

EC and UK Competition
Law Update 2008

Other EC Developments in brief

Wednesday 12th March 2008

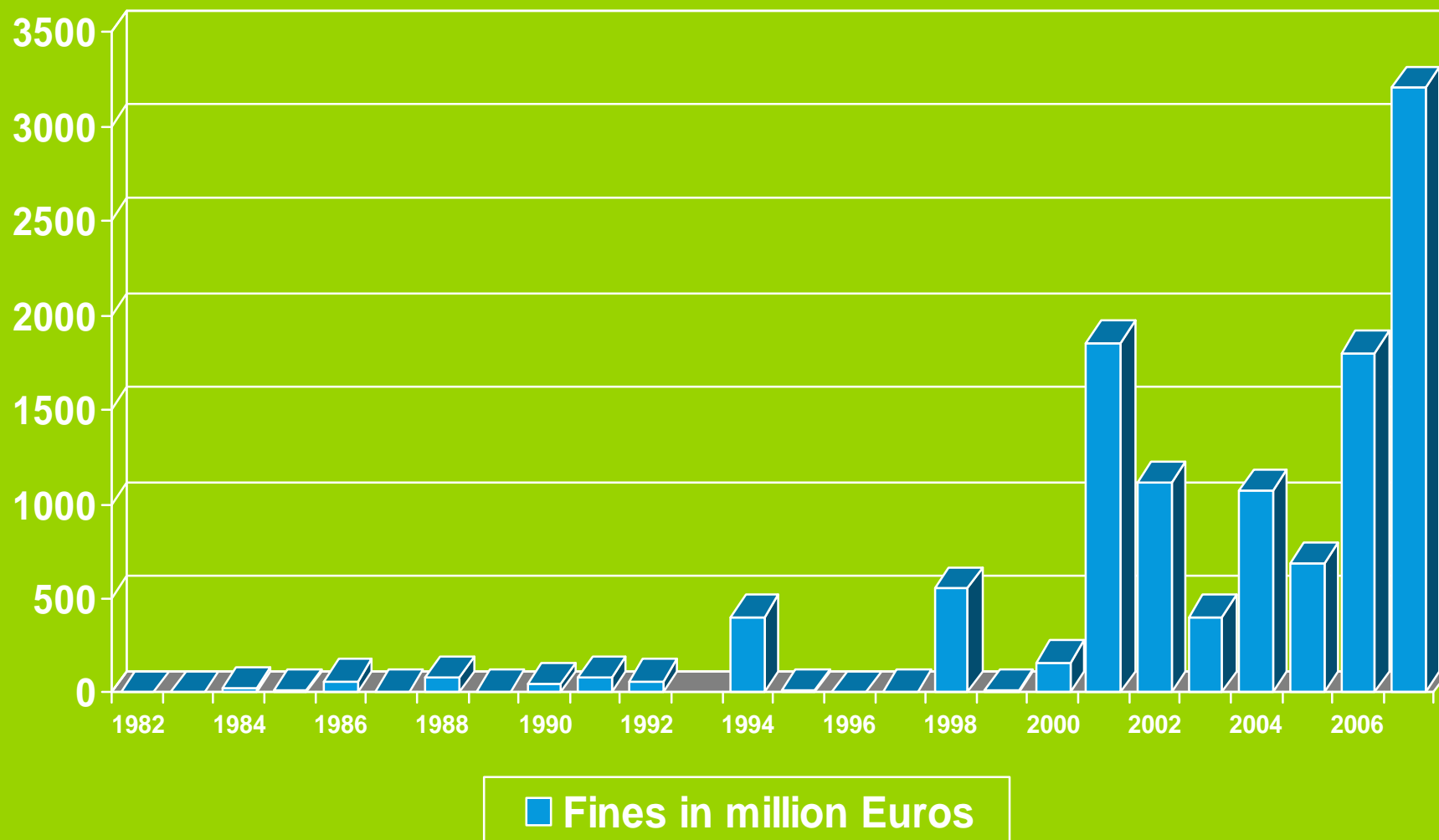
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What Else?

Record Fines in 2007 (1)



Record Fines in 2007 (2)

- Over €3,3 billion by EC alone
- 5 companies fined €992 million for cartels in the installation and maintenance of elevators and escalators in 4 countries
- Higher fines expected as a result of EC's new Fining Guidelines

New Fining Guidelines (1)

| | 2006 Fining Guidelines | Prior Guidelines |
|-----------------------|---|---|
| Starting Point | <ul style="list-style-type: none"> • up to 30% of value of sales affected | <ul style="list-style-type: none"> • ± €20 million for “serious” case |
| Duration | <ul style="list-style-type: none"> • multiply basic amount by number of years | <ul style="list-style-type: none"> • 10% per annum increase |
| Entry Fee | <ul style="list-style-type: none"> • add additional 15-25% | <ul style="list-style-type: none"> • not applicable |
| Recidivism | <ul style="list-style-type: none"> • multiply by 100% for each prior infringement established by EU or NCA | <ul style="list-style-type: none"> • multiply by 50% once if previous infringement established by EU |
| Other Factors | <ul style="list-style-type: none"> • increase for failure to cooperate, role as leader, instigator or coercer • increase for extra deterrence to reflect size/sophistication of perpetrator | |
| RESULT | <ul style="list-style-type: none"> • Fines likely to reach legal max. of 10% of global, aggregate annual turnover | <ul style="list-style-type: none"> • highest single fine so far €479.7 million |

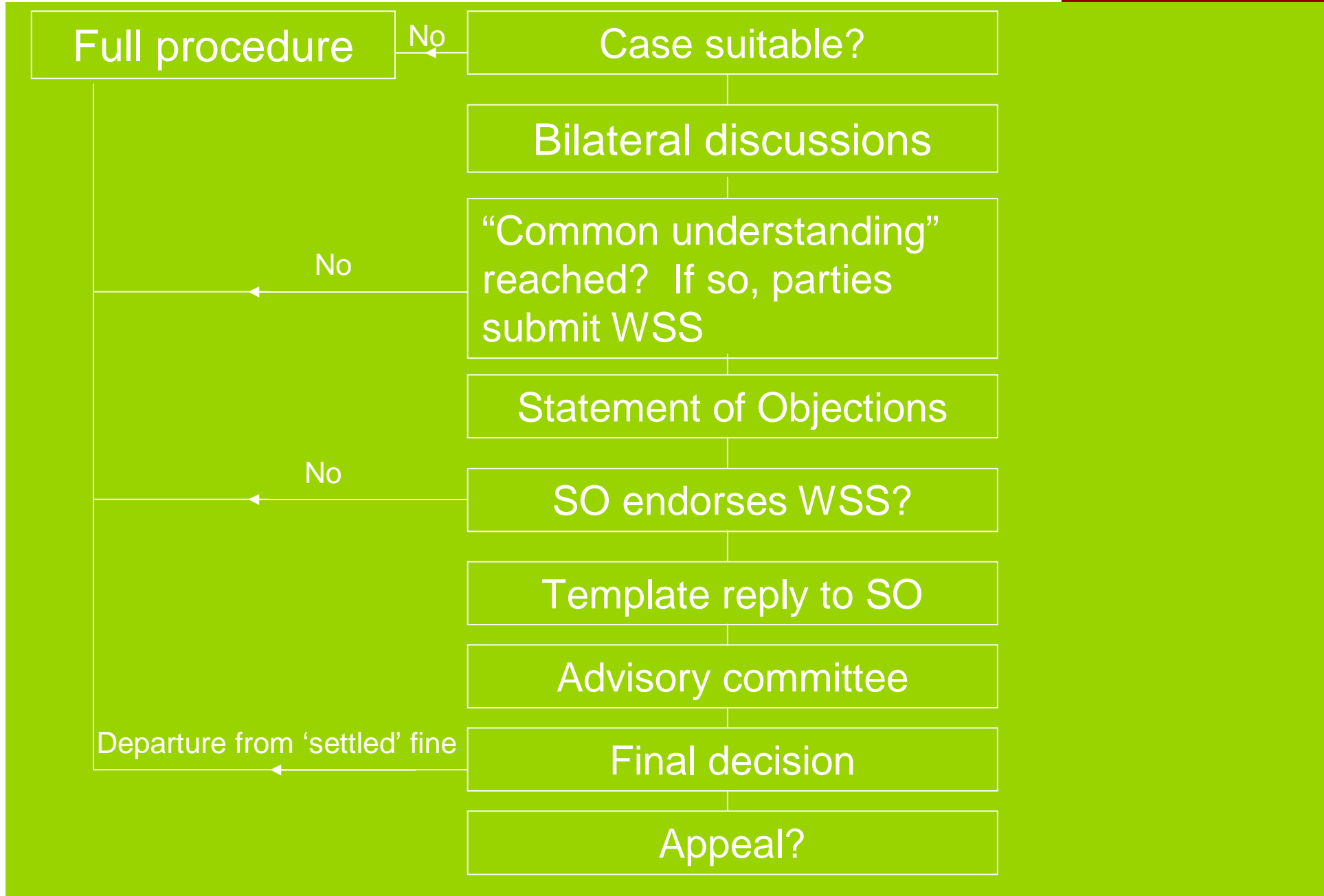
New Fining Guidelines (2)

- Applied in 7 cases to date: Professional Videotape, Flat Glass, Chloroprene Rubber, Synthetic Rubber, International Moving Services, Sodium Chlorite, Aluminium Fluoride
- First impressions:
 - Clear increase in level of fines
 - Draconian fines for smaller companies
 - Very little reasoning on choice of starting point percentage
 - Starting point and entry fee at similar level
 - Same percentage applied to each company (regardless of duration/intensity of participation)

Cartel Settlements (1)

- Confined to cartel cases
- Optional procedure
- Reduced fine in return for:
 - acknowledgment of liability
 - waiver of certain procedural rights
(further access to file, oral hearing, separate counsel within same corporate group, language)
- Same fixed % discount for each company
- Available in addition to leniency
- Not a real (US style) ‘plea-bargain’

EC Settlements



Cartel Settlement (3): Open Issues

- Discoverability: WSS = a written confession; why not paperless?
- Commission discretion:
 - whether case suitable for discussions
 - pace of discussions and disclosure of evidence
 - whether SO/decision will reflect WSS
- No “everyone or no-one” policy, but what if only one or two defendants interested?
- Timing of settlement / “normal” decisions unclear: Concurrent? Settlement decisions first?
- Limited protection if breakdown in discussions
 - BUT: separate “settlements team”

EC Sector Inquiries (1)

1/2007- Final Report on Retail Banking Sector

- Indications of large variations in merchant and interchange fees for payment cards
- Indications of barriers to entry in the market for payment systems and credit registers
- Indications of obstacles to customer mobility and product tying

EC Sector Inquiries (2)

9/2007- Final Report on Business Insurance Sector

- Longstanding and widespread industry practices involving alignment of premiums in co- and reinsurance sector, which may lead to higher prices for large risk commercial insurance
- Networks of long term contracts in Austria, which may lead to foreclosure
- Concerns about transparency of remuneration and conflicts of interest in insurance brokerages, which may inflate price and reduce choice

EC Sector Inquiries (3)

1/2008 – Launch of Inquiry into Pharmaceuticals Sector

- Indications that fewer new medicines are being brought to market
- Indications that entry of generic medicines are delayed
- Indications that artificial barriers to entry are created (e.g. misuse of patent right or vexatious litigation)

Final Report expected in March 2009 (Interim Report in Autumn 2008)

Legal Privilege

9/2007 – CFI Judgement in AKZO Nobel v. Commission

- CFI rejects arguments that legal privilege should be extended to cover in-house communications
- CFI extends the categories of privileged material to cover internal documents prepared **exclusively** for seeking advice from and external lawyer (although Akzo failed to prove that its documents had this exclusive purpose)
- CFI clarifies the procedure to be adopted if there is a dispute with the Commission (e.g. in a dawn raid scenario) over whether a particular document attracts privilege.

4/2008 – Consultation on Insurance Block Exemption Regulation

- BER expires on 2010
- Exempts agreements on joint calculations, tables and studies, standard policy conditions and models on profit, common coverage of certain types of risks (pools), security devices / safety equipment
- Deadline for submission of comments on 17 July 2008

Merger Control (1)

Schneider v. Commission, damages claim under Article 288

- Dispute about Commission decision to block Schneider/Legrand transaction (10/2001, note: Schneider already acquired 98% through public bid)
- Commission decision annulled by CFI due to breach of procedural rights (10/2002)
- Schneider brings damages claim in excess of € 1,5 billion (Article 288 requires unlawful conduct; fact of damages; causal link)
- 7/2007 – damages awarded to Schneider for breach of rights of defense: expenses related to additional Commission procedure, reduction in divestment price to postponement of closing, all other claims rejected for lack of causal link
- No damages awarded relating to flaws in substantive assessment; express recognition of margin of discretion
- Appeal by Commission to ECJ

Merger Control (2)

MyTravel v. Commission, damages claim under Article 288 EC

- 1999: Airtours/First Choice merger blocked by Commission
- 2002: CFI rules manifest error in collective dominance assessment and annuls Commission decision
- 2003: £519,7 million claim brought before the CFI
- 9/9/2008: CFI dismisses MyTravel's action for damages: even though manifest error, other factors are relevant: Commission's margin of discretion, complexity of prospective merger assessments, time constraints imposed on Commission under ECMR
- Policy issue: if annulment would be enough to give rise to damages, this would compromise the Commission's capacity to function as competition regulator
- Error of assessment unlikely to trigger damages / procedural irregularities give better chance (Schneider)

Verticals (1)

- Verticals Block Exemption Regulation due to expire on 31 May 2010
- Commission published (and abandoned) tender for survey on application of VBER by national courts
- Various signals from Commission: “do not fix, unless broken”, abandon exemption altogether and move to merely having guidelines only, inclusion of MVBBER
- Consultation document announced for Spring 2009
- NOW it is time to prepare, identify and raise issues

Verticals (2)

Possible issues

- market share threshold
- hard-core list
- 5 year non-compete
- Internet sales restrictions
- issues raised by NCAs
- Issues raised by you?

International Co-operation

Marine Hose Pipe Investigation – May 2007

- European Commission raids producers in France, Italy and the UK
- UK competition authority launches parallel criminal investigation including a home search
- US authorities simultaneously arrest 8 executives from France, Italy, Japan and the UK in the US from a conference

'Hub and Spoke Cartels'

- UK, France, Belgium
- Switzerland?

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