



# National fining practice

## Overview

**Maarten Schueler**

**Netherlands Authority for Consumers and Markets  
(ACM)**

Beijing, 19 March 2015

# Who we are



The authority with combined powers in consumer protection, competition and sector-specific oversight, since April 2013.

# Combined powers

Consumer protection:

- Protecting and empowering consumers

Competition:

- Cartels
- Merger review
- Abuse of dominance

Regulation of specific industries:

- Energy, telecommunication, postal services, transport

# Outline

- Introduction
- Competition law and fining
- Policy and guidelines
- Judicial review (national)
- Collection of fines
- Related issues

# Introduction

- Focus on fines imposed for cartels
  - Not for abuse
  - Not for procedural infringements
  - Not on individuals
- The basics and practical theory
- Cases: challenges in fining practice

# Competition law and fining

- Aim of competition agencies is promotion of competition rules and compliance with those rules.
- Sanctions such as fines are an important instrument
- Deterrence is crucial
- Drivers for deterrence:
  - Damages, civil litigation
  - Fines
  - Criminal sanctions
  - Reputation

# Competition law and fining

- National legal framework determines who sets the fine in individual cases
- Administrative or criminal law systems
- Importance of developing fining practice and policy
- Key question: how to set the fine at the right level?

# Competition law and fining

- Anti-competitive behaviour is triggered by expected gains. The expected gains are in general related to the commerce affected by the infringement.
- Affected commerce therefore an important parameter to determine the level of the fine. Annual turnover as an alternative.



# Policy and guidelines

- National law determines maximum fine,
  - but competition authority has discretionary power to set the level of the fine in individual cases, and to develop a fining practice.
- 
- Fining guidelines
    - Transparency
    - Consistency
    - Deterrence
    - Precondition for a successful leniency program

# Policy and guidelines

- Key issues
  - Maximum fine
  - How to shape deterrence
  - Affected commerce
  - Duration
  - Seriousness
  - Aggravating and mitigating circumstances
  - Proportionality

# EC guidelines 2006 (2006/C 210/02)

- Legal basis Article 23 (2) (a) Reg. 1/2003
  - Administrative fines on undertakings
  - Reflecting gravity and duration
  - Cap 10% of worldwide turnover (preceding year)
- Basic amount
  - Value of sales
  - Gravity percentage (0-30%)
  - Duration multiplier
  - 'Entry fee' (15-25%)

# EC guidelines 2006

- Adjustments to the basic amount
  - Aggravating circumstances
  - Mitigating circumstances
  - Specific increase for deterrence
    - Large turnover
    - Exceeding amount of illegal gains
  - Legal maximum: 10% cap
  - Leniency
  - Settlement
  - Inability to pay
  - Symbolic fine (*AC Treuhand, Motorola*)

# EC guidelines 2006

- Fining discretion needs to be exercised with respect for general principles of law
  - Legitimate expectations
  - Equal treatment
  - Non-discrimination
  - Proportionality
  - EU Courts enjoy unlimited jurisdiction and are not bound by the guidelines (although approved by CJ)

# ACM fining policy rule 2014 (FPR)

- <https://www.acm.nl/en/publications/publication/13315/Policy-rules-regarding-fines-and-leniency/>
- Slightly different from earlier guidelines (and EC guidelines)
- Judicial review and search for flexibility (*Dutch Trade and Industry Appeals Tribunal 12 August 2010, Mobile Operators*)
- Guidelines are important but ‘fining is customizing’
- eg. No mathematical ‘seriousness multiplier’ (fixed number based on economic context, gravity, etc)

# ACM fining policy rule 2014

- Legal basis Article 56 and 57 Dutch Competition Act
  - Maximum fine of € 450.000,-- or, if more
  - 10% of (annual) turnover
- FPR Article 2.2: the level of the fine will be based on
  - Seriousness of the violation
  - Circumstances in which the violation was committed
  - Duration of the infringement
- Basic fine: between 0 and 50% of the *relevant turnover*.
  - Estimate if necessary
  - Bid-rigs
  - Association of undertakings
  - Relevant turnover sufficient to reflect economic value of practice?
  - Specific prevention for 'large undertakings'



# ACM fining policy rule 2014

- FPR Article 2.8: considering aggravating and mitigating circumstances
- Aggravating, in any event (but not exhaustive)
  - Recidivism (100%, unless...)
  - Hindering the investigation
  - Instigating or leading role
  - Control or coercive methods



# ACM fining policy rule 2014

- Mitigating, in any event (but not exhaustive)
  - Cooperation beyond legal obligation, other than leniency (eg. settlements 10%)
  - Compensation of parties injured by infringement
- Leniency deduction
- FPR Article 2.12: Symbolic fine, if warranted by special circumstances in the case
- Final assessment
  - Deterrent?
  - Proportional?
  - Not exceeding the maximum?

# Judicial review (national)

- Fining governed by general principles of law
  - Legitimate expectations
  - Equal treatment
  - Non-discrimination
  - Proportionality
- National legal framework determines intensity of court involvement.
- In Europe, courts (generally) have full jurisdiction.

# Judicial review (national)

- Dutch courts very critical towards imposed administrative fines (*Mobile Operators*)
  - How does *this* fine work out in *this specific* case under *these* circumstances?
  - Do the effects (in a certain case enough) to justify the acclaimed seriousness of the infringement?
- Reason to re-evaluate fining policies

# Collection of fines

- Current practice: Collection only after decision is irrevocable
- Reminder 2 weeks notice
- Warrant served by bailiff directly enforceable
- Flexible payment plans possible
- If not paid timely, we are 'hands on' in recovering funds
- No possibility of commanding bank guarantee
- New practice: collection 6 weeks after the decision is taken
- Fines go to the Treasury Department

# Related issues

- Fines seem to get higher over the years. Can a fine be too high?
- Fines may not lead to bankruptcy. Or should it sometimes be the ultimate punishment?
- Should fines be imposed on individuals instead of companies? The consumer pays the price in the end.
- Should state-owned companies be subject to regular fines?
- Publicity about fines as extra deterrent?

-----