



CARTEL INFRINGEMENTS IN THE NETHERLANDS

HOW TO GET THE FINE RIGHT

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Outline

- **Legal framework**
- **Facts & figures**
- **Setting the fine**
- **Where do we stand? Where are we going?**

Legal framework (1)

Statutory rules limited to setting maximum fine

- 1998 - mid 2016:

EUR 450.000 (until 2002 NLG 1 mln) or 10% annual turnover (*cf.* EU) whichever is higher

- 1 July 2016:

EUR 900.000 or 10% annual turnover x duration of the cartel infringement in years (with a maximum of 4)

New law takes effect as of 1 July 2016 and will apply to infringements that take place / start after that date

Legal framework (2)

Statutory rules complemented by fining guidelines

- Give further guidance to fine setting by ACM
- Over the years: 5 sets of Guidelines
- New Guidelines introduce smaller or larger changes in fining policy – over the years, higher fines
- Transition regime: generally, fining guidelines in place at date of Statement of Objections are applicable (*cf.* transition clause in specific guidelines)

Legal framework (3)

- **Fining Guidelines 2001**
Introduction concept of affected turnover and overcharge proxy 10%
Base fine: 10% affected turnover in the infringement period x gravity factor of max 3
- **Fining Guidelines 2007**
Introduction of fining policy for individuals for their role in cartel infringements
- **Fining Guidelines 2009**
Implementation principle of high trust -> increasing gravity factor to max 5 and 'starting fee' of 25%
- **Fining Guidelines 2013**
Establishment ACM; no substantive changes to the guidelines
- **Fining Guidelines 2014**
Base fine of max 50% of the affected turnover in the last year of the infringement x duration of infringement in months

Legal Framework (4)

Collection of fines

- **1998 - 2014:**

- payment within 13 weeks, however
- no legal obligation to pay until end of court proceedings
- legal interest due as of 13 week after fining decision

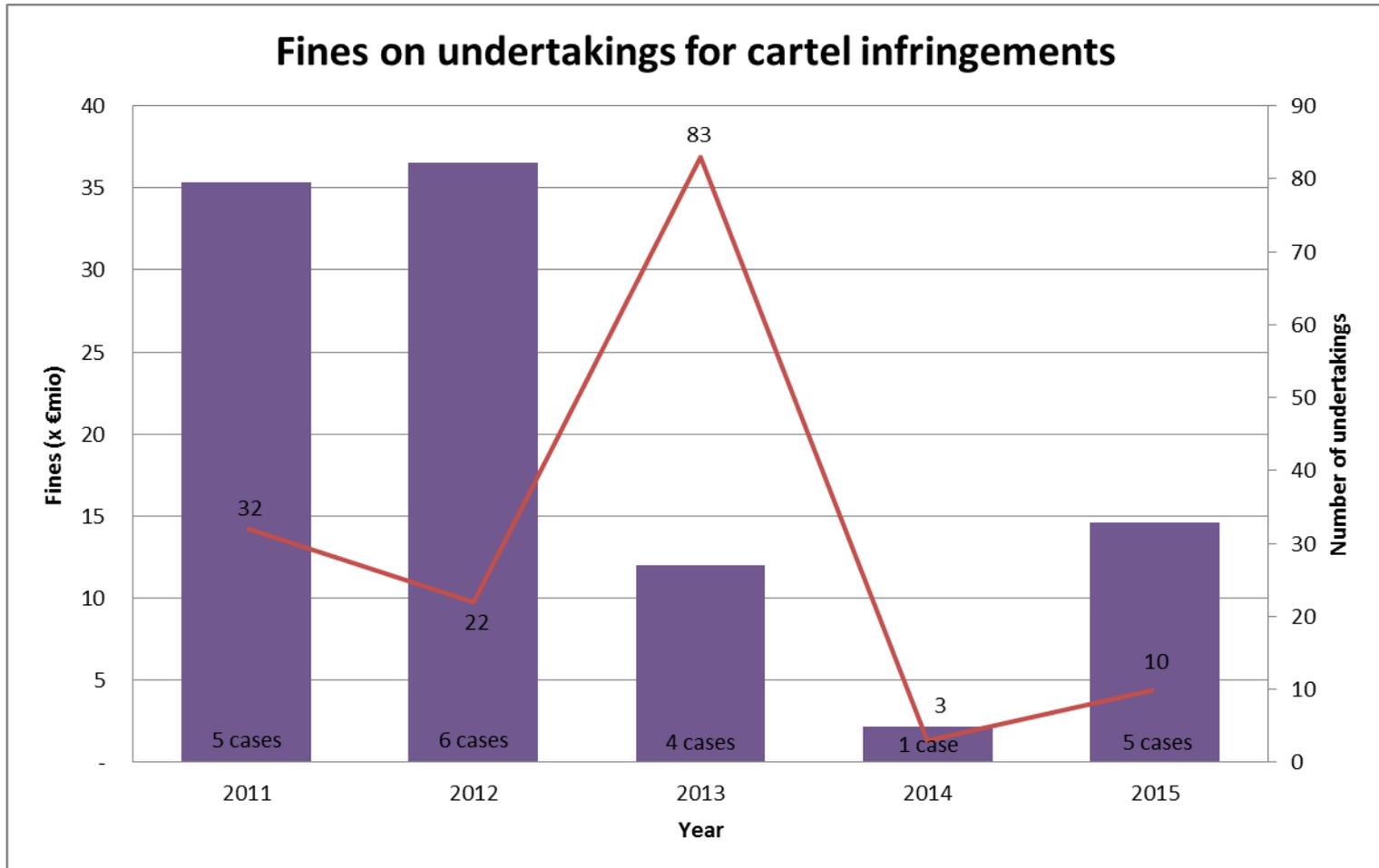
- **2014 Streamlining Act:**

- within 6 weeks or, in case of appeal, within 24 weeks after fining decision (no further extension of payment obligation)
- legal interest due as of date payment obligation

- **In exceptional cases:**

- ACM has accepted a payment plan (spreading of payment terms)
- assets have been seized to recover the fine
- ACM started civil proceedings to hold board members responsible for undertaking's failure to pay

Facts & figures



Setting the fine (in 6 steps) (1)

1. Determination of affected turnover

- ACM follows practice comparable to Commission

2. Base fine

- application of 10% proxy has been disputed in court but unsuccessfully
- factor range used: 1 – 3,5

3. Aggravating and mitigating factors

- high trust principle: strict policy regarding recidivism in Fining Guidelines (Janssen de Jong case) and in new law on maximum fines
- fines substantially lowered for compensation of injured parties (Public Green areas Maastricht) (stimulates private settlement of damage claims)

4. Statutory maximum (*serves as a “fine cap”*)

5. Leniency discount (*if applicable*)

6. Proportionality test / ITP

Setting the fine (2)

Review by the Courts

- **Full jurisdiction**

- full review of level of fine; however, fine cannot be higher than fine imposed by ACM (no *reformatio in peius*)



- **Approval of use of Fining Guidelines by ACM**

- fining guidelines do not bind the courts; when amending the fine, courts do not consistently follow all steps of the guidelines

- **Focus on proportionality of the fine**

- in cases where infringement is upheld, rather limited amendments of fines by Court
- the higher the fines, the more Courts seem to require that ACM can give certain insight in the harm caused by the infringement

Where do we stand? (1)

- **Do the fining Guidelines function well?**
 - Guidelines result in fines that are deterrent and proportionate and respect equal treatment
- **What is less satisfactory?**
 - Extensive debate possible on definition and value of affected turnover in concrete case.
 - Level of fine may be affected to large extent by (changes in) corporate structure (due to statutory rules on maximum fine).
 - When fining guidelines result in absolute statutory maximum fine (Eur. 450.000) for various cartel members, fines may not sufficiently take into account the differences among cartel members. ACM has looked for ways to differentiate (see Reading Folders case).

Where do we stand? (2)

- **Solutions?**
 - lift level of statutory maximum
 - however, ability to pay may set a limit below statutory maximum (bankruptcy risk)
- **ACM practice on ITP**
 - ACM applies bankruptcy test
 - test: bankruptcy likely and direct effect of fine imposed?
 - Bankruptcy test requires serious scrutiny
 - requires detailed input of undertakings
 - resource and time-consuming
 - requires specific expertise

Crystal ball

- Development of case law on assessment of ability to pay / ITP claims
 - Supreme Court 2014: *ex nunc* assessment of financial ability to pay the fine. Court proceedings on ITP may also include assessment of recent financial situation
- Development of case law on equal treatment and proportionality with regard to fines capped on statutory maximum or bankruptcy limit (e.g. Flour case and Reading Folder case)
- Obligation to pay the fine pending proceedings (Streamlining Act) increases the burden on ACM and the undertaking to get the numbers right