



# **Are sanctions for cartels sufficiently deterrent and proportionate?**

**17 February 2016**

**Gerald Miersch**

Head of Unit G.2

European Commission/DG Competition

\* The views expressed are personal and do not bind  
the Commission

## Purpose of sanctions for cartels:

- To punish
- To deter
  - specific deterrence
  - general deterrence

- Regulation 1/2003:
  - Gravity and duration of infringement
  - Capped at 10% of total turnover
  
- General principles of law to be respected
  - Equal treatment
  - Proportionality
  
- Fining Guidelines: create predictability

## Starting point under the 2006 Fining Guidelines: cartelised sales

- Value of sales per participant
  - Gravity multiplier of 15-30%
  - Duration fully counts
- > proxy to reflect economic importance of infringement per participant
- > focus on potential effect on market and potential illegal profit of participant

- Entry fee
  - > deters from even entering into cartel
  
- Adjustments
  - Aggravating circumstances
  - Mitigating circumstances
  - Deterrence multiplier
  - > focus on impact of fine on participant in view of its total size

- 10% ceiling
  - Functions as cap
  - Refers to the total worldwide turnover of the undertaking
  
- > focus on impact of fine on participant in view of its total size
  
- > purpose is to avoid excessive or disproportionate fines

## "Undertaking" for application of cap

- Parent B bought subsidiary A after infringement
  - > B not liable, only cap of A applies
- B sold A after infringement
  - > A and B remain liable
  - > for each A and B, their own cap applies  
(CJEU, Kendrion)
- B bought A during the infringement
  - > for B, cap of B applies
  - > for A?

## YKK judgment of the CJEU of September 2014

- Commission decision: For A, the cap of B applies for the whole infringement period of A
  
- GC: agreed
  
- CJEU: disagreed - For the period for which A is solely liable, only the cap of A applies
  - Argument: Concept of undertaking should be the same for attribution of liability and application of the cap



- Point 37 reduction for "mono-product companies"
    - Nearly all companies would be capped
    - Several companies have high "mono-product" ratios
    - Differences between the parties in view of their individual involvement
- > considers both impact of fine on participant and its role in infringement

## Legality of "mono-product" reductions

- Oral Hearings before GC in Mountings case
- GC in Car glass (Pilkington, December 2014)
- But see also GC in Calcium carbide (Novácke, December 2012)
- Still pending before the GC in Shrimps (Stührk) and Envelopes (Tompla)

- Inability to Pay reductions
  - > exceptional, following careful scrutiny and only if conditions of point 35 are met
  - > purpose:
    - Avoid that fine drives financially distressed but competitive companies out of the market
    - And that this causes adverse social and economic consequences
  
- Note: risk that fine causes insolvency does not as such render the fine disproportionate

## Scrutiny of ITP assessment by GC in Pre-stressing steel case (WDI judgment of July 2015)

- Disagreement with assessment of Commission
- Same result in exercise of unlimited jurisdiction
  - > Based on factual situation at time of judgment

- Are fines too high or too low?
- Appropriate balance between sufficiently deterrent and proportionate fines
- Evidenced by successful leniency program and increased compliance efforts
- Cartel decisions are basis for private damage actions