



European Commission

Competition

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

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Key objective of Commissioner KROES for her mandate (Parliamentary Hearings Nov 2004) :

Focus the enforcement of the Commission on actions that make an actual difference in the market place, both in terms of actual harm to consumers and in terms of competitiveness of the European Industry.



Make the fight against cartel priority no.1: a Road Map

- Creation of Cartel Directorate
- Improved investigating techniques
- Revisit the EU Leniency Programme and Establish a Coherent System of Leniency within Jurisdictions that Apply Article 81 EC
- Revise the Guidelines on Fines
- Introduce a “plea bargaining like system” in EU Competition Law (*Neelie Kroes : Studienvereinigung Kartellrecht April 2005*)



Deterrence: what drives it?

1. level of fines
 - level of fines imposed
 - extent to which fines are upheld in Court
2. probability of being caught
 - efficiency of leniency programme(s)
 - efficiency of ex officio approach
 - efficiency of ECN cooperation



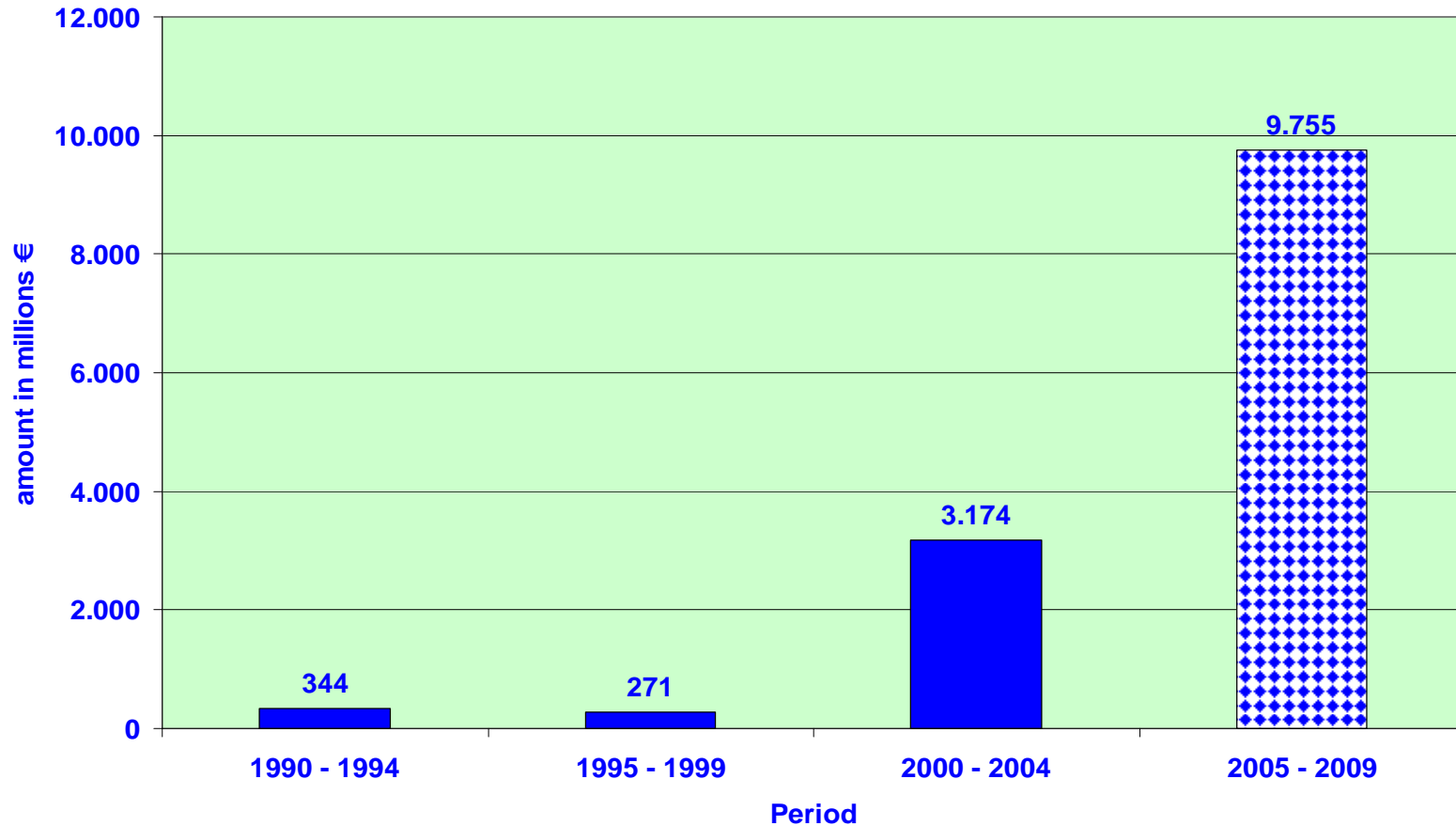
Some numbers

- 33 cartel cases decided from 2005 until now
- 213 cartel decisions from 2005 until now
- In total 9.762 billion EUR of cartel fines imposed from 2005 until now
- Highest fines in cartel cases: car glass (1.38 billion) and elevators and escalators (992 million)
- Highest fines imposed on individual companies in cartel cases: Saint Gobain (car glass, 896 million), E.ON (553 million), ThyssenKrupp (elevators and escalators, 480 million)



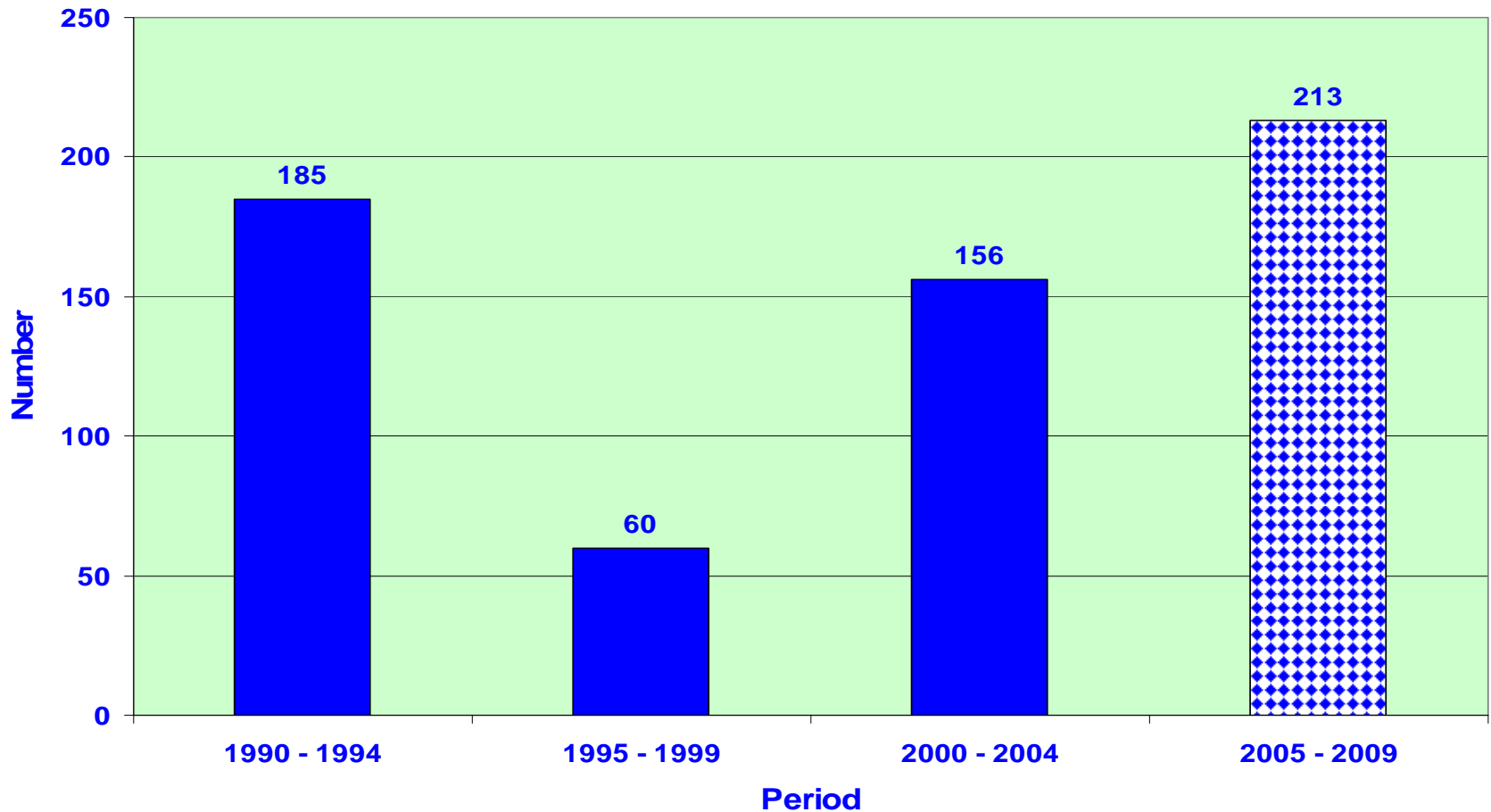
Cartels – fines imposed

(corrected for Court judgments)





Cartels – undertakings receiving decision





Cartels

Ten highest cartel fines per case

Ten highest cartel fines		
Year	Case name	Amount in € [*])
2008	Car glass	1.383.896.000
2009	Gas	1.106.000.000
2007	Elevators and escalators	992.312.200
2001	Vitamins	790.515.000
2007	Gas insulated switchgear	750.712.500
2008	Paraffin waxes	676.011.400
2006	Synthetic rubber (BR/ESBR)	519,050,000
2007	Flat glass	486.900.000
2002	Plasterboard	458.520.000
2006	Hydrogen peroxide and perborate	388.128.000

*) amounts corrected for changes following judgments of the CFI and ECJ



Cartels

Ten highest cartel fines per undertaking

Ten highest cartel fines / undertaking			
Year	Undertaking**	Case	Amount in €*
2008	Saint Gobain	Car glass	896.000.000
2009	E.ON	Gas	553.000.000
2009	GDF Suez	Gas	553.000.000
2007	ThyssenKrupp	elevators and escalators	479.669.850
2001	F. Hoffmann-La Roche AG	vitamins	462.000.000
2007	Siemens AG	Gas insulated switchgear	396.562.500
2008	Pilkington	Car glass	370.000.000
2008	Sasol Ltd	Candle waxes	318.200.000
2006	Eni SpA	synthetic rubber	272.250.000

* amounts corrected for changes following judgments of the CFI and ECJ



What about the probability of being caught?

- efficiency of ECN cooperation
- efficiency of leniency programmes:
 - Commission + National Comp. Authorities
- efficiency of ex officio approach
 - Complaints , referrals, informants
 - Follow-on of investigations elsewhere
 - Economic - based market monitoring



Total Cartel enforcement in ECN

- Since 2004, anti-cartel enforcement is done by the Commission in cooperation with the National Competition Authorities, in the framework of the European Competition Network (ECN)
- Regulation 1/2003 foresees joint action and assistance of competition authorities within the ECN (Article 22).
- Between 2004 and 2008, NCAs adopted in at least **25 cartel cases**, decisions based on Article 81 EC
- Fines imposed by NCAs are clearly increasing



Has the optimal level of fines been reached?

Fines used to be underdeterrent ...

« Despite the sterling record of EU fines since the late 1990s ... such fines are far below what is necessary to achieve optimal deterrence. ... New Fining Guidelines ... late 2006 ... are likely to lead to far higher cartel fines.»

J.M. Connor and D.J. Miller at the 3rd LEAR Conference on The Economics of Competition Law, Rome, June 25-26, 2009, p. 59.



Legal room for increase of fines levels ...

“the Commission must [...] ensure that its action has the necessary deterrent effect [...] It [is therefore] open to the Commission to have regard to the fact that [certain types of infringements], although they were established as unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them and, consequently, it [is] open to the Commission to consider that it is appropriate to raise the level of fines [within the limits indicated in Article 23(2) of Regulation 1/2003] so as to reinforce their deterrent effect”.

Judgments of the Court of Justice of 7 June 1983 in Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others v Commission* [1983] ECR 1825, paragraphs 106-109, and of 2 October 2003 in Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraph 81.



Fines Guidelines 2006

- Fines calculated on the value of sales directly or indirectly affected by cartel
- Rate of fine on annual cartel sales of company = 15-30%
- Basic fine = fine rate * annual sales * duration
- Total fine = Basic fine plus entry fee (15-25%) plus aggravation/mitigation factors less leniency reduction if any
- Fines capped by 10% of global turnover of Group - not just the infringing company



Has the optimal level of fines been reached?

The lag ...

“the fact that at a given point in time relatively many antitrust infringements are still discovered is primarily indicative of the deterrent effect of the level of fines imposed just before or around the time these infringements started. Cartels tend to get detected and punished many years after they come into being. The number of cartels detected at a given point in time is thus more likely to be indicative of the adequacy of the level of fines imposed ten or fifteen years earlier than of the level of fines imposed five years earlier.»

W. Wils, The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights forthcoming in *World Competition*, Volume 33, No. 1, March 2010 and accessible at <http://ssrn.com/abstract=1492736>, fn. 41



Has the optimal level of fines been reached?

The cases in which fines have been capped at the 10 % ceiling remain relatively rare:

Fines Guidelines 2006 – fine as percentage of global turnover
Last update: ++02nd June 2009++

Undertakings fined	0 - 0,99 %	1 - 1,99 %	2 - 2,99 %	3 - 3,99 %	4 - 4,99 %	5 - 5,99 %	6 - 6,99 %	7 - 7,99 %	8 - 8,99 %	9 - 10 %
51	26	4	3	2	2	1	1	1	0	7



Point 35 of the 2006 Fines Guidelines:

“In exceptional cases, the Commission may, upon request, take account of the undertaking’s inability to pay in a specific social and economic context ... solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value”



Application of point 35

- “the Commission may” : discretion (cp. final point 37 of the Guidelines)
- “upon request” : can be elicited at Hearing; can be withdrawn at any time;
- “inability to pay” : financial distress shown in financial analysis of individual undertaking
- “in a specific social and economic context”
- “on the basis of objective evidence” : financial data of undertaking, group, shareholders



Application of point 35

- “the fine would irretrievably jeopardise the economic viability of the undertaking”: the causality between the fine and the financial distress (voluntary restructurings ; distinction undertaking – legal person; dimension issue: proportion between fine and size of undertaking)
- Confidentiality: identity of unsuccessful applications; analysis and financial data of all;



Relevance of criminalisation to deterrence

- Commission can only impose pecuniary sanctions on undertakings ("fines")
- Member States can also impose sanctions on individuals (pecuniary, disqualification orders, custodial)
- Main argument in favour of sanctions against individuals is deterrence



Sanctions against individuals should come with:

- Increased investigative powers
- Sufficiently well resourced and dedicated prosecution bodies
- Willingness of judges to convict
- An efficient leniency program for individuals operated seamlessly with the corporate leniency program