

# Cartel fines, deterrence and ability to pay: Getting the balance right

Remarks prepared for the CRA conference  
*Economic Developments in European Competition Policy*  
9 December 2009, Brussels

Prof. dr. Maarten Pieter Schinkel  
University of Amsterdam and ACLE



# 1. Discovery of Cartels

- Breaches are found out about in a variety of ways:
  - Accidental finds (employees, former, disgruntled or confused)
  - Complaints (victims and alert members of the public)
  - Culprits self-reporting in return for leniency
  - Active detection by the competition authorities
- Competition authorities lean heavily on leniency (over 80% of cases)
- Celebrated as a great success by the large numbers of applications



## Some Issues with Leniency

- Not clear at what stage of the investigation leniency was applied for
- Not obvious what the quality of the applications is:
  - Programs may attract primarily ‘old-and-dying’ cartels
  - ‘Cleaning-out-the-closet’-effect
- The leniency programs can over-burden the agencies:
  - Detection probability for active cartels may go down
  - Strategic abuse by sophisticated cartels and their advisors
  - Adverse selection of cases by officials
- Cartels formed post-lenieny programs may be leniency-proof





# PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR

## *An Antitrust Primer*

---

*This primer briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive collusion.*

### **Introduction**

American consumers have the right to expect the benefits of free and open competition — the best goods and services at the lowest prices. Public and private organizations often rely on a competitive bidding process to achieve that end. The competitive process only works, however, when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is cheated. Price fixing, bid rigging, and other forms of collusion are illegal and are subject to criminal prosecution by the

### **Federal Antitrust Enforcement**

Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity. Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice.

Violation of the Sherman Act is a felony punishable by a fine of up to \$10 million for corporations, and a fine of up to \$350,000 or 3



# Detecting Bid Rigging, Price Fixing, And Other Types Of Collusion

## Bids

- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.

## Prices

- Identical prices may indicate a price-fixing conspiracy, especially when:
  - Prices stay identical for long periods of time.
  - Prices previously were different.
  - Price increases do not appear to be supported by increased costs.

Source: website US DoJ, Antitrust Division



## 2. The 2006 EC Fining Guidelines

- Deterrence is an explicit objective (recitals 30-31)
- Effects analysis by rough approximation only
- Potential for harsh fines – possibly too harsh in cases
- Clear and simple – yet with quite some discretion for the Commission



# Implied Fine Formula in 2006 EC Fining Guidelines

$$F = \overbrace{(30\% \times \eta \times n + 25\% \times \kappa)}^{\text{Basic amount}} \times \overbrace{p^a Q^a}^{\text{Value of sales}} \times \overbrace{\theta^a \times \theta^m}^{\text{Adjustments}}$$

$0 < \eta \leq 1$	gravity (recitals 21-23)
$n$	number of years (recital 24)
$\frac{3}{5} \leq \kappa \leq 1$	'entrance fee' (recital 25)
$1 \leq \theta^a \leq 2$	aggravating circumstances (recital 28)
$0 < \theta^m \leq 1$	mitigating circumstances (recital 29)

Source: Bos and Schinkel (2006)



## Some Issues with the EC Fining Guidelines

- Calculus of affected commerce can be complex:
  - Delineating what part of business has been affected
  - Value of sales develops over the business years
  - Unclear what are sales “indirectly” related to the infringement
- 10% maximum (Art.23(2) Regulation 1/2003) *very* often binding
- Basis for bargaining over “direct” settlements



### 3. Private Litigation for Antitrust Damages

- Compensation for deterrence from the Green to the White Paper
- Commission is preparing guidance on methods of calculation
- Current (visible) practice so far (seems to remain) weak



## **DG Comp seeks damages from elevator cartel**

---

**13 June 2008**

The European Commission is taking private enforcement action against the four elevator manufacturers it prosecuted last year.

DG Comp fined Thyssenkrupp, Otis, Schindler and Kone €992 million - the commission's highest-ever cartel fine - for price-fixing, bid-rigging, allocating markets and sharing confidential information.

The offences took place between 1995 and 2004, but DG Comp said at the time that the effects could continue for as long as 50 years, because the company that installs an elevator usually carries out the maintenance.



## Some Issues with a Private Damages Practice

- Cartel damages often multi-dimensional:
  - Non-linear pricing and pay-back schemes
  - Unexploited scale economies
  - Poor quality and little R&D
- Damages are typically dispersed in the chain of production
- There can be a (little recognized) “undercharge” upstream
- Courts may award damages overzealously, leading to multiple liability



for consumers or undertakings that did not themselves infringe any part of the intellectual property rights of the infringing undertaking, to prove the scope of that harm. To alleviate the burden of proof for a claimant showing himself to be a purchaser of goods or services that are affected by the infringement, it is appropriate to presume that the actual loss initially suffered by the one who made the purchase from the infringing undertaking has been fully passed on to the claimant. The infringing undertaking should be allowed to rebut this presumption by showing that the actual loss has not been passed on. Where the infringing undertaking can only show that part of the actual loss has not been passed on, it should still compensate the claimant for the remaining part.

Draft Directive (informally circulated April 2009)



## 4. Competition Authorities

- Agencies are players in a complex game of hide-and-seek
- Up against a professional private practice, adapting quickly to new tools of enforcement
- The net-effective expected cartel liability (escape, caps, leniency, settlements) unclear
- What we know (empirically) about cartels is largely based on a biased sample
- Systematic research on the cartel population is needed

