

# Fines and Antitrust Damages

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# Discovery of Antitrust Violations

- Breaches are discovered as a result of:
  - Accidental leaks (disgruntled employees)
  - Complaints from victims
  - Self-reporting (corporations and individuals)
  - Active detection by the competition authorities
- Competition authorities lean on leniency (over 80% of cases)
- Celebrated as a great success by the large numbers of applications



# Some Issues with Leniency

- An extensive private leniency practice has developed
- 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
- Leniency-proof cartel agreements (jig-sawed evidence, Swiss default contracts)





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

## *An Antitrust Primer*

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*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



# Antitrust Fines

- 2006 EC Fining Guidelines
- Deterrence an explicit objective (recitals 30-31)
- Effects analysis by approximation
- Affected value of sales as a base
- 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

- Effects analysis by approximation only
- Calculus of affected commerce can be complex:
  - Value of sales develops over the business years
  - Unclear what are sales “indirectly” related to the infringement
- Last year’s sales may be high for a leniency applicant (defection)
- 10% maximum (Art.23(2) Regulation 1/2003) *very* often binding



# Private Litigation for Antitrust Damages

- Commission's White Paper expected early 2008
- Current (visible) practice so far remains weak
- Yet, the market is developing ways around existing obstacles:
  - Cartel Damage Claims (CDC)
  - SPV's act as opt-in class with contingency-type fees
  - Securitization
  - Private leniency programs

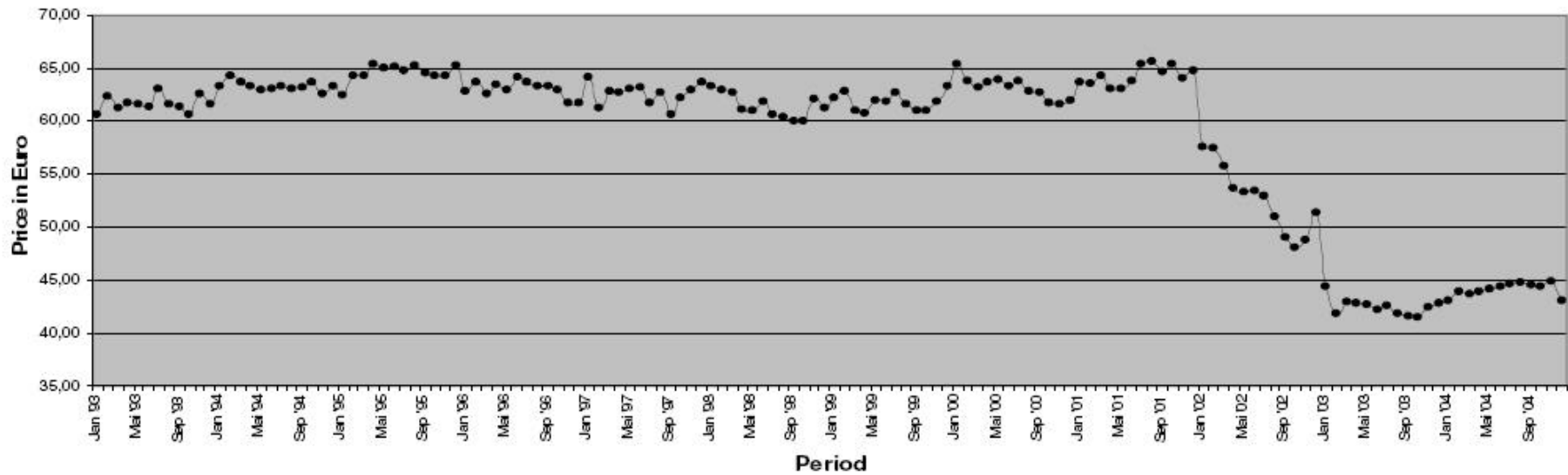


## Some Issues with a Private Damages Practice

- Damages are typically dispersed in the chain
- Risk of undisclosed settlements with direct purchasers
- Antitrust damages often multi-dimensional:
  - Non-linear pricing and pay-back schemes
  - Unexploited scale economies
  - Poor quality and little R&D



Price development (weighted average price)  
Freight included in prices



Source: CDC, Classen (2007)



# Competition Authorities

- Agencies are players in a complex high-stakes game
- Up against a professional private practice:
  - Cartel consultants
  - Forensic cartel audits
  - ‘Clean teams’
- Eminent new enforcement tools increase complexity:
  - Sanctions for individuals (proper targeting, indemnification)
  - Plea bargaining (asymmetric information, commitment)
- Reputation is key (active detection, transparent procedures, good decision making)



# Concluding Remarks

- Anticompetitive behavior appears to remain a tempting proposition
- What we know about it is based on a biased sample
- Too little systematic and detailed (*post-mortem*) case research
- A better understanding internal organization can help develop:
  - Incentive-compatible compliance programs
  - Screens for potential competition concerns
  - Effective enforcement tools
  - Targeted inspections and remedies
  - Good estimators for cartel damages

