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National fining practice

Challenges in setting fines

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Outline

- Parental liability
  - *Investment firms case*
- Associations of undertakings
  - *GP's association case*
- Extra-territorial fining
  - *Silverskin onions case*
- Inability to pay
- Maximum fine - 10% cap

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Parental liability

- Important for deterrence and collection
- Parental liability, test:
  - Can the parent exercise decisive influence on the commercial policy and conduct?
  - Does the parent actually exercise its decisive influence?
  - Was the parent able to adduce sufficient evidence to rebut the presumption?

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- Where a parent holds a <u>100%</u> shareholding in a subsidiary [or a *de minimis* amount of less than 100%] a <u>rebuttable presumption</u> that the parent does *in fact exercise decisive influence* over the commercial policy and conduct of its subsidiary applies. In such cases joint and several liability for the parent firm follows unless it adduces sufficient evidence to show that the subsidiary acted independently (CJ C-97/08P, 10 September 2009, *Akzo*)

Parental liability

- ACM held investment/private equity firms liable in the '*Flour cartel*' (ACM Decision 20 November 2014)

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- Investment firms usually hold shares via funds. Tendency to resell shares after a while. ACM is of the opinion that these firms too can be held liable for the behaviour of the firms they own (through those funds), particularly if the investment firm in question has decisive influence.

- Start building the file from the start of the investigation

Associations of undertakings

- Article 57 DCA*:"….not more than 10% of the sum of turnover generated by its members."*
- *GP's case*: Trade association making recommendations to its members (GP's)

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- Usual calculation of the fine, except for two specific issues
  - 'Turnover': no relationship to behaviour
  - Relation to financial capacity (increasing membership fee, member liability and terminated membership)

- Article 23 (4) reg. 1/2003: position of trade associations. Insolvency → call upon members or even fining members directly

National borders and fining

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- Jurisdiction and territoriality
  - Link with national territory: either cartel arrangements made or executed within national borders or effects of cartel behaviour occurred within national borders.
  - Legal basis required for expansion of jurisdiction outside national borders
  - Multiple jurisdictions involved: cooperation between authorities required
- Effects of an infringement create jurisdiction (*Woodpulp* ECJ 27 September 1988)

National borders and fining

- *Silverskin onions case* (District Court of Rotterdam, 20 March 2014)
- ACM has jurisdiction in its own territory: applying Article 6 DCA and Article 101 TFEU simultaneous.
- Question of deterrence and under enforcement
- Fine based on affected national turnover + EU affected turnover
- District court sides with ACM: legal basis EU Treaty and regulation 1/2003
- Appeal pending

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Inability to pay I

- Increasing practice due to economic circumstances
- *In principle, the authority does not take the financial situation into account when setting the fine…..On the other hand it should not be the case that a fine would lead to likely bankruptcy.*
- Initiative and burden of proof on company: *“recent, complete and verifiable”*
- ACM accountants as well as independent accountants
- Reliable data is crucial

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Inability to pay II

- Test
  - ACM's fine makes the companies' bankruptcy likely at the moment the fine is imposed.
  - The likely bankruptcy is the <u>direct effect</u> of the imposed fine.
- Result of lowering the fine due to inability claim
  - Bring back the fine to level where the company pays as high a fine as possible without bankruptcy being likely anymore
  - Agreements on payment can be a part of 'lowering the fine'
- (Second) chance in ACM's objections/review procedure
- ACM's practice is deemed reasonable by Dutch courts

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Maximum fine

- 10% of worldwide turnover in the preceding business year
- Example: Cartel shower gel:
  - Company A is a multinational with worldwide turnover of € 10 billion
  - Company B is a specialty soap manufacturer with a 'worldwide' turnover of € 10 million
  - Similar behaviour and similar affected turnover of a long term cartel: € 20 million.
  - Fine: Company A € 20 million and Company B € 1 million
  - Principle of equality?
  - *Window Mountings* and *North Sea Shrimps* for reductions in the case of single product firms.

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Maximum fine

- Discussion:
  - Healthy companies are fined heavily, unhealthy companies are protected?
  - SCCI and 10% cap: incentive for long-term cartels?
  - When and where to ‘cap’ the fine?

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