

G&Co EU Cartel Watch

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What is a cartel?

In simple terms a cartel is an agreement between businesses not to compete with each other in order to maximize profits for its members, usually at the expense of consumers.

A cartel agreement will typically relate to sales prices, restrictions on sales or production capacities, dividing geographic, product or customer markets, or commercial conditions for the sale of products or services such as discounts, credit terms, guaranties, etc. In other words the exchange of any element which is commercially sensitive which may influence a competitor's behaviour and which thus under normal circumstances would not be exchanged between competitors could fall under the cartel restriction.

Though cartels can take place in any sector, certain sectors are more susceptible to cartels than others due to the structure of the market or the way in which the market operates. Examples of elements which may 'promote' the formation of cartels are the lack of competitors, the existence of established communication channels between competitors, products having similar characteristics, a market suffering from excess capacity or a general recession.

Consequences of being caught for the participants:

Cartels are in principle contrary to EU competition law and the national competition laws of the current 27 EU Member States. Furthermore, as soon as the cartel has an impact within the EU, the authorities within the EU will have jurisdiction. In other words even cartels entered into outside the EU between non-EU companies can be caught by EU rules. Equally, it is sufficient for a behaviour to have an effect of restricting competition for it to be prohibited and sanctionable - ignorance of the competition rules does not justify the infringement of the rules.

The consequences of a conviction by a competition authority can be

significant. If convicted, businesses can face substantial fines (up to 10% of world-wide turnover - see tables below), be disqualified to participate in public and private tenders, face shareholder reaction, draw the attention of other regulatory bodies (eg under the FCPA, stock exchange regulators) and in certain jurisdictions the participating individuals may face extradition, criminal prosecution and imprisonment.

Fines imposed by the European Commission:

The European Commission revised in 2006 its Guidelines on the method of setting fines on businesses involved in cartels and other restrictive business practices. Many national jurisdictions have adopted similar Guidelines. The EU Fining Policy Guidelines were revised to increase the deterrent effect of fines and have integrated a number of changes. The main changes are an 'entry fee' for every cartel participant, the link between the fine and the duration of the infringement, and the possible significant increase of the fine for repeat offenders.

The tables below(*) provide an overview of fines imposed by the European Commission. The decisions by the European Commission can be appealed to before the Court of First Instance and then before the Court of Justice of the European Communities in Luxembourg. An appeal may however lead to a decrease or increase of the initial fine.

Footnotes:

¹*Giani Pandey deals with EU and Belgian competition law, trade law, internal market and regulatory matters. He also advises companies on Belgian corporate law issues. (Full bio on www.graystoncompany.com)*

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The top 10 fines imposed by the European Commission in cartel cases:

By company:

Firm	Year	Fine (euros)
1. Saint Gobain (IP/08/1685)	2008	896 000 000
2. ThyssenKrupp ¹ (IP/07/209)	2007	479 669 850
3. Hoffmann-La Roche AG (IP/01/1625)	2001	462 000 000
4. Siemens AG ¹ (IP/07/80)	2007	396 562 500
5. Pilkington (IP/08/1685)	2008	370 000 000
6. Sasol Limited ¹ (IP/08/1434)	2008	318 200 000
7. ENI SpA ¹ (IP/06/1647)	2006	272 250 000
8. Lafarge SA ³ (IP/02/1744)	2002	249 600 000
9. BASF AG ² (IP/01/1625)	2001	236 845 000
10. Otis ¹ (IP/07/209)	2007	224 932 950

By sector:

Sector	Year	Total (euros)
1. Car Glass	2008	1 383 896 000
2. Elevators and escalators ¹	2007	992 312 200
3. Vitamins ²	2001	790 515 000
4. Gas insulated switchgear ¹	2007	750 712 500
5. Paraffin waxes ¹	2008	676 011 400
6. Synthetic rubber (BR/ESBR) ¹	2006	519 050 000
7. Flat Glass ¹	2007	486 900 000
8. Plasterboard ³	2002	458 520 000
9. Hydrogen peroxide ¹	2006	388 128 000
10. Acrylic glass ¹	2006	344 562 500

The top 10 fines imposed by the European Commission in cartel cases:

Year	Sector covered by cartel	Number of undertakings subject to decision	Total fine (euros)
2009	Marine Hoses (IP/09/137)	6	131 510 000
2008	Car Glass (IP/08/1685)	4	1 383 896 000
2008	Bananas ¹ (IP/08/1509)	3	60 300 000
2008	Paraffin Waxes ¹ (IP/08/1434)	10	676 011 400
2008	Aluminium fluoride ¹ (IP/08/1007)	4	4 970 000
2008	Sodium chlorate ¹ (IP/08/917)	4	79 070 000
2008	International Removal Services ¹ (IP/08/415)	10	32 755 500
2008	Nitrile Butadiene Rubber (IP/08/78)	2	34 230 000
2007	Chloroprene Rubber ¹ (IP/07/1855)	6	247 635 000
2007	Flat glass ¹ (IP/07/1781)	4	486 900 000
2007	Professional videotape (IP/07/1725)	3	74 790 000
2007	Bitumen Spain ¹ (IP/07/1438)	5	183 651 000
2007	Hard Haberdashery: Fasteners ¹ (IP/07/1362)	7	328 644 000
2007	Dutch beer market ¹ (IP/07/509)	4	273 783 000
2007	Elevators and escalators ¹ (IP/07/209)	5	992 312 200
2007	Gas insulated switchgear ¹ (IP/07/80)	11	750 712 500
2006	Alloy surcharge (re-adoption) ¹ (IP/06/1851)	1	3 168 000
2006	Synthetic rubber (BR/ESBR) ¹ (IP/06/1647)	6	519 050 000

Year	Sector covered by cartel	Number of undertakings subject to decision	Total fine (euros)
2006	Steel beams (re-adoption) ¹ (IP/06/1527)	1	10 000 000
2006	Copper fittings ¹ (IP/06/1222)	11	314 760 000
2006	Bitumen Netherlands ¹ (IP/06/1179)	14	266 717 000
2006	Acrylic Glass ¹ (IP/06/698)	5	344 562 500
2006	Hydrogen Peroxide ¹ (IP/06/560)	9	388 128 000
2005	Rubber chemicals ¹² (IP/05/1656)	4	75 860 000 [Initial fine: 75.86 million]
2005	Industrial bags ¹ (IP/05/1508)	16	290 710 000
2005	Italian tobacco ¹ (IP/05/1315)	6	56 052 000
2005	Industrial thread ¹ (IP/05/1140)	11	43 497 000
2005	Monochloroacetic acid ¹ (IP/05/61)	4	216 910 000
2004	Choline chloride ³ (IP/04/1454)	6	57 884 000
2004	Haberdashery products: needles ³ (IP/04/1313)	3	47 000 000
2004	Spanish tobacco ¹ (IP/04/1256)	9	20 038 000
2004	French beer (IP/04/1153)	2	2 500 000
2004	Sodium gluconate (IP/01/1355)	1	19 040 000
2004	Copper plumbing tubes ¹ (IP/04/1065)	9	222 291 100
2003	Industrial pipes ¹ (IP/03/1746)	3	78 730 000
2003	Organic peroxides ² (IP/03/1700)	6	69 531 000 [Initial fine: 69.8 million]
2003	Carbon and graphite products ³ (IP/03/1651)	6	101 440 000
2003	Sorbates ² (IP/03/1330)	5	113 650 000 [Initial fine: 138.4 million]
2003	Viandes bovines ⁴ (IP/03/479)	6	12 690 000 [Initial fine: 16.7 million]

¹ Appeal lodged before the Court of First Instance

² Following judgment by the Court of First Instance

³ Appeal lodged before the Court of Justice

⁴ Following judgment by Court of Justice

* Source: European Commission data

How are cartels discovered?

Given that businesses can go through great lengths to cover up the existence of such cartels Competition Authorities have also been given far reaching powers to detect and prosecute cartels, eg they may enter into both business and private premises to seize or copy data which may prove the existence of the cartel (the so-called dawn raids). The Competition Authorities also cooperate with each other, both within the EU as with their non-EU counterparts.

The Competition Authorities can be alerted to the existence of a cartel via a number of sources. For example as a result of a complaint they receive (eg from a dissatisfied customer) or as a result of their own market monitoring (eg if they notice the price of certain products increased within a similar range within a close timeframe from each other without any obvious justifying cause such as increase of cost elements).

Cartel participants who decide to disclose the existence of the cartel in exchange for immunity (*so-called leniency applicants*) are increasingly becoming a prime source of information for the authorities. Some Competition Authorities also provide financial rewards to employees who come forward and disclose the existence of a cartel by their company.

For who is it an issue ?

For consumers: Consumers, be it individuals or businesses who are victim of a cartel or who suspect they are can lodge a complaint to the Competition Authorities. In practice in order to get the attention of the Competition Authorities they will need to submit a minimum amount of information to convince the authorities of the seriousness of the complaint. Once the Competition Authorities start the investigation, the plaintiff will not have to incur any further legal or other costs to have the cartel participants prosecuted (as would be the case before a national commercial or civil court procedure). Equally, if the Competition Authorities conclude that a cartel has been taking place, the consumer can go to its national court with the decision and proof of the extent of the damages it suffered to claim compensation from the cartel participants.

For businesses in general: Companies who do not take part in a cartel may also be suffering as a result of the cartel. Often they will have a good understanding of the market and detect anomalies in the market forces at some point. As with consumers, the complaints procedure allows for a cost efficient follow-up. However, if a competing company is aware of a cartel or had reason to suspect the existence of a cartel but does not inform the Competition Authorities of this, it runs the risk of being implicated in a possible investigation for (be it passive) cooperation to the cartel.

For Trade Associations: Given the very nature of Trade Association, ie bringing competitors together to discuss and further common interests, they will need to exercise great caution not to infringe the competition law rules by becoming a forum for or facilitator of cartels. Some Trade Associations will use lawyers to monitor all communications between members to stop any inappropriate communications. Equally the necessary caution will need to be exercised when collecting, compiling and publishing market data from its members.

For cartel participants: The sanctions for participating in a cartel can be significant. Participants to a cartel can limit the fines they risk being subject to by filing for leniency or entering into a settlement procedure. Most leniency regimes will grant leniency on a first come first serve basis or proportionate to the order of cartel participants coming forward. A well coordinated application for leniency may be required in multiple jurisdictions. The decisions by the European Commission can be appealed against before the Court of First Instance and then before the Court of Justice of the European Communities in Luxembourg.

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