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LATIN AMERICAN COMPETITION FORUM

Session I: Criteria for Setting Fines for Competition Law Infringements

Call for Country Contributions

3-4 September 2013, Lima, Peru

The attached document is circulated in preparation for the discussion under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 3-4 September 2013 in Peru. Delegates are requested to send written contributions for that session to the Secretariat by 15 July 2013 at the latest. Advance notice of contributions by 24 June 2013 would be useful.

Contact: Sean ENNIS, Senior Economist
Tel: +33 (0) 1 45 24 89 78; Fax: +33 (0)1 45 24 96 95; Email: Sean.ENNIS@oecd.org

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session I: Criteria for Setting Fines for Competition Law Infringements

CALL FOR COUNTRY CONTRIBUTIONS

1. Introduction

1. This request for contributions is circulated in preparation for the discussion to be held in Session I of the 2013 Latin American Competition Forum. Session I is entitled: “**Criteria for Setting Fines for Competition Law Infringements.**” You are invited to make a written contribution for this session.

2. In this call for contributions we identify some topics that you may wish to address in your written and oral contributions. This list is neither prescriptive nor exhaustive. You are free to raise other relevant issues that reflect your experiences. Please prepare a concise contribution, even if that ignores some of the questions. Speakers will be selected on the basis of the written contributions submitted to the OECD Secretariat in response to this call. To assist the OECD Secretariat in planning the session, please inform us by **24 June 2013** if you intend to submit a contribution and, also by 24 June, please **submit a copy of any fining guidelines you have, or any relevant sections of your law.** The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Marianne Aalto [Marianne.Aalto@oecd.org] and copied to: Sean Ennis [Sean.Ennis@oecd.org] by **15 July 2013** at the latest. Country contributions will be circulated to participants through the LACF website (www.oecd.org/competition/latinamerica).

3. Relevant previous OECD work includes two previous OECD roundtables, the 2006 Roundtable on Remedies and Sanctions in Abuse of Dominance Cases and the 2012 Roundtable on Compliance, and the third Hard Core Cartel report. These are available on the LACF website. The Secretariat will circulate a version of the Criteria for Setting Fines Background Note in advance of the LACF meeting.

4. Fines can play a critical role in deterring anti-competitive conduct such as collusion and abuse of dominance. Particularly in countries with limited personal liability for participating in a cartel, no prison terms for cartel organisers and limited ability of affected third parties to collect damages, fines may destabilise ongoing illegal behaviour. Even when other penalties are present, fines are an important element of the competition authority’s toolkit.

5. Over the last 15 years, the size of fines has increased substantially, even in those jurisdictions with the most established histories of enforcement against abuse of dominance and cartels. Nonetheless, an increasing body of research is suggesting that fines may be inadequate to deter cartel conduct. For example, a recent study finds that the mean and median overcharge rates of European cartels are 20% and 18%, with typical discovered cartels having 8.4-year lifespan. This suggests that fining guidelines based on 10% of revenue in the affected products, even if collected over the entire life of the abuse or cartel would not deter cartel formation *even* if 100% of cartels are detected.

6. Even if the calculus of abuses and of cartel formation suggests that fines are inadequate to deter violations of the law, the existence of substantial fines may still, in the case of cartels, contribute to instability of the cartel conduct by increasing the likelihood of leniency applications.

7. If fines are raised to a level that may actually deter, some companies facing penalties could be liquidated, thus having the counter-productive effect of reducing the number of competitors. Alternative payment mechanisms may be worth exploring such as transferring shareholder interest to the state.

8. While fine levels have been increasing in recent years, judicial rulings are commonly reducing fines. Thus firms are provided with a strong incentive to appeal fines, often winning minor reductions in fines, and sometimes winning very substantial reductions. Appeals are not equally frequent in all jurisdictions.

9. Some observers have suggested that fining guidelines should take into account some element of proof of actual effect of the cartel. That is, if some cartels have almost no effect on price while others raise price more than 10%, a standard fine of 10% may arguably be excessive in some cases and too limited in others.

10. A number of jurisdictions in Latin America have guidelines law and guidelines for fines, such as Brazil, Chile, El Salvador, Mexico and others. Moreover, in many Latin American jurisdictions, fines remain one of the sole tools of punishment within the competition authority's arsenal, because third-party damages are not collected and criminal enforcement is either not in the law or criminal prosecutions have not occurred.

11. This roundtable will review the state of fining policy and activity in Latin America and elsewhere. As fines play a key role in deterring violations of competition law, the roundtable promises to be interesting, relevant and topical. Questions for consideration in country contributions follow. These can serve as the basis for your contribution.

QUESTIONS FOR CONSIDERATION IN COUNTRY CONTRIBUTIONS

1. Please aim to provide a unified, essay contribution that considers the most interesting aspects of fining policy for your jurisdiction. That is, do not simply answer each question below as though it is a questionnaire. Instead seek to provide an integrated response.

2. The discussion will distinguish fines for collusion and for abuse of dominance. For the sake of clarity, please be clear in your responses about whether you are referring to fines for collusion or for abuse of dominance.

1. Types of violation and violator subject to a fine

1.1 Background

3. In some jurisdictions, fines are primarily or exclusively applied to address cartel behaviour. In others, fines are imposed for abuses of dominance. For competition authorities that apply fines both for collusion and abuse, the process for calculating fines may differ. Some competition authorities seek to avoid fines for abuse of dominance, even when they have a legislative basis for applying them, while others impose large fines.

1.2 Questions

- Can your authority seek fines in abuse of dominance cases? In cartel cases? Are fines imposed on companies, individuals or both?

2. Policy objectives of fines

2.1 Background

4. The main objectives of imposing fines are generally **deterrence, sanction and disgorgement**. At times, competition authorities and courts impose fines considering other objectives of the fining system such as **proportionality** (the fine should increase in proportion to the illegal gains and the degree of gravity of the infringement) and **predictability** (a company knows in advance the gravity of any illegal actions and the likely fine amount). Predictability enhances deterrence and promotes leniency applications.

5. The methods for calculating fines may differ depending on the relative emphasis between all these objectives.

2.2 Questions

- What are the main objectives for imposing fines on infringements of competition law?
- Which elements are related to disgorging the illegal gains in your fining system? Which elements are related to the punishing for infringing competition law and affecting competition in your fining system? If possible, describe those elements related to deterrence.
- What measures do you take to enhance proportionality, predictability and transparency?

3. How to set the base fine

3.1 Background

6. Many OECD jurisdictions use four steps when setting fines for a cartel violation: 1) set the base fine; 2) adjust the base fine in light of aggravating or mitigating circumstance; 3) apply a cap on the resulting overall fine; and 4) reduce or eliminate the fine to account for a leniency application.

7. When considering fines for abuse of dominance, OECD jurisdictions have a variety of approaches, so identifying common steps is more difficult.

8. Challenges for enforcers include determining:

- illegal gains;
- prices absent the illegal activity;
- elasticity of demand; and
- consumer harm.

9. Given these challenges, competition enforcers often use proxies for calculating a base fine, including the:

- volume of sales in the affected market;
- market share;
- type of illegal behaviour;
- duration of the infringement; and
- characteristics of the affected market and firms.

3.2 Questions

- How do you set the base fine? Do you reflect the duration of infringement in setting the base fine? When calculating the period of the infringement, how do you find the start-point and finish-point?
- How do you determine the relevant product(s)?
- If you apply fines in abuse of dominance cases, are there any differences in the method of calculation from the method used in cartel cases?

4. Which factors are considered to adjust the base fine?

4.1 Background

10. Most competition authorities will increase or decrease the base fine to account for certain aggravating or mitigating circumstances. The relevant circumstances may vary by jurisdiction.

11. Common circumstances are listed below.

Aggravating Circumstances		Mitigating Circumstances
1	Recidivism	Effective compliance policy
2	Leading role or instigator of violation	Minor role (just following)
3	Coercion or retaliatory measures to ensure continuation of the infringement	Pressure exercised by other companies
4	Refusal to cooperate	Cooperation with competition authority (except for leniency applications)
5	Continuation of the violation after start of competition authority's investigation	Immediate termination of the violation
6	Awareness of the illegal nature of the conduct (committed intentionally)	Uncertainty as to existence of a violation
7	Institutionalized nature of the violation	Motivated by public authorization/encouragement
8	Significance of the industry influenced	Non-implementation of the infringement
9	Involvement of director or high-level executives	Slow reaction/excessive length of procedures before the competition authority
10	Violation of an injunction/condition of probation	Compensation of injured parties

4.2 *Questions*

- Do you adjust the base fine for recidivism? What conditions are necessary for a finding of **recidivism**?
- Are the **actual effects of the infringement** considered in adjusting the base fine?
- A distinction is sometimes drawn between **intentional and unintentional violations**. Do you draw such a distinction in adjusting the base fine?
- Do you take into account **active or passive roles in the violation** for adjusting the base fine? How?
- Which conditions do you take into account for adjusting the base fine, if any, related to **cooperation or obstruction of investigation**?
- What other aggravating or mitigating factors do you consider in adjusting the base fine?
- Have any courts cancelled, annulled or modified the decision of the competition authority because of errors of calculation of the base fine or adjustments to it? If so, please describe the court's rationale.

5. Leniency

5.1 Background

12. Many jurisdictions have implemented leniency programmes for cartel violations. These provide for complete or partial reduction in fines in return for early information provision and co-operation. They are effective for unmasking collusion and providing evidence. Leniency programmes can be viewed, from the perspective of this roundtable, as a form of fining policy.

5.2 Questions

- Do you have a leniency programme? If so, how is the reduction in fine calculated for a leniency applicant? Have there been leniency reductions in your jurisdiction?

6. Ability to pay

6.1 Background

13. Competition authorities commonly face the challenge of how to ensure that fines have a true deterrent effect. On the one hand, fines should be large enough to ensure the “expected fine” from a violation is greater than the gain. The calculation of the expected fine will take into account the likelihood that a violation will not be discovered. On the other hand, large fines may, at times, force a company into liquidation, resulting in fewer competitors.

6.2 Questions

- How does your authority respond when a company that is subject to a fine asks for a reduction because the full fine would drive the company into bankruptcy or liquidation? Is there any experience of companies appealing fines due to their inability to pay?

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