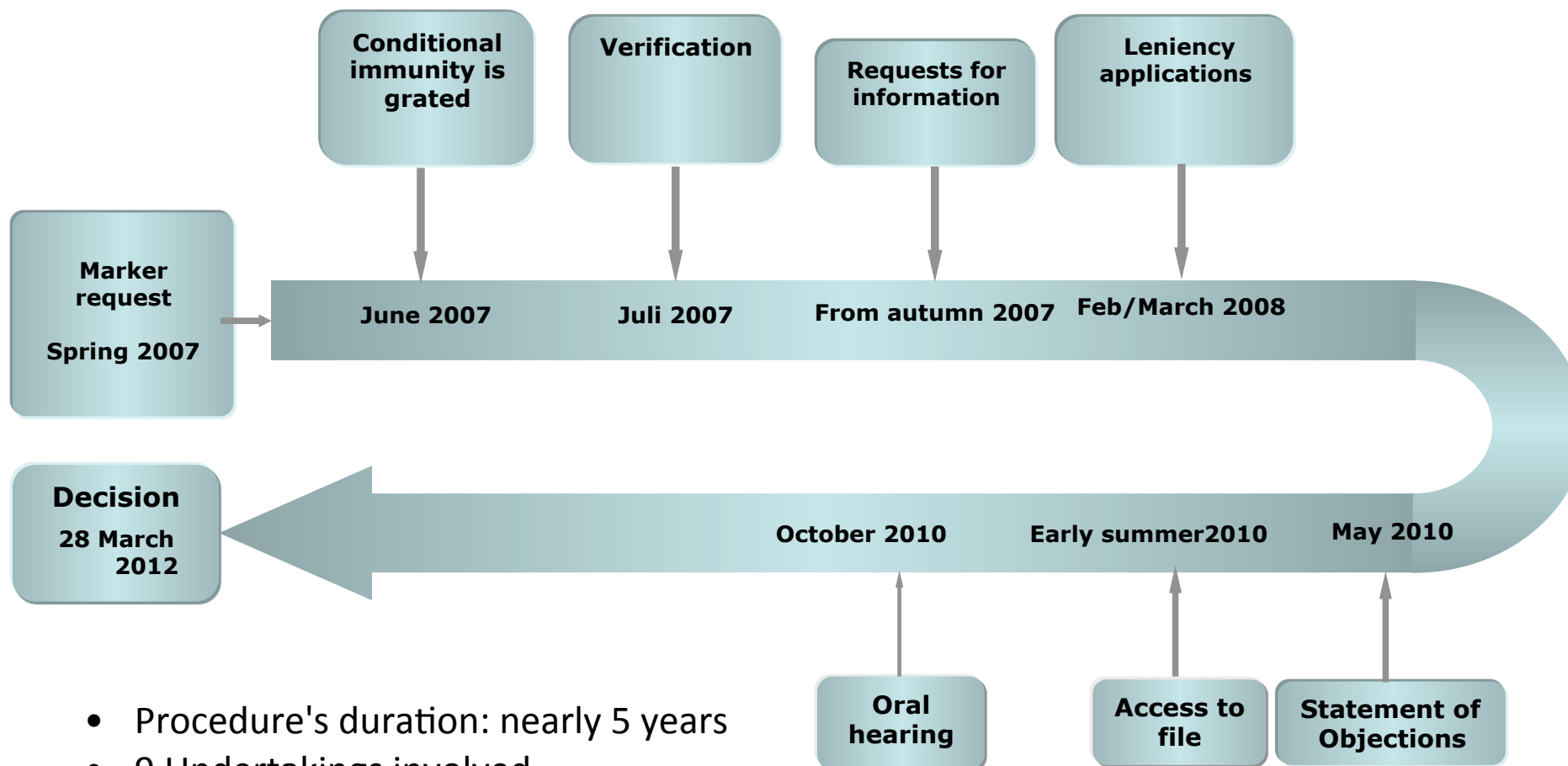
Company admits liability in a settlement submission and states a maximum for a fine

Shorter Statement of Objections

Decision in a quicker timeframe

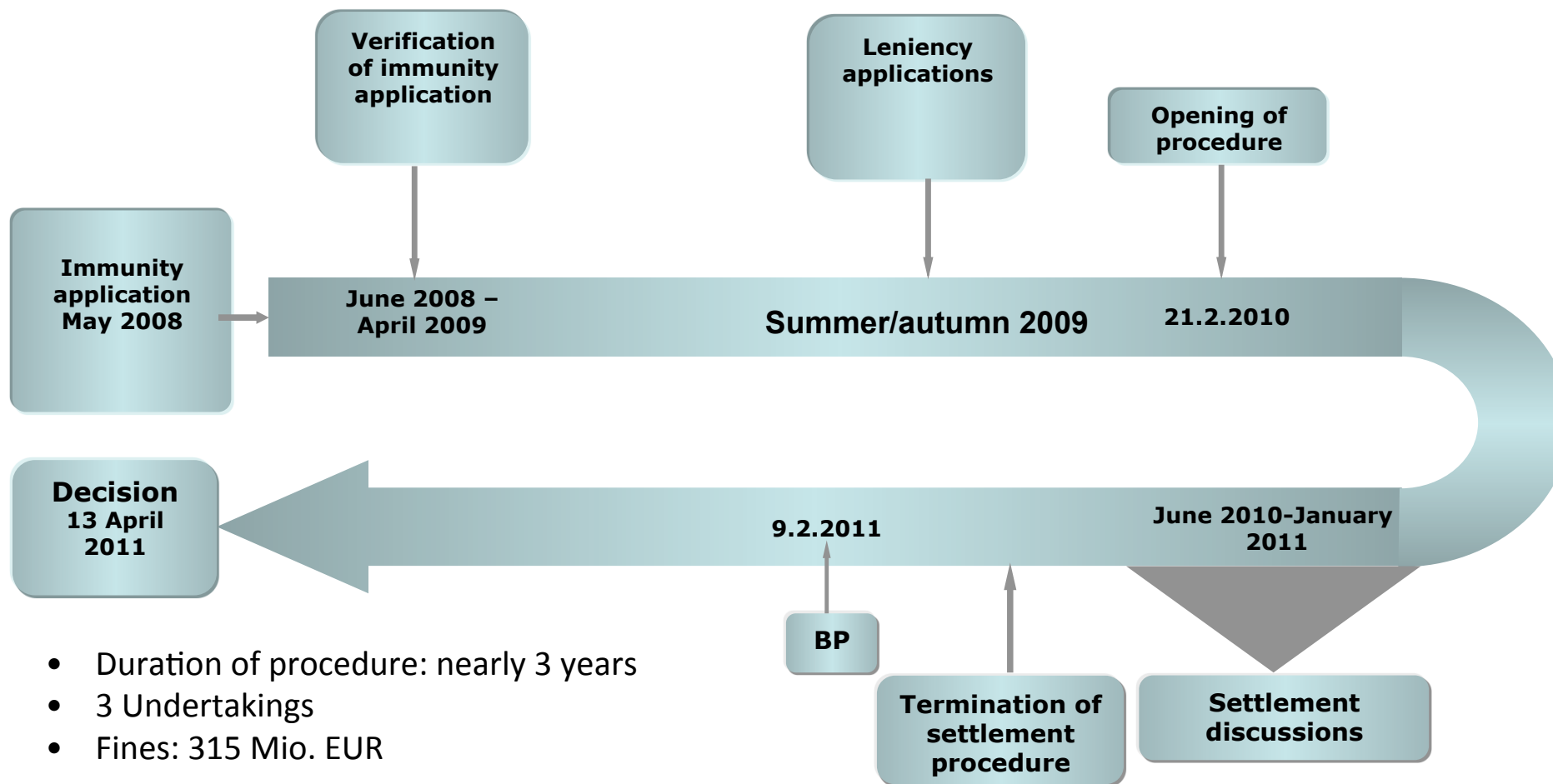
Decision will not be appealed to the EU Courts

## Overview over Window mountings case (normal procedure)



- Procedure's duration: nearly 5 years
- 9 Undertakings involved
- Fines: 86 Mio. EUR

## Overview – settlements procedure: Consumer Detergents



- Duration of procedure: nearly 3 years
- 3 Undertakings
- Fines: 315 Mio. EUR



## *11. Commitment procedures (article 9)*

Undertakings request commitment procedure

- Denied when nature of infringement calls for fine

Preliminary assessment

- summarises the main facts of the case
- identifies competition concerns warranting a decision requiring the infringement be terminated
- serves as a basis for the parties to formulate appropriate commitments



## *11. Commitment procedures*

### Submission of the voluntary commitments

- behavioural or structural nature
- unambiguous and self-executing (trustee: monitoring and/or divestiture)

### Market test

- Official Journal + Press release inviting comments

### Subsequent discussions with the parties

- agreement or revert to prohibition decision

### Commitment decision

- concludes that there are no longer grounds for action
- makes the commitments binding on the parties

# 11. Comparison

## Commitment procedure

- No finding of an infringement
- No admission of guilt
- Voluntary commitment
- No fines

## Settlement

- Finding of an infringement
- Admission of guilt
- Impose remedies
- Fines (but reduced)



Thank you for your attention

**Questions please**

See all EU laws, Regulations, Guidelines  
and Notices, decisions, press releases etc.

on:

**[http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)**