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LATIN AMERICAN COMPETITION FORUM

Session I: Criteria for Setting Fines for Competition Law Infringements

Background Note by the OECD Secretariat

3-4 September 2013, Lima, Peru

This Background Note by the OECD Secretariat is circulated to the Latin American Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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

Session I: Criteria for Setting Fines for Competition Law Infringements

Background Note by the OECD Secretariat *

* This paper was written by Sean Ennis and Sunmi Lee, OECD Competition Division. While the authors have sought to confirm the cited information is up to date, some information may be outdated.

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1. Introduction

1. Fines are often levied against competition law offenders. The policies and practices for fines play a fundamental role in deterring and punishing competition law violations.¹ As an illustration of the financial significance of fines, worldwide cartel fines amount to about USD 64 billion since 1990.² The question of how to set fines is one that many jurisdictions have addressed; the answers chosen affect incentives of companies and their personnel to comply with the competition law. While there is substantial international convergence over the objectives of fining regimes, the details of fining regimes vary considerably. This paper discusses criteria used when setting fines and how these criteria relate to the ultimate goals of deterring and punishing competition law offences.

2. Fines are a deterrent because the possibility of a fine enters into the calculus of undertakings considering violating the law. While normative commitment to follow the law has a strong impact on compliance with the law,³ a calculating manager not bound by such moral values might focus exclusively on profit-making. Such a manager would determine whether to participate in an illegal activity by comparing the expected illicit gains to the expected cost of punishment.⁴ The expected cost of punishment depends critically on the value of the fine reduced for the probability of paying the fine.⁵ If the amount of fines sufficiently exceeds illicit gains, offences can be deterred even when the probability of paying a fine is low.

3. Over the last 25 years, the size of fines for competition law violations has increased substantially. For example, in the European Union, the total fines imposed at the EU level for cartel violations adjusted for Court judgments, rose from EUR 344 million in the 1990-1994 period to EUR 8.3 billion during 2005-2009.⁶ The US DOJ collected USD 142 million in total corporate fines during 1990-1994, a figure that rose

¹ While deterrence is also promoted by private action, criminal penalties, personal liability, leniency, reputational damage, disqualification and bounty systems for whistleblowers, fines are clearly one of the main tools available to competition authorities.

² Authors' calculations using Private International Cartels spreadsheet by John M. Connor, Purdue University, Indiana, USA (May 2013). Worldwide figures for abuse of dominance fines are not available to the authors' knowledge.

³ See Wils (2006).

⁴ See Becker (1968), Wils (2006).

⁵ The probability of paying the fine is based on both detection and ultimate determination of a legal violation meriting that fine.

⁶ EU cartel statistics, July 2013, available at: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>. According to the roundtable paper of OECD 2011 'Promoting compliance with competition law', the average corporate fine grew from less than EUR 2 million in 1990-1994 to EUR 46 million during 2005-2009, or approximately 2200 percent. Meanwhile, the number of cartel cases decided by the European Commission climbed from 11 in 1990-1994 to 33 in 2005-2009. Over the same time periods, the Antitrust Division at the US DOJ chalked up similarly impressive numbers. It collected USD 142 million in total corporate fines during 1990-1994, a figure that rose to USD 3.35 billion in the 2005-2009 timeframe (an increase of about 2250 percent). During the same time intervals, the average corporate fine rose from USD 480,000 to about USD 44 million (about 9000 percent). The average fine levied on individuals rose from USD 125,000 in 1998 to more than USD 600,000 in 2007. Interestingly, those figures were all rising during a period when the total number of criminal price fixing cases brought per year by the US DOJ was falling. In fact, the figure fell by 68 percent from the early 1990s to the 2004-2006 timeframe. The downward trend applies both to cases brought against corporations as well as cases brought against individuals. These statistics suggest that the US DOJ has been targeting a relatively small number of "big cases" with the potential for large penalties rather than a great number of "little cases" with smaller

to USD 3.35 billion in the 2005-2009 timeframe. Likewise, fines for competition law violations in Latin America were minimal until after 2000 and then increased substantially in the next decade.⁷

4. Fines are not limited to cartel offences. In the European Union, for example, in one abuse of dominance case the European Commission levied a fine of EUR 1.06 billion.⁸

5. While the aggregate amount of fines is large, an increasing body of research is suggesting that fines may be inadequate, notably for cartels. For example, a recent study finds that the mean and median overcharge rates⁹ of European cartels are 20% and 18%, with typical discovered cartels having 8.4-year lifespan. (Smuda, 2013) This suggests that typical fines would be insufficient to deter cartel formation, even if 100% of cartels are detected, as the base fines may amount to 10% of revenue in the relevant products, even if collected over the entire life of the offence.¹⁰

6. If fines are raised to a level that may be fully sufficient for deterrence,¹¹ many companies subject to a fine could face financial difficulties.¹² These financial difficulties would be an economic policy concern if the financial difficulties reduced the number of competitors, the vigour of competition or had substantial negative social and economic consequences. Some commentators are concerned that fines that bankrupt a company would therefore be unacceptable and disproportionate.¹³ Note though that bankruptcy

penalties. That strategy is consistent with the rising number of cases brought against large, international cartels.

⁷ For figures between 1999 and 2010, see Table 1.

⁸ The fine for Intel's alleged abuse of dominance was announced 13 May 2009. See http://europa.eu/rapid/press-release_MEMO-09-235_en.htm.

⁹ The cartel overcharge is the difference between the cartel price and the so called "but-for" price that would prevail in the absence of a cartel.

¹⁰ Even if the calculus of abuses and of cartel formation suggests that fines alone 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. Moreover, the 10% figure of a base fine is often adjusted up because of aggravating circumstances. Finally, the percentage profit increase from a cartel will at times be substantially lower than the percentage revenue increase, often by a factor of about ½, due to lost sales from higher prices.

¹¹ Wils (2006) suggests the effective deterring level of fines could be 250-500% of annual turnover for products concerned. If a company engages in illegal activity for five years, with profits increased by 5% of turnover and a 10% chance of detection and decision to issue a fine, a deterring fine would amount to 250% of annual turnover for the product concerned. With a 5% chance of detection and decision, a deterring fine would amount to 500% of annual turnover for the product concerned. Werden et al. (2011), p 211, suggest that twice the annual commerce would be a "sufficient" fine level for deterrence, and note that the annual volume of commerce of US corporations filing tax returns is roughly the same as their net worth, thus implying that fully deterring fines may exceed the ability to pay. Heimler and Mehta (2012) suggest considerably smaller numbers for effective deterring fines, in the range of 5-15% of annual turnover.

¹² While some commentators are concerned about the effects of over-deterrence if fines against cartellists were excessive (see Calvani and Calvani (2011)), others argue that effects of fines above the full deterrence level would not be serious and would not constrain efficiency-enhancing economic activity (see Werden et al. (2011)).

¹³ See, for example, Wils (2006) who suggests that large multiples of fines "risk being unacceptable from a proportional justice perspective." The General Court has stated that "the fact that the fine imposed on an undertaking is considerably higher than its entire net profit in a financial year is not, in itself, sufficient for it to be concluded that the fine is disproportionate." Judgment of 12 December 2012 of the General Court (Third Chamber) in Case T-410/09. *Almamet GmbH Jandel Mit Spanen und Pulvern Aus Metall v European Commission*, paragraph 271. The net profit from products will be considerably smaller than

is not equivalent to liquidation, and the main concern to competition, social and economic policy would come from liquidation. Bankruptcy will not necessarily lead to liquidation for two reasons. First, companies may have liabilities that exceed assets (notably due to fines) but at the same time be profitable enterprises going forward.¹⁴ If a company enters bankruptcy solely because of a fine, there is a good reason to believe that the companies underlying business is sound and could continue after resolution of the bankruptcy. Bankruptcy law would often ensure that such companies, or at least their operations, would not be liquidated but that their productive assets would survive intact, thus continuing to serve as a competitive force and a source of economic activity. Second, alternative mechanisms for paying fines may exist such as payment plans, issuing shareholder interest to the state¹⁵ or rights issues to obtain funds; such mechanisms can ensure that companies remain in operation. The appropriate level of fines is thus an open question.

7. Written guidelines on fining criteria are important for ensuring predictable and transparent fines. . A number of jurisdictions in Latin America have guidelines for fines, including Brazil, Chile, Colombia, El Salvador and Mexico.

8. In many 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 yet included in the relevant legislation or criminal prosecutions have not occurred. Table 1 shows fines by country and year for selected Latin American jurisdictions. Cartel fines in Latin America amount to about USD 2.6 b between 1999 and 2010. Table 2 shows that about 431 companies were fined in Latin America between 1999 and 2010. Fines are widely present in Latin America, though relatively modest in many countries. As a result, it is particularly important to discuss criteria for setting fines, drawing on worldwide experience.

Table 1. Cartel fines by year and country of fine, in select Latin America jurisdictions 1999-2010 (USD, millions) (Provisional figures)

| Country | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | Total |
|--------------------|------------|------------|------------|------------|------------|------------|--------------|-------------|--------------|--------------|-------------|----------------|----------------|
| Argentina | n.a. | n.a. | n.a. | n.a. | n.a. | n.a. | 95.6 | n.a. | n.a. | n.a. | n.a. | n.a. | 95.6 |
| Brazil | n.a. | n.a. | n.a. | n.a. | 0.4 | 1.8 | 84.1 | n.a. | 304.9 | 60.4 | 61.2 | 1,847.6 | 2,360.4 |
| Chile | n.a. | n.a. | n.a. | n.a. | n.a. | n.a. | 0.0 | 9.2 | 0.0 | 39.1 | 0.6 | 0.0 | 48.8 |
| Colombia | n.a. | n.a. | 1.2 | 2.1 | 2.0 | 7.3 | 12.6 |
| Costa Rica | 0.1 | 0.1 | 0.0 | 0.3 | 0.2 | 0.1 | 0.4 | 0.01 | n.a. | n.a. | n.a. | n.a. | 1.3 |
| El Salvador | n.a. | n.a. | 1.7 | n.a. | n.a. | n.a. | 1.7 |
| Honduras | n.a. | n.a. | n.a. | 1.0 | n.a. | 7.0 | 8.0 |
| Mexico | 0.1 | n.a. | 1.4 | n.a. | n.a. | n.a. | n.a. | 14.1 | n.a. | n.a. | 31.7 | n.a. | 47.2 |
| Peru | n.a. | n.a. | n.a. | n.a. | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 | 3.1 | 3.1 | 3.1 | 9.7 |
| Total | 0.2 | 0.1 | 1.4 | 0.3 | 0.7 | 2.0 | 180.2 | 23.3 | 307.9 | 105.7 | 98.6 | 1,865.1 | 2,585.4 |

Source: Authors' calculations based on Private International Cartels spreadsheet by John M. Connor (May 2013), submissions from Chile, Mexico Peru, OECD peer reviews and the UNCTAD peer review of Costa Rica. Figures do not sum perfectly due to rounding error. *Supreme Court annulled conviction.

turnover, but the statement of the court suggests that fines that might drive a company bankrupt are not necessarily disproportionate.

¹⁴ For example, in the EU, as stated by the General Court, "Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value." Judgment of 12 December 2012 of the General Court (Third Chamber) in Case T-410/09. *Almamet GmbH Jandel Mit Spanien und Pulvern Aus Metall v European Commission*, paragraph 267.

¹⁵ This is not a suggestion that states should hold any shareholding interest acquired in this way. Typically it could be imagined that such shares could be sold off through stock market sales, notably for listed companies, as with the state holdings in many financial firms arising from state support during the financial crisis.

Table 2. Number of companies fined for cartels, by year and country of fine, in select Latin America jurisdictions (1999-2010) (Provisional figures)

| Country | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | Total |
|--------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| Argentina | n.a. | n.a. | 3 | 5 | 3 | 2 | 7 | n.a. | n.a. | n.a. | n.a. | n.a. | 20 |
| Brazil | 1 | 2 | 16 | 11 | 5 | 8 | 10 | 5 | 8 | 6 | 3 | 13 | 88 |
| Chile | n.a. | n.a. | n.a. | n.a. | n.a. | 4 | 1 | 2 | n.a. | 2 | 1 | 1 | 11 |
| Colombia | n.a. | 2 | 47 | 21 | 38 | 108 |
| Costa Rica | 16 | 17 | 31 | 63 | 10 | 2 | 1 | 2 | n.a. | n.a. | n.a. | n.a. | 142 |
| El Salvador | n.a. | 2 | n.a. | n.a. | n.a. | 2 |
| Honduras | n.a. | 17 | n.a. | 8 | 25 |
| Mexico | 3 | n.a. | 3 | n.a. | n.a. | n.a. | n.a. | 15 | n.a. | n.a. | 3 | n.a. | 24 |
| Peru | 1 | 2 | 0 | 5 | 3 | n.a. | 11 |
| Total | 21 | 21 | 53 | 84 | 21 | 16 | 19 | 24 | 12 | 72 | 28 | 60 | 431 |

Source: Authors' calculations based on Private International Cartels spreadsheet by John M. Connor (May 2013), submissions from Chile, Mexico Peru, OECD peer reviews and the UNCTAD peer review of Costa Rica.

9. This paper will review selected jurisdictions' fining criteria for competition law infringements focusing on:

- What types of offence are subject to fines;
- Which types of offenders are potentially subject to fines, whether corporate or individual actors;
- How the policy objectives of fines affect the criteria for setting fines;
- Methods for setting the base fine;
- Aggravating and mitigating circumstances sometimes considered when adjusting the base fine; and
- General challenges in setting fines.

10. This paper is intended to serve as a basis for a cross-country discussion about the criteria used in setting fines for competition law violations; it is not intended as a complete review of jurisdictional experience. This paper does not make recommendations about fining policy and should not be relied upon for the purpose of setting fines.

11. While some Latin American countries have been using their fining powers extensively, others have been less active; overall, Latin America accounts for only about 4-5% of fines worldwide between 1990 and 2010. Excluding one case with particularly large fines, the percentage would fall to below 1%. Despite the modest level of fines, fining experience is quickly increasing in the region as laws are improved, enforcers use their powers and legal precedent is established.

2. Nature of offence and types of offender subject to a fine

12. The criteria set for violations typically depend first of all on the nature of the offence (cartel or abuse of dominance) and the type of offender (broadly classed as individual or undertaking). The most serious fines are typically reserved for undertakings implicated in cartels. A summary of the legal offences that are subject to fines is presented in Table 3.

Table 3. Fines by legal offences, selected jurisdictions

| | Fine for Abuse of dominance | Fine for cartel |
|---------------------------|--|--|
| EU | Yes | Yes (additional fine of 15-25% of one-year turnover: entry cost) |
| Brazil | Yes | Yes |
| Canada | Yes (\$10 million) | Yes |
| Chile | Yes | Yes |
| Colombia | Yes | 30%+15-25% (showing special severity) |
| Dominican Republic | Yes | Yes |
| Ecuador | Yes | Yes |
| France | Yes | Yes |
| Germany | Yes | Yes (additional fine of 15-25% of one-year turnover) |
| Japan | Yes | Yes |
| Korea | Yes | Yes |
| Mexico | Yes | Yes |
| The Netherlands | Yes | Yes |
| Peru | Yes | Yes |
| Portugal | Yes | Yes |
| Spain | Yes (serious-5% of total turnover) (very serious-10% of total turnover) | Yes (serious-5% of total turnover) (very serious-10% of total turnover) |
| UK | Yes | Yes |
| US | No, though by statute, fines could be imposed. | Yes |
| Venezuela | Yes | Yes |

Source: Authors' collation of various ICN, OECD and national sources.

2.1 Imposing fines on abuse of dominance and cartel conduct

13. In at least one major jurisdiction, fines are primarily or exclusively applied to address cartel conduct.¹⁶ In most jurisdictions, fines can also be imposed for abuses of dominance.¹⁷ For competition authorities that apply fines both for cartel offences and abuse of dominance, the process for calculating fines may differ, typically with a higher percentage of revenue subject to fine for cartel violations.

14. Heimler and Mehta (2012) suggests that when deterrence principles are used as a basis for determining general fine levels for cartels and abuse of dominance, the base fine level for cartels should indeed be higher, as a percentage of turnover, than for abuse of dominance violations. One of the main reasons for this suggestion is their argument that the probability of detecting violations arising from cartel activity is lower than the probability of detecting violations from more easily detected abuse violations. Detecting cartels may be more difficult than detecting abuses of dominance because mostly cartel agreements are secret and participants of a cartel hide cartel evidence. Meanwhile much potentially abusive

¹⁶ The jurisdiction that does not rely on fines is the US While Section (2) of the Sherman Act enables fines for monopolisation, according to the OECD (2006) "as a matter of policy, single-firm anti-competitive conduct is virtually never viewed as suitable for punishment by the agencies because too much case-by-case judgment and ex post assessment are required to determine whether the conduct was unlawful in the first place." However, the U.S. FTC may seek disgorgement under the FTC Act, e.g. FTC v. Mylan Labs, Inc., 62 F.Supp. 2d 25 (D.D.C. 1999).

¹⁷ 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.

conduct by dominant firm such as excluding competitors from the market is done openly and thus is relatively easy to detect by the competition authority as a result of complaints from affected competitors. While accurate predictions of probability of detection are difficult, they suggested that the probability of detection of cartels may be 20% while the detection probability of abuse of dominance may be as high as 70%.¹⁸ Heimler and Mehta begin by observing that profit increases from cartel behaviour will generally be considerably lower than price increases, for reasonable economic parameters. They use this figure as the basis for deterrence, taking into account the long-run probability that cartels will be discovered and fined. They state that deterring fines would only need to be about 5%–15% of turnover for what they consider reasonable economic parameters of cartel violations and 2.7%–6.3% of turnover for what they argue are reasonable economic parameters of abuses of dominance. This is low compared to what would be expected from multiplying an increased profit (say, 10% of turnover) by a 20% probability of discovery (which might intuitively suggest a deterring fine would be 100% of turnover). The low values are due to profit increases being lower than price increases and to the view that the probability of discovery (which might be 20% per year) becomes quite high over multiple years of operation. The minimum for deterrence will increase significantly if cartels do not have long lives and if the 20% probability of detection assumed is actually lower.¹⁹

15. The principles underlying this modelling approach may also suggest that, other things being equal, cartel violations with arguably larger price effects (such as bid rigging) would need higher levels of fines to achieve deterrence than other forms of cartel violation.²⁰

16. Such models exclude considerations of consumer harm, which may be substantially in excess of cartel profits. Fining criteria may also be based, to some extent, on the rationale that fines should in some way be reflective of consumer harm, particularly where that harm is unlikely to receive alternative forms of redress, such as through private action for damages.

17. While such calculations can be of interest, provided that probabilities of detection can be reasonably calculated and that the underlying models are appropriate, it would be difficult to apply similar reasoning to individual cases, with calculations of probabilities of detection that would differ from one case to another. In individual cases, it would be impractical to set multiples based on the individual likelihood that an antitrust violation will be detected and successfully prosecuted. (Edward Cavanagh,

¹⁸ Heimler and Mehta (2012) state “[a] paper by Combe, Monnier and Legal (2008) based on EU cartel prohibition decisions adopted during the pre-leniency period, that is, before mid-1990s, estimated a detection rate of 13%. Since this paper looks only at EU cases, ignoring cases prosecuted by national authorities as well as basing its sample on actual prosecutions rather than cartels detected but not prosecuted due to lack of evidence, it can be concluded that this is an underestimate of the implicit detection rate. Furthermore, the period of analysis predates EU’s Leniency Programme; hence, the underestimate is likely to be significant. A study based on US DOJ’s cartel enforcement (Miller (2009)) estimates that an effective leniency programme can increase cartel detection rate by over 60% and reduces cartel formation by 59%. A probability of detection of 20% is therefore a conservative estimate.” (p 104) “Since the purpose of the abuse is to exclude affected competitors, they are very likely to notice that they are being excluded. The probability of detection is, therefore at least above 50% for situation where the dominant firm is a relatively small entity, above 70% for larger dominant firms, and virtually 100% for super-dominant large firms.” (p. 116)

¹⁹ The 20% discovery rate implies that for a 5-year cartel, there is a 67% likelihood of cartel discovery during one of the 5 years, for a 10-year cartel years a 90% likelihood and for a 15-year cartel, a 97% discovery rate.

²⁰ Though arguably with screening techniques, bid rigging is more easily discovered than other types of cartels, meaning the probability of detection for bid rigging could be higher. (See Heimler and Mehta (2012).)

“Antitrust Remedies Revisited,” 84 Oregon Law Review 147, 171 (2005))²¹ Moreover, the actual profits for which proxies are often used might not be the right figure for deterrence, which should instead be based on ex ante expectations of profits, rather than the actual profits.

18. Rules for corporate fines at a jurisdictional level are discussed below. More detailed discussion about the calculation of fine amounts will follow later in the paper.

- In 2004, the US Antitrust Criminal Penalty Enforcement and Reform Act increased maximum corporate fines from USD 10 million to USD 100 million. Higher fines are possible if there are large illicit gains. The ‘alternative fine provision’ of the Sentencing Reform Act provides that corporate defendants convicted of a cartel offence can be fined up to twice the amount of the illicit gain,²² as was the case in the 1999 Hoffman-Laroche case concerning vitamins which resulted in a USD 500 million fine as with the 2012 AU Optronics case.
- Under the 2006 Fining Guidelines of the EU,²³ if there is hard core cartel (horizontal price-fixing, market-sharing and output limitation agreements), the base fine is up to 30% of an undertaking’s relevant turnover²⁴ and then the European Commission will add between 15% and 25% of the relevant turnover as the base for the members of hard core cartels as a so-called “entry fee”. However, on average, lower actual percentages may be applied in abuse of dominance cases compared to cartel cases when calculating the base fine.
- Authorities in other countries, however, may choose not to impose fines in abuse of dominance cases. The US enforcement agencies, for example, do not typically impose fines for monopolisation. The Sherman Act authorises fines for violations of section 2 as well as section 1, but the Department of Justice does not generally seek fines in section 2 cases. The Department of Justice could seek treble damages for antitrust violations in general, but only when the government has suffered harm from them.²⁵
- Spain can impose fines in abuse of dominance cases according to the terms of the penalisation procedures established in the Competition Act 15/2007 of 3rd July (CA). However, there is no stated difference in the process of calculating fines for abuse of dominances compared to other types of violation. Under article 62 of the Competition Act, all types of infringements are classified as minor, serious or very serious. If there is an abuse of dominance in recently liberalised markets such as energy, telecommunication or postal services and the abuse of a dominant position has a market share near monopoly or which enjoys special or exclusive rights, it is *per se* considered a very serious infringement. Under Article 63 of the competition act the Nation Competition

²¹ OECD (2006) Remedies and Sanctions in Abuse of Dominance case. See Box 1.

²² See 18 U.S.C. § 3571(d).

²³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), para 25.

²⁴ Relevant turnover is defined as ‘the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA’. See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), para 13. This is distinct from global turnover, which would include worldwide sales of all goods or services of the undertaking.

²⁵ See the OECD 2006 the Secretariat paper of ‘Remedies and sanctions for abuse of market dominance’..

Commission (CNC; Comisión Nacional de la Competencia) may impose fines up to 10% of the total turnover of the undertaking in the fiscal year prior to the CNC's resolution²⁶.

- Korea also can impose fines on the abuse of dominant positions, but the process of calculating basic amount of fines is explicitly different between abuse of dominance cases and cartel cases. The base fine will be related to a proportion of the relevant turnover depending on the nature of the infringement. While the base fine for cartel conduct will be applied up to 10% of relevant sales of turnover, the base fine for the abuse of market dominance conduct will be applied up to 2% of relevant sales of turnover.²⁷

2.2 *Imposing fines on companies and individuals*

19. Fines are not just imposed on undertakings. They can also apply to individuals in a number of jurisdictions. There are several reasons why individual fines, and other individual penalties, are sometimes included in the system of penalties. Some significant systems with substantial successes in detecting and prosecuting cartels do not include individual fines, notably the European Commission. Arguments for applying individual fines include:

- First, individuals commit the anti-competitive practices. A *direct deterrence* regime will target those who may take the decision to engage in, or actions to further, illegal practices. A regime of penalties that focuses solely on undertakings and excludes individuals would only operate indirectly to create incentives to abide by the law. Fines would be paid by shareholders in the form of lesser profits or a fall in the stock value while the punishment imposed would not affect persons directly responsible for infringement. .
- Second, imposing individual penalties may create a broad environment of legal compliance in the company through a positive *feedback loop*. Individuals subject to potential fines will be more likely to follow compliance programme advice, co-operate with investigations of a competition authority, resist direction from management to engage in illegal activity and even encourage employees to act as whistleblowers.
- Third, *monitoring problems* by external parties may be difficult to overcome. Monitoring could be performed through shareholder oversight of management, management oversight of company staff, or outside counsel (as in some compliance programmes) interaction with company staff. No matter how large corporate fines are, if managers or other employees engaged in cartels or other anti-competitive behaviour cannot be monitored effectively and if they face positive incentives to engage in cartel activities (such as through bonuses as a function of profits), their incentives to comply with the law will not be clear and direct.²⁸

20. Effective deterrence thus can benefit from a combination of corporate fines and individual fines as above discussed. However, when there is a limitation in the competition law or regulation that does not permit such fines, as in the EU, another approach such as a dismissal order or disqualification order may be

²⁶ See Spain's Competition Act 15/2007 of 3rd July, International Competition Network Anti-Cartel Template and Spain country contribution in OECD the 2006 roundtable on 'Remedies and Sanctions in Abuse of Dominance Cases'.

²⁷ See Korea surcharge guideline, "Announcement on detailed standards, etc. for the imposition of surcharges" IV.A.

²⁸ Geradin (2011) p 15.

considered. Disqualification is a possible penalty for price-fixers in Australia, Brazil, Canada, Slovenia, Spain and Sweden and the UK, among others.²⁹

21. Approaches of selected jurisdictions to individual fines are described below.

- The US is one of the jurisdictions that adopted criminal penalties against individuals. The US can and does impose high fines (including imprisonment) on managers or executives actively involved in cartel violations. The Antitrust Criminal Penalty Enforcement and Reform Act of 2004 increased maximum individual fines from USD 350,000 to USD 1 million, and the maximum jail time from 3 to 10 years.
- Although the EU institutions' fine system does not foresee individual fines, a number of EU Member States have introduced individual penalties at the national level for competition infringement for the breach of Articles 101 and 102 of the EC treaty. On the other hand, under Regulation 1/2003, Article 23(2)(a) the European Commission can only punish undertakings or associations of undertakings for competition law infringement by imposing corporate fine. For example, Germany can sentence to jail up to five years and impose fines up to EUR 1.0 million. The Spanish competition law provides that legal representatives or the members of its management bodies that have intervened in the prohibited agreement or decision may personally be fined up to EUR 60,000.³⁰
- In Chile, fines may be imposed upon the infringing legal entity and on its directors or managers and persons who participated in the infringement of the Chilean Competition Act.³¹
- In Mexico, executives can be fined up to a maximum of about USD 1 million, as a result of legal amendments passed in 2011. Prison time of up to 10 years can also be sought by the competition authority once a decision has been reached that a competition law violation occurred.
- In the UK also, an individual guilty of involvement in price-fixing, limitation of supply or production, market-sharing, or bid-rigging risks a term of imprisonment of up to five years or an unlimited fine.³²

22. The Portuguese competition authority reformed the competition law on 8 May 2012. It broadened the liability of individuals for infringements of competition law and the range of people who may be held liable. In addition to the members of the management bodies of legal entities, any director or person responsible for monitoring or supervising the area of activities in which an infringement is committed may also now be subject to individual fines when they were either aware or ought to have been aware of the

²⁹ OECD (2011) "Promoting compliance with competition law" 3.2.4.

³⁰ Competition Act 15/2007 of 3rd July, Article 63.2.

³¹ In Chile investigations are conducted by an enforcement agency, the National Economic Prosecutor 'Fiscalia Nacional Economica (FNE)'. Orders and sanctions are decided by a specialised decision-making tribunal, the Tribunal de defensa de la Libre Competencia (TDLC) with the status of a court. The FNE may prosecute the legal entity and its managers (or directors) involved in the infringement by filing a report (administration decision) to the Competition Tribunal (TDLC). The TDLC may impose a financial sanction on business and any person involved in the infringement of up to 30.000 tax units (approx. USD 26 million). The amount depends on the financial benefit received from the infringement, the severity of the breach and the offenders recidivism. (ICN, anti-cartel template and OECD, Accession Report on Competition Law and Policy in Chile, 2010.)

³² Section 190(1)(a) of the Enterprise Act (2002).

anti-competitive infringement and did not take appropriate steps to put an immediate end to it. In such cases, fines can reach up to 10% of the annual income of the individual paid by the breaching company.³³

3. Objectives of fines

23. The main objectives of imposing fines are generally deterrence, punishment, and disgorgement. Considering each of these in turn:

- Deterrence eliminates the incentive to engage in illegal and anticompetitive conduct;
- Punishment is a penalty on undertakings or individual for breaching the competition law; and
- Disgorgement requires the undertakings or individual that violated the law to give up any financial benefit from its illegal activity.

24. The objectives of punishment and disgorgement are closely related to the objective of deterrence. By showing that the competition authority will punish undertaking or individuals for proven breaches of the competition law, the incentive for engaging in that conduct is deterred. By taking away any profits coming from their illegal conduct, the incentive for engaging in that conduct is also eliminated and thus the conduct is deterred.

25. The way criteria for calculating fines may differ depends on the objective(s). For example, Japan's competition authority determines the fine depending on the size of enterprise (large-sized, small and medium sized) and the type of business (manufactures or retailers), taking into account average sales amount and ordinary profit. The character of the fining system for cartels in Japan is largely aimed at disgorgement. That is, the government collects an economic gain derived from a cartel so that cartelists cannot keep it, not as a monetary punishment against cartels. In contrast, Germany can impose punitive fines with added compensation for excess gains (ARC section 81(5)) because according to Section 17(4) of the Act on administrative offences, administrative fines shall exceed gains made as a result of the infringement. Therefore, the character of fining system in Germany includes both punishment and disgorgement.

26. The criteria for setting the fine may be related to culpability of undertakings implicated in a violation, regardless of the gains or profits from illegal activity. Such culpability factors may include:

- Whether offenders intentionally broke the competition law;
- Whether offenders played an active role in the infringement;
- Whether offenders co-operate with the competition authority's investigation;
- Whether director or high-level executives were involved in the infringement; and
- Whether offenders coerced other participant to ensure continuation of the infringement or refuse.

27. Fines that disgorge ill-gotten gains are not uncommon for competition law violations. Disgorgement stems from the idea that a firm should not be allowed to retain financial benefits from an illegal activity. Disgorgement would lead to some deterrent value, but would typically not, on its own, take

³³ The New Portuguese Competition Law, Lisbon Vieira de Almeida & Associados, Sociedade de Advogados, RI(2012.5) and Summary of Key Aspects of the New Competition Law, PLMJ Sociedade de Advogados, RI(2012.5) ; The concept of remuneration is very broad in character including as it includes wages, salaries, payments, gratuities, percentages, commissions, shareholdings, subsidies or bonuses, attendance fees, and accessory emoluments and remuneration.

into account the fact that probability of detection is less than one. As a result disgorgement of ill-gotten gains will generally not be sufficient for deterrence.

28. Some jurisdictions have a rule in their fining guidelines that, if possible, the real impact of the infringement (illegal gains or affected harm) can be considered when setting fines. For example, after the basic amount is increased to reflect aggravating factors or decreased to reflect mitigating factors, the European Commission may increase specifically the adjusted amount of fines once more for deterrence or disgorgement. The EU Fining Guidelines read: “The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount” (paragraph 31). The impact of the rule is to permit higher fines when merited by the facts. The alternative fining provision of the US Sentencing Reform Act also ensures that ill-gotten gains can be recovered, up twice the pecuniary gain to the defendant or twice the pecuniary loss to affected may be set as a fine.

29. Proportionality and predictability are other objectives of fining system that competition authorities consider in determining fines. With predictable fines, a company knows in advance the likely fine amounts and hence the gravity of any illegal action. Fines imposed should be increased in proportion to the illegal gains, the degree of gravity of the infringement and the duration of infringement.³⁴ Such proportionality is an important principle for imposing dissuasive penalties and optimal fines. If expected fines for the infringement are too low to deter then enforcement activity is unproductive. If they are too high they may lack proportionality.

30. In addition, the structure of fining guideline should be sufficiently transparent and predictable for an undertaking so that a potential offender knows in advance the likely fine amount and the gravity of its action before committing any anti-competitive conduct. Furthermore, predictable fining guidelines can facilitate co-operation with the law enforcer because the estimated fine is a key factor in an undertaking’s consideration of whether to co-operate in a competition authority’s investigation. The decision is typically made in the earliest stages of an investigation. Therefore, a fining regime with more transparent criteria and a high degree of legal certainty will assist counsel to estimate the likely fining range for the undertaking and conduct under review. In short, predictable and transparent fining regimes increase deterrence and will likely promote leniency applications. To ensure predictability, fining guidelines typically include the following:

- How to calculate the base fines, the relevant turnover, and the duration of the infringement
- How to determine the imposition rate as a proportion of the relevant turnover;
- How to classify or evaluate the degree of gravity of the infringement depending on the type of conduct involved;
- Which criteria are applied to increase or decrease the basic amount as aggravating factors and mitigating factors and the rates of addition or reduction for each aggravating or mitigating factor;
- How often and by how much to reflect the frequency of violation (recidivism); and
- How to calculate the maximum fine that can be imposed.

31. This paper will consider these topics, as the policies on these points encompass most of the criteria for determining fines.

³⁴ Firms of a variety of sizes can be implicated for violations of competition law, so a one-fine-fits-all approach will not be tailored to individual violations and will either be disproportionately high for firms with small turnover or too small to deter violations by undertakings with large turnover.

4. How to set the base fine

32. Jurisdictions typically go through a number of steps before determining final fines. Many OECD jurisdictions take four main steps when setting fines for competition law infringement:

- Set the base fine;
- Adjust the base fine in light of aggravating or mitigating circumstance;
- Apply a cap on the resulting overall fine; and
- Reduce or eliminate the fine to account for a leniency application.

33. The last step applies only in the case of cartels, but the others are common to both abuse of dominance and cartels. The remainder of this paper will focus primarily on the first two steps.

34. General factors considered for establishing the base fine include:

- The volume of sales in the relevant market;
- Nature and extent of violation;
- Type of violation;
- The duration of the infringement;
- The size of the relevant geographic market; and
- The actual impact on the market.

35. These factors are mainly used to reflect the relative harm of conduct and illegal gains obtained by offender in the base fine.

36. To ensure that fines can achieve their deterrence effect, fines should be greater than the expected extra profit derived from the illegal conduct. The loss to consumer surplus may exceed the extra profit, so some authorities would impose fines that are larger than those strictly necessary for deterrence, by taking into account consumer harms. The law in Spain,³⁵ for example, makes it clear that effects on consumers should be taken into account when setting fines.

37. Generally it is difficult to obtain accurate data on these illegal gains, prices absent the illegal activity, elasticity of demand, deadweight loss, lost consumer welfare, etc. Given these challenges, competition enforcers (e.g., the EU³⁶) often use proxies for calculating a base fine, including the volume of

³⁵ Article 64 of Competition Act 15/2007 of 3rd July (Criteria for the determination of the amount of the fines). 1. The amount of the fines shall be set in light, among others, of the following criteria; a) the dimension and characteristics of the market affected by the infringement, b) the market share of the undertaking, c) the scope of the infringement, d) the duration of the infringement, e) the effect of the infringement on the rights and legitimate interests of consumers or on other economic operators, f) the illicit benefits obtained as a consequence of the infringement, g) the aggravating and mitigating circumstances that exist in relation to each of the responsible undertakings.

³⁶ The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method (Regulation No 1/2003).

sales in the affected market, market share, type of illegal behaviour, duration of the infringement, and characteristics of the affected market.

38. In the first stage, a base fine is calculated as a percentage of the turnover achieved in the market affected over the duration of the infringement by using proxies, with some exceptions.³⁷ Three elements are required to determine the base fine; 1) the amount of sales of goods or services related to an infringement (the relevant turnover, T), 2) a proportion of the value of sales (a percentage rate for the violation, P) and 3) duration of the infringement (the number of years of participation in the infringement, Y). For example, according to paragraph 19 of the EU Fining Guidelines, the base fine, BA , will be related to a proportion of the value of sales (T), the proportion applied to the infringement (P), multiplied by the number of years of infringement (Y), i.e., $BA = T \times P \times Y$.

4.1 *Calculating the relevant turnover*

39. The definition of the relevant turnover or the relevant value of sales which most jurisdictions use in their fining system is similar.

- In EU, ‘value of sales in the relevant market’ (called ‘value of sales’) takes the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA during the last full business year of its participation in the infringement (paragraph 13, EU Fining Guidelines). In US, under the Federal Sentencing Guidelines Manual §8C2.4, the base fine for sentencing of organisation is the greatest of (1) the amount from a table provided in that section; (2) the pecuniary gain to the organisation from the offence; or (3) the pecuniary loss from the offence caused by the organisation, to the extent the loss was caused intentionally, knowingly, or recklessly. However, when considering that the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount shall not be used for the determination of the base fine. Under §8R1.1(d), the ‘volume of affected commerce’ can be used instead of the pecuniary loss or gain as a proxy.³⁸
- In Germany, Korea, The Netherlands, Portugal, Spain and the UK, among others, ‘relevant sales turnover’ refers to the sale of relevant goods or service affected from violation during a period of violation.

40. In conclusion, most jurisdictions use the concept of relevant turnover as a basis for calculating the base fine. Relevant turnover is commonly defined as the amount of the undertaking’s sales of goods or services related to the infringement and in the relevant geographic area.

41. In the European Commission regulations, the turnover is determined before VAT and other taxes directly related to the sales. (Paragraph 17, EU fining guidelines).

42. The definition of relevant product underlies the determination of relevant turnover, because the turnover is calculated only for relevant products. If the scope of the relevant product market is narrow, the value of sales will be decreased; if the scope is wide, the value of sales will be increased. The EU Fining

³⁷ Mexico does not adopt the concept of undertaking turnover as the basis for the determination of fines in cartel cases, where penalties for an offence can rise to the equivalent of 1.5 million times the general wage in the Federal District; their level depends on circumstances listed in the Law on Economic Competition. Colombia also uses the concept of monthly minimum wages for setting maximum fines, in addition to considering total turnover.

³⁸ Kathleen M. Beasley, “Application of the Federal Sentencing Guidelines to Organization in Antitrust Cases: A Practical Guide”(The International Cartel Workshop, February, 2010).

Guidelines state clearly that the goods or services directly and indirectly related to the infringement are included in the scope of the relevant product as well as goods or services directly related to the infringement. One reason for including goods or services indirectly related to the infringement is that horizontal price fixing arrangements for a given product may in turn affect the price of products that are close substitutes to those (footnote (6), EU Fining Guidelines). Especially to the extent that such close substitutes are sold by the implicated undertaking, the extra profits on these products should also be considered as arising from the illegal activity.

4.2 *Determining a percentage of relevant turnover*

43. The base fine is generally a percentage of the relevant turnover over the relevant period

44. Select jurisdictions enforce maximum percentage of turnover as shown in Table 4.

Table 4. Maximum base fines

| Jurisdiction | Maximum % of relevant turnover for base fine |
|---------------------|--|
| EU | 30% |
| Canada | 20% |
| Colombia | 30% |
| Germany | 30% |
| Japan | Depending on the size of enterprise and the type of business |
| Korea | For abuse of dominance, very serious:1.5- 2%, serious:1-1.5%,less serious:0.3-1%, For cartels, very serious: 7-10%, serious: 3-7%, less serious:-0.5-3% |
| Mexico | 1,500,000 times the general minimum wage in the Federal District |
| The Netherlands | 30% (less serious-start with 10% serious-start with 10-20% very serious-start with 15-30%) |
| Portugal | 30% |
| Spain | Starting 10% up to 30% |
| UK | 10% |
| US | Starting 20% |

Source: Various ICN, OECD and national sources.

45. There are many approaches for determining the percentage of turnover that are used.

46. Under the UK's OFT fining guidelines, the base fine cannot exceed 10% of the relevant turnover of the undertakings. In the EU, Germany, Italy, and many other jurisdictions especially in Europe, the relevant authorities may decide on up to 30% of the value of sales in setting the base fine depending on the gravity of the infringement. Therefore, for example, under the maximum of this percentage, the European Commission has discretion to determine the percentage from 0-30% on a case-by-case basis for all the types of infringement, taking into account all the relevant circumstance of the case.³⁹ However, in the most serious infringements such as price-fixing, market allocation agreements, and output limitation infringements, the proportion would be set close to 30%. Furthermore, 15% to 25% of one-year turnover (so called 'entry fee') may be added for the most serious offences.

³⁹ The EU Fining Guidelines, paragraph 22 states "In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower and or at the higher end of that scale, the Commission will have regard to a number of factors such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented."

47. In the US, the base fine for bid-rigging, price-fixing or market allocation agreements among competitors is commonly set at 20% of the organisation's turnover in the affected market over the duration of the infringement.⁴⁰

48. Japan's Fair Trade Commission (JFTC) also adopted the concept of the relevant turnover (the amount of sales of goods or services related to infringement in the affected market during the duration of the infringement) as a basis of fines and the base fines is related to a proportion of the relevant turnover. However, the fining system of Japan is different compared to other jurisdictions. On one hand, the proportion of the relevant turnover is set depending on the size of enterprise (large, medium or small) and the type of business (manufacturer, retailers or wholesalers). For example, the surcharge rates for a large-sized manufacturer and retailers from a cartel offence would be set at 10% and 3% respectively, while the small and medium-sized manufacturers would be set at 4% and 1.2% respectively. These rates, shown in Table 5, were increased in 2005 by revising the competition law. A surcharge rate was set as a function of the average sales amount and an ordinary profit rate according to the type of industry in the corporate statistics for the past ten years. There is no difference in cartel offences between the gravity of the infringement, such as a minor infringement or a very serious infringement (however, the fines for private monopolisation are classified by the type of conduct (control type or exclusionary type) and type of business (manufacturers, retailers, or wholesalers). On the other hand, the competition authority has no discretion in deciding the rate because it is fixed. However, the way to calculating the fines is simple and clear so that corporate can easily estimate its fine range likely derived from the infringement.

Table 5. Cartel and monopolisation base fine rates, Japan

| | Cartel and bid rigging | | Private monopolisation | |
|---|-------------------------------|----------------------------|-------------------------------|-------------------|
| | Large enterprises | Medium & Small enterprises | Control type | Exclusionary type |
| Manufacturing, construction, transportation etc | 10% | 4% | 10% | 6% |
| Retail | 3% | 1.2% | 3% | 2% |
| Wholesales | 2% | 1% | 2% | 1% |

49. In contrast, in Ecuador, Korea, Peru and Spain, the seriousness of an infringement is classified among three groups: minor, serious or very serious infringements, not only depending on the nature of the infringement but also on other quantitative or qualitative factors such as their impact on the market and the market share of the offender. Each imposition rate is applied according to the degree of seriousness.

- For example, in Korea, price-fixing for the nationwide market is a highly significant violation so that the imposition rate will be applied from 7% to 10% of relevant turnover, while a price-fixing for regional limited market can be considered as a weakly significant violation so that the imposition rate will be from 0.5% to 3%. The basic surcharge shall be computed by multiplying the relevant turnover by the imposition rate of the respective violation significance, by type of violation, as in Table 6.

⁴⁰

The Federal Sentencing Guidelines which were introduced in November 1987, Section 2.R1.1(d) relate to bid rigging, price-fixing and market allocation. This section, in subsection (d), provides Special Instruction for fines of organisations: "In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce". Under the Supreme Court's 2005 *Booker* decision, the Federal Sentencing Guidelines cannot be considered mandatory though may be viewed as advisory.

Table 6. Cartel and abuse of dominance fine rates, Korea

| Degree of Significance | Unfair concerted practice imposition Rate | Abuse of market dominance imposition rate |
|-------------------------------|--|--|
| Highly significant violation | At least 7.0%, at most 10.0% | At least 1.5%, at most 2.0% |
| Significant violation | At least 3.0%, at most 7.0% | At least 1.0%, at most 1.5% |
| Weakly significant violation | At least 0.5%, at most 3.0% | At least 0.3%, at most 1.0% |

- In Spain, collusive conduct between undertakings that are actual or potential non-competitors is classified as a serious infringement while collusive conduct between actual or potential competing undertakings is classified to a very serious infringement. However, the proportions of the total turnover applied to the three degrees of the gravity of the infringement differ from those in Korea. For example, the competition authority may impose fines of up to 1% of the total turnover for a minor infringement, fines of up to 5% of the total turnover for a serious infringement, and fines of up to 10% of the total turnover for very serious infringements.
- In Ecuador and Peru, infringements are classified as minor, serious or very serious. Fines for minor, serious and very serious infringements may be up to 8%, 10% and 12 % respectively of total turnover of the undertaking in the previous financial year.

50. Discretion of the enforcers to determine base fine levels differs across jurisdictions. In the EU, German and UK, the fine regime leaves more discretion to the enforcers to decide the percentage of relevant turnover, in contrast to the US and Japanese fine regimes. In the US, the US DOJ or courts decide the proportion of the affected volume of commerce according to the Federal Sentencing Guidelines. In Japan, the JFTC does not have discretion to increase or decrease the amount of surcharge when taking into consideration the individual circumstance of implicated undertakings because the surcharge rate is calculated automatically according to the size of enterprise and type of business.

51. When enforcers have substantial discretion in setting the base fine, transparency and predictability can be sacrificed. In order to enhance predictability in systems with substantial discretion, it is particularly important for competition authorities or courts in such jurisdictions to explain the reasons why a given turnover, percentage and period was selected.

52. On the other hand, when the standard or range of assessment of gravity is classified in a detailed manner (like Korea) or is fixed as a percentage of the relevant turnover according to the size of enterprise or type of business (like Japan), the competition authority loses flexibility to apply the rate depending on the actual market impact on the market on a case-by-case basis.

4.3 *The duration of the infringement*

53. Most jurisdictions take into account the full duration of the participation of each undertaking in the infringement when setting that undertaking's base fine. Duration is used rather than relying on fines limited to one or several years because the longer the period of the infringement, the greater the pecuniary gain to the implicated undertakings and the more the pecuniary harm from the offence to consumers. Providing for a maximum duration that is shorter than the period of violation would reduce deterrence.⁴¹ Differences do exist between countries on how to combine duration of infringement with the relevant sales turnover.

⁴¹ In some countries, the statute of limitations could affect possible duration.

54. In the EU, the value of sales will normally be the sales made by the undertaking during the last full business year of its participation in the infringement (paragraph 13, EU Fining Guidelines). The value of sales in the most recent year is then multiplied by the number of years of infringement. Periods of less than six months will be counted as half a year, while periods longer than six months but shorter than one year will be counted as a full year (EU Regulation 1/2003, paragraph 24). This technique eases the task for the competition authority of determining the initial day and the ending day of the infringement and also helps to ensure that information necessary for calculating turnover is available.⁴²

55. While there are a number of advantages to rounding up, there is also a disadvantage. The last complete business year for each of the undertakings concerned at the date on which the decision was adopted may not sufficiently reflect the offender's financial situation. It is possible that the offender had low relevant turnover on the last year while the offender had attained substantially higher (or lower) relevant turnover previously. Consider as an example a three-year price-fixing cartel in which the first year sales revenue of the infringement was \$50 million, the second year sales revenue was \$60 million and the last year (the previous year of the decision) was \$40 million, the values of sales will be \$40 million \times 3 years = \$120 million, while the actual value of sales would be \$150 million.

56. In other jurisdictions (for example, Germany, the Netherlands, Korea and the US) the length of the period of infringement fully enters into the base fine because the affected commerce is taken as the turnover of the company over the period of the infringement. For example, if we apply the above case, the values of sales will be \$50+\$60+\$40=\$150 million. This approach leads to heavier fines for companies whose turnover decreased over the duration of the infringement and lower fines for companies whose turnover increased. Therefore, the relevant turnover can be in proportion to the period of infringement. However, the competition authority faces a high burden to prove the starting day and the ending day of the infringement. At times, courts may cancel or annul a decision if there is insufficient proof of either of these two dates, or if the offender is found to have discontinued the infringement during part of the period between the start and end of the infringement.

57. Japan has a statute that limits the relevant duration of the infringement. When the period of infringement exceeds three years, the relevant duration shall be the three years before the date on which the business activities constituting the infringement were discontinued⁴³. This may reflect the difficulty in obtaining relevant evidence or documents to calculate the base fine for periods longer than three years. Critics might suggest that three years is too short and the limitation of period of implementation, and would not sufficiently deter longstanding violations.

58. Spain adopts weighting coefficients that place substantially more emphasis on recent effects than older ones. The coefficients are found in Table 7. A weighting coefficient is applied starting in year 1 (the most recent year in which the infringement caused effects), and is reduced by 25% of total sales volume per year until the fourth year. From the seventh year onwards the weight is 5% for each year.⁴⁴ Under the Spanish weighting, disgorgement of old violations is extremely small. Critics could suggest that the weights would not sufficiently deter longstanding cartels.

⁴² If a violation lasts for 10 years, and relevant turnover is calculated separately for each year of violation, gathering relevant information to calculate accurately old turnover figures may be difficult or impossible.

⁴³ The Private Monopolization and Unreasonable Restraint of Trade, Article 7-2 (1), (4).

⁴⁴ Spain's contribution for LACF, September 2013.

Table 7. Spanish weights to be applied to sales over duration of offence

| Sales for year | Weighting |
|----------------|-----------|
| 1 | 1.00 |
| 2 | 0.75 |
| 3 | 0.50 |
| 4 | 0.25 |
| 5 | 0.15 |
| 6 | 0.10 |
| 7 and above | 0.05 |

Source: Spain's contribution to LACF September 2013.

5. Mitigating and aggravating circumstances

59. After the base fine is set, many regimes then take into account circumstances related to the violation and the offender.

60. In the US, for example, a 'culpability score' is calculated,⁴⁵ and the multiplier from this score is applied to the base fine of 20% of the volume of affected commerce. Factors taken account in a culpability score include high-level managerial involvement, with large corporations scoring larger point additions than small corporations, prior history, violation of an existing order, obstruction of justice, having an effective compliance programme and self-reporting and acceptance of responsibility.⁴⁶ Under one of special instructions in §2R1.1(d), the minimum multiplier for violating the Sherman Act must be at least 0.75, so the bottom of the fine range will be at least 15% of the affected volume of commerce if no other adjustments are made.

61. Common aggravating and mitigating circumstances are listed in Table 8:

Table 8. Aggravating and mitigating circumstances

| Aggravating Circumstances | Mitigating Circumstances |
|---|---|
| 1 Recidivism | Effective compliance policy |
| 2 Leading role or instigate in infringement | Minor role |
| 3 Coercion or retaliatory measures to ensure continuation of the infringement | Pressure exercised by other companies |
| 4 Refusal to co-operate | Co-operation with competition authority (except for leniency applications) |
| 5 Continuation of the infringement after start of competition authority's investigation | Immediate termination of the infringement |
| 6 Awareness of the illegal nature of the conduct (committed Intentionally) | Uncertainty as to existence of an infringement |
| 7 Institutionalised nature of the infringement | Motivated by Public authorisation/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 or condition of probation | Compensation of injured parties |

⁴⁵ Kathleen M. Beasley, "Application of the Federal Sentencing Guidelines to Organization in Antitrust Cases: A Practical Guide" (The International Cartel Workshop, February, 2010), p.4 "To find the organization's Culpability Score".

⁴⁶ See 2012 Federal Sentencing Guideline Manual, **§8C2.5 on Culpability Scores**. http://www.uscourts.gov/Guidelines/2012_Guidelines/Manual_HTML/8c2_5.htm

62. We discuss the most common and important circumstances below.

5.1 *Recidivism*

63. A recidivist is a repeat offender. Most fining regimes consider that repeat offences by the same undertaking should be taken into account when fixing the fine. The fact that an undertaking violates the competition law a further time means that the undertaking was not effectively discouraged from infringing the competition law by the fine level initially applied. Recidivism has a significant impact on the calculation of the amount of the fine in the EU, for example, where it can lead to an increase of 100% for each previous infringement established.

64. Some fining institutions apply recidivism broadly as an aggravating factor. Recidivism is one of the most common aggravating circumstances in European Commission decisions. Recidivism applies only to “the same or similar” infringement.⁴⁷ If the nature of the conduct is so similar that an undertaking’s managers should reasonably consider that their conduct could violate the same rule, this may be sufficient to constitute a similar infringement. When an undertaking participated in a cartel, all types of behaviour are considered “similar”, no matter the exact goal of the collusive behaviour (price-fixing, market allocation, sensitive information exchange). However, when different rules are breached, such as cartel and abuse of a dominance position, the second violation is generally not a “similar infringement”.^{48 49}

65. A long lapse of time between two infringements may prevent a finding of recidivism. A maximum time limit between the past infringement and the present one is at times used by competition authorities. Spain considers an offender can be a recidivist within 10 years.⁵⁰ Recidivism in the UK covers only the last 15 years. In Korea, recidivism within 3 years over at least 3 offences will increase the base fine by 20%, 4 times within 3 years will increase the base fine by 40% and 5 times within the past 3 years would increase the base fine by 50%. In Japan, a surcharge for repeated offenders within 10 years is 50% of the base fine. The French competition authority does not expect to apply recidivism penalties to an undertaking when the period of time between infringements exceeds 15 years.⁵¹ In the EU, though, there is no pre-determined maximum time limit between different infringements.

⁴⁷ The EU Fining Guidelines paragraph 28 state “where an undertaking continues or repeat the same or similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 or 102: the basic amount will be increased by up to 100% for each such infringement established.”

⁴⁸ Geradin (2011) p 40, section 9 A(1) to (3) Company Directors Disqualification Act.

⁴⁹ In Korea, the different types of violation for determining recidivism are distinguished in the guidelines ‘Announcement on Detailed Standards, etc for the imposition of Surcharge’ II (definition) 11. The types of violation can be categorised into 5 types, namely i) Abuse of market dominance (Paragraph (1), Article 3-2 of the Act), ii) Violation of regulation against concentration of economic power (Paragraph (2) to Paragraph (5), Article 8-2; Article 9; Paragraph (1), Article 10; Paragraph (1), Article 10-2; Paragraph (1), Article 17-2), iii) unfair concerted practices (Article 19), prohibited activities of enterprisers organisations (Paragraph (1), Article 26) and participation in prohibited activities of enterprisers organisations (Paragraph (2), Article 28), iv) unfair trade practices (excluding unfair supportive activities) (Paragraph (1) to Paragraph(5), Paragraph (8), Article 23), maintenance of resale price (Article 29), conclusion of unfair international agreements (item 7, Paragraph (7), Article 23), V) and unfair supportive activities (item 7, Paragraph (1), Article 23).

⁵⁰ Spain contribution to LACF September 2013.

⁵¹ The French Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties already provides that “the period of time running from the prior finding of infringement to the starting point of the practice at stake is taken into account in order to address, in a proportionate way, the propensity of the

5.2 *Actual effect of the infringement*

66. While it may be difficult to measure the actual effect of the infringements, circumstances related to effects are at times taken into account as aggravating or mitigating circumstances. Points often considered include:

- Whether there is implementation of the infringement;
- Whether the infringement has continued after the competition authority investigation becomes known;
- Whether the infringement was terminated immediately after the competition authority's investigation started; or
- Whether the offender adopted measures to offset the negative effects and compensate injured parties after the violation of competition law.

67. In Spain, under article 64.3 of the competition law, 'the performance of actions that terminate the infringement', 'the effective non-application of the prohibited conduct', and 'the performance of actions intended to repair the damage caused' shall be taken into account as mitigating circumstance to partially offset the penalty. In Japan, the fine for undertakings that stopped a violation early is reduced by 20% of the base amount. In Korea, the fine for cartel members that did not implement the agreement can be reduced up to 30% of the base amount.

5.3 *Distinction between intent and negligence*

68. In order to prevent undertakings from repeating offences in the future as well as to attain sufficient deterrence, a distinction is sometimes drawn between infringements that have been committed intentionally and those that are the result of negligence. Many jurisdictions such as the EU, Germany, Korea and the UK, distinguish between intentional and negligent violations of the competition law. For example, in the UK, companies that obtain professional legal advice about a practice that is later deemed collusive can cite the existence of this advice as a defence against criminal penalties.⁵² Under the EU Fining Guidelines, the base fine may be reduced where the undertaking provides evidence that the infringement has been committed as a result of negligence. While a number of jurisdictions reduce fines when an undertaking is negligent, such approaches may discourage establishment of compliance programmes and other desirable preventive measures.⁵³ So there is not universal agreement on whether negligence should be a mitigating factor or intent an aggravating one.

5.4 *Role of the undertaking in collective infringement*

69. The more involved an undertaking is in an illegal activity, the more the undertaking may be considered responsible for the harm resulting from that activity. Jurisdictions may take into account an active or passive role of the offender in the infringement as an aggravating or mitigating factor for deterrence and proportionality.

concerned undertaking or entity to break free from competition rules; the Autorité does not intend" to apply recidivism to an undertaking or entity when this period of time exceeds 15 years (para 51).

⁵² Section 188B of the Enterprise and Regulatory Reform Act 2013.

⁵³ Compliance programmes may establish the knowledge that ensures managers committing a legal offence would be aware of the offense and would be breaking the law intentionally.

- In the EU, under the Fining Guidelines, the base fine may be increased when the Commission finds that the undertaking was an instigator or leader of the infringement, or finds the undertaking took steps taken to coerce other undertakings to participate in the infringement or finds the undertaking took retaliatory measures against other undertakings to further the infringement.
- For example, under the fining guidelines of Korea, when it is clear that an undertaking initiated or played a leading role in the violation, this may be considered as an aggravating factor, with a 30% increase above the base fine. If the undertaking also threatened or took retaliatory actions against other firms to ensure the others would infringe, the undertaking would be subject to an additional 20% increase in the fine. In contrast, if the undertaking's participation was demonstrably forced and unavoidable, the base fine may be reduced by up to 30%.
- In Spain, under article 64.2 b) c) of the competition law 'the position of leader in or instigator of the infringement' and 'the adoption of measures to impose or guarantee the enforcement of the conduct constituting the infringement' are taken into account as an aggravating circumstance to set the amount of the fine.

5.5 *Co-operation with the investigating authorities*

70. Adjustments to the base fine based on co-operation provide undertakings with incentives to co-operate with investigations and not to obstruct investigations. Such adjustments not only help to ensure faster resolution of cases and better evidentiary basis for claims made by the investigating authorities, but also increase the impact of public resources allocated to competition law enforcement. Co-operation is the most common mitigating factor considered by competition law enforcers in adjusting base fines.⁵⁴

71. Many jurisdictions take into account factors related to co-operation or obstruction of an investigation as an aggravating or mitigating circumstance.

- In the EU, under the Fining Guidelines, the base fine may be increased where the Commission finds that an undertaking refuses to co-operate with or obstructs the investigation. The base fine may be decreased when an undertaking has effectively co-operated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.
- In Spain, under article 64.2 d) and 64.3d) of the competition law 'the lack of collaboration or obstruction of the inspection task' and 'the active and effective collaboration with the National Competition Commission' shall be taken into account as an aggravating or mitigating circumstances for setting the amount of fines.
- In the US, under the Federal Sentencing Guidelines, §8C2.5 US considers 'any obstruction of justice' and 'co-operation and acceptance of responsibility' as culpability score factors when determining a minimum multiplier or maximum multiplier after setting the base fine.⁵⁵
- In Korea, an undertaking's base fine may be increased by up to 30% if it refuses to provide information, interferes with the investigation, ignores the investigation, or actively conceals the illegal acts of violation. The base fine may be reduced by up to 30%, when the implicated undertaking actively co-operates by consistently acknowledging any illegal acts from the

⁵⁴ See ICN (2008) Chart B, p 29.

⁵⁵ Kathleen M. Beasley, "Application of the Federal Sentencing Guidelines to Organization in Antitrust Cases: A Practical Guide" (The International Cartel Workshop, February, 2010), footnote 6. "If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offence, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add 3 points." § 8C2.5(e).

examiner's investigation stage until the end of the Commission's hearing, by submitting informative materials or by testifying.

6. Fined company's inability to pay

72. Ability to pay is rarely taken into account when setting fines. Arguably, though, ability to pay may have been taken into account in setting caps on fine levels.⁵⁶

73. Fines that are sufficiently large to deter illegal conduct may at times be quite large, compared to annual profits. Large fines may, at times, force a company into liquidation, resulting in fewer competitors. To avoid losing competitors, some competition law enforcers do consider the financial capability of implicated undertakings to pay a fine. In particular, some authorities consider that fines affect small, specialised companies, such as mono-product SMEs, more adversely than large, diversified businesses because fines would apply to the entire business of a mono-product SME. Some competition authorities explicitly consider 'the inability to pay' in order to prevent liquidation of small, specialised companies.

74. Not all jurisdictions consider in the ability to pay fines. For example, Mexico could not consider the ability of an implicated undertaking to pay a fine in determining the fining level (ICN (2008, p. 26)).

75. Even among those jurisdictions that do consider ability to pay, a reduction in fining levels to ensure ability to pay may be rare. Under the EU Fining Guidelines paragraph 35, the European Commission may take into account of ability to pay when "the imposition of the fine... would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value". This reduction would only be granted when the inability to pay is connected to the general social and economic context, not on the mere finding of an adverse or loss-making financial situation. The European Commission has adjusted fining levels only one time in response to concerns about ability to pay. (See Box 1.)

Box 1. Ability to Pay in Prestressing Steel Cartel

The EU Commission granted its first fine reduction on the basis of inability to pay in 2010 in the *Prestressing Steel Cartel*. The undertaking Almamet received a 20% reduction in its fine. Despite the reduction received, Almamet appealed before the General Court asking for the annulment of its fine in February 2010, saying that as a small company with a limited range of products, a EUR 3 million fine would be "excessive and disproportionate". The company had a net annual profit of between EUR 400 thousand and EUR 500 thousand in recent years. In December 2012, the court upheld DG Competition's decision to fine Almamet for taking part in a cartel to fix the price of calcium carbide between 2004 and 2007, writing "Contrary to the view apparently taken by the applicant, the possibility of its insolvency is not, in itself, sufficient for it to be concluded that the fine imposed is disproportionate....The Commission is not, in principle, required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking concerned, since recognition of such an obligation would be tantamount to giving an unjustified competitive advantage to undertakings least well adapted to the market conditions." The Court added that "[w]ith regard to the applicant's references to its profits...the fine imposed for infringement of the competition rules pursues not only a preventive, but also a punitive, objective. The Court has already held, taking into account that punitive aspect, that a fine to be imposed for participation in a cartel in breach of the competition rules cannot be set at a level which merely negates the profits of the cartel. Thus, the fact that the fine imposed on an undertaking is considerably higher than its entire net profit in a financial year is not, in itself, sufficient for it to be concluded that the fine is disproportionate."⁵⁷

⁵⁶ See ICN (2008) p. 26 for Hungary.

⁵⁷ EC press release, Brussels, 22nd July 2009 article "Antitrust: Commission fines suppliers of calcium carbide and magnesium based reagents over €61 million for price fixing and market sharing cartel", Article "Almamet appeal questions excessive damages". Rosalind Donald. Tuesday, 2 February 2010. Article,

76. Box 2 provides selected jurisdictional guidance for whether and under what conditions the competition law enforcer may reduce fines for inability to pay.

Box 2. Jurisdictional policy on inability to pay

European Union

According to the EU Fining Guidelines, paragraph 35, “In exceptional cases, the Commission may, upon request, take account of the undertaking’s inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of adverse or loss-making financial situation. A reduction would be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.”

Brazil

Brazilian authorities can take into account ability to pay when determining the ultimate fine amount.⁵⁸

US

According to the US guidelines, courts may reduce a fine if the fine would impair the offending company’s ability to give restitution to victims of the illegal actions.

Germany

In Germany, if an undertaking proves that it could not pay the fine in the short term, the Bundeskartellamt can issue a debtor’s warrant or allow deferred payment.

Korea

(1) The surcharge may be reduced by up to 50% of the optional surcharge if the amount of the optional surcharge is deemed excessive. Circumstances to consider include: because the offending enterprise’s realistic payment abilities, the market was under pressure from demand or supply shocks, or fluctuations in business conditions of the economy were not fully taken into account, all as detailed below. The reason for reducing the optional surcharge shall be specified in the Fair Trade Commission’s written resolutions.⁵⁹

(2) Surcharges may be waived if as of the hearing day, the offending enterprise is in a situation of non-payment or ceased payment according to the "Bankruptcy and Debtor Rehabilitation Act," or, if the offending enterprise is deemed unable to pay the surcharges for reasons such as debt exceeding assets on financial statements of the year prior to the hearing day.

New Zealand

The courts in New Zealand have determined that a defendant’s inability to pay can be taken into account when determining the fine for that defendant. Nonetheless, in the case of very serious legal violations, fines may reach levels that would make a defendant go out of business.

“General Court rejects inability to pay appeal”. Stefano Berra, Friday, 14 December 2012. Judgment of the General Court (Third Chamber) 12 December 2012. *Almamet GmbH Jandel Mit Spanen und Pulvern Aus Metall v European Commission*.

⁵⁸ See ICN (2008), p.27.

⁵⁹ Reasons may include: (A) The weighted average, with weights of 3:2:1, of net income as stated on financial statements for the business year immediately prior to the hearing date, the business year 2 years prior, and the business year 3 years prior is negative, or, capital on financial statements was impaired the prior business year; (B) The market or industry conditions of the offending enterprise is under severe pressure due to factors such as sudden or continuous decrease in demand, sudden or continuous increase in supply; (C) The domestic economy is under severe pressure or has been severely pressured due to reasons such as war and political factors, sudden fluctuations in the price of raw materials such as petroleum, lack of dollars and foreign currency, sudden fluctuations in exchange rates, and international financial crisis; or (D) Reasons other than the above paragraphs (A) to (C) that make it extremely difficult for the enterprise to pay when the optional surcharge is reduced within a range of 50%.

77. While risks of bankruptcy may be cited as a reason to reduce fines, the harm from this risk may be overstated as bankruptcy does not necessarily result in loss of competitive pressure. Companies in many countries can emerge from a bankruptcy process while continuing in operation, sometimes even in the hands of the same management. The loss of competitive pressure would most clearly apply in the case of liquidation of assets when the assets will cease to serve their current purpose.

78. When companies may face difficulties paying a fine, governments may consider alternatives, such as establishing payment schedules (like Canada), debtor warrants (like Germany) or receiving stakes in enterprises that are unable to pay their entire fine, for example through the issuance of shares to the government. Such stakes would be saleable, not planned as long-term government involvement in enterprises, and where possible sold immediately after being obtained. The provision of value to governments via shareholding interest could reduce risks of reduction in the number of competitors while maintaining the effect of fines.⁶⁰

7. Maximum Fine and Leniency

79. After a fine level is established, this is often checked against the maximum fine level. Table 9 shows the maximum fine levels for select jurisdictions. A fine that would otherwise exceed the maximum is generally reduced to the maximum level. Maximum fine levels exist to ensure that the boundaries of fining activity are clearly delimited.

Table 9. Maximum fines by type of offender, selected jurisdictions

| | Maximum fine for corporate (statutory ceiling of final fine) | Maximum fine for individuals |
|--------------------|--|---|
| EU | 10% of the undertaking's world-wide turnover during the last financial year (i.e. not limited to the cartelised market) | No |
| Brazil | 20% of undertaking's (including group of companies) gross revenue in the year prior to the beginning of the investigation | Yes (between 1 to 20% of the fine imposed on their company) |
| Canada | For cartels, maximum fine is CND 25 million, for abuse of dominance maximum fine is CND 10 million | Yes (CND 400.000 or 14 years) |
| Chile | 20.000 tax units (approx USD 19 million in 2013) for abuse of dominance or non-cartel offences, 30.000 tax units (approx USD 28.5 million in 2013) for cartels | 30.000 tax units (approx USD 28.5 million in 2013) |
| Colombia | 10% of the total income during the last complete financial year and 100.000 current monthly minimum legal wages (CMMLW) (30 million USD) or 150% of the income resulting from the infringing conduct | Yes (2,000 CMMLW, USD 700.000) |
| Dominican Republic | For non-cartel abuse, between 200 and 3000 times the minimum wage; for cartel, between 30 time and 3000 times the minimum wage | Yes |
| Ecuador | Minor violations: 8% of the undertaking's total turnover in the prior financial year; Serious violations: 10% of total turnover Very serious violations: 12% of total turnover | Yes (USD 150,000) |
| France | 10% of undertaking's world-wide total turnover in the preceding year | Yes (EUR 75,000) |
| Germany | 10% of undertaking's world-wide turnover | Yes (EUR 1 million) |

⁶⁰ Governments obtained shareholding interest in a number of companies (e.g., AIG, Allied Irish Bank, Citibank, GM, HBOS, Lloyds), as a provision of value in the wake of the financial crisis, in return for financial support or financial guarantees provided; but provision of shareholder interest has not, up until now, been applied for competition law fines.

| | | |
|-----------------|---|--|
| Japan | 10% (large, manufacture), 3% (large, retailer), 2% (large, wholesale) of the sales amount of the relevant goods or services | Yes (JPY 5 million) |
| Korea | Cartel - 10% of the undertaking's relevant turnover Abuse of dominance - 3% of the undertaking's relevant turnover | Yes (KRW 200 million) |
| Mexico | 8% annual turnover for relative monopolistic practice and 10% of annual turnover for absolute monopolistic practice | Yes (200,000 times the general minimum wage in the Federal district – approx USD 1 million) |
| The Netherlands | the greater of €450,000 or 10% of the undertaking's world-wide turnover in the financial year preceding the decision | No |
| Peru | Mild – 500 Tax units and 8% of income Severe – 1000 Tax units and 10% of income Very severe – 12% of income | 100 Tax units (approx USD 133,000 in 2013) |
| Portugal | 10% of total turnover | Yes (10% of the annual income of the individual) |
| Spain | 10% of total turnover in the preceding business year | Yes (EUR 60,000) |
| UK | 10% of total world-wide turnover | Yes (no limit) |
| US | USD 100 million or twice the pecuniary gains derived from the criminal conduct or twice the pecuniary loss caused to the victims of the crime | Yes (USD 1 million or twice the gross pecuniary gains the offenders derived from the crime or twice the gross pecuniary loss caused to the victims of the crime) |
| Venezuela | 20% of the undertaking's gross turnover | Yes |

80. After a fine is adjusted to ensure it is below any relevant caps, leniency-based reductions in a fine are considered, if applicable. Leniency is integrally related to the fining regime. The value of leniency depends on the fine that would be levied absent leniency. Leniency applicants often come forwards because they know the level of fine from an offence and wish to avoid such a fine. The way that fines would be calculated, as discussed in this paper, and the transparent and predictable nature of the fining regime, are therefore important. The details of leniency programmes, and how they modify fines, are highly varied. For further discussions on leniency, please see the LACF Roundtable OECD (2009) and the OECD roundtable (OECD, 2012).

8. General Topics

81. A number of broad challenges apply to determination of fines, either cutting across the chronology of fine-setting or that arising after the fines have first been determined. Challenges discussed below relate to:

- Treatment of parents and subsidiaries
- Treatment of trade associations and business associations
- Appellate review
- Collection of fines

8.1 Treatment of parents and subsidiaries

82. Fines are imposed on the “undertaking” that violates the competition law. The boundaries of an undertaking, as defined in each jurisdiction’s competition law, are closely related to the process of setting fines and the final amount of fines. In particular, the boundaries of the liability of the infringement can

have a serious impact on 1) the determination of the amount of relevant turnover for calculating the basic amount, 2) the determination of the number of recidivist events, and 3) the determination of the amount of a statutory ceiling (cap) on the total fine imposed.

83. In some jurisdictions such as Japan and Korea, the liability of the infringement is limited to the individual company that broke the law. In such jurisdictions: 1) the relevant turnover for setting basic fine is calculated on the basis of the sales volume of products or services which affected in the relevant market by the directly involved company; 2) the existence of recidivism is focused solely on behaviour by the offender directly involved in the infringement; and 3) the cap applied based on turnover is calculated based on the total turnover in the jurisdiction of the offender directly involved in the infringement.

84. In other jurisdictions, such as Brazil, the EU, Portugal and Turkey, the liability of the infringement is expanded to the whole economic group to which the offender belongs (including parent companies and other subsidiaries of parents and closely related companies besides the direct offender). See Box 3 for some examples. For such jurisdictions: 1) the combined total relevant turnover of the subsidiary and the parent company are considered for base fine; 2) the previous infringements of other subsidiaries and the parent company are counted as recidivism and lead to increases in the fine above the base level. In addition, the combined total turnover of other subsidiaries and the parent companies are considered as a statutory ceiling for the final fine, which can result in much higher caps of the total turnover to increase significantly and mostly the final amount calculated are under the cap of the total turnover.

Box 3. Boundaries of an undertaking

EU

In the EU, competition law applies to “undertakings”. Article 101 and 102 of the TFEU do not define undertaking, but the ECJ defined an ‘undertaking’ as an ‘economic unit’ for the purpose of the subject-matter of the agreement in question. An economic unit can include multiple natural or legal persons⁶¹. The “Akzo Nobel” decision states “...It must be borne in mind that Community competition law recognises that different companies to the same group form an economic entity and therefore an undertaking within the meaning of Article 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company”⁶². A subsidiary’s lack of independence is determined on the basis of two elements : the *possibility* of another company to *exert decisive influence* over its commercial policy and the fact that such influence or control was *actually exercised*.⁶³ Some authors have claimed “this would make it almost impossible for a parent company to prove that a subsidiary acted independently on the market.”⁶⁴ Another author claims “Pursuant to *Akzo Nobel*, in the case of wholly owned subsidiaries, there is a rebuttable presumption that the parent company does in fact exercise such decisive influence. This parental liability doctrine can have a significant impact on the way fines are calculated. Potentially higher fines might be imposed as the 10% cap on the amount of the fine applies to the combined turnover of the subsidiary and the parent company. In addition, rules on recidivism apply to the whole group, thus significantly increasing the risk that this aggravating circumstance will apply to the undertaking in question.”⁶⁵

⁶¹ ECJ, 12.7.1984, Hydrotherm Gerätebau GmbH/Compact, Case 170/83, ECR 1984, 2999, paragraph no. 11

⁶² CFI, 12.12.2007, Akzo Nobel NV et al./Commission, Case T-112/05, ECR 2007, II-5049, margin no. 58; the decision was confirmed by the ECJ on Sept. 10, 2009, Case C-97/08 P.

⁶³ ECJ, 25.10.1983, Allgemeine Elektrizitäts-Gesellschaft AEG – Telefunken AG/Commission, Case 107/82, ECR 1983, 3151, paragraph no. 50.

⁶⁴ See Hifstetter and Ludesher (2010), p.7.

⁶⁵ Discussion paper, The EU competition law fining system: a reassessment, page 16 October 2011, Damien Geradin.

Portugal

With the 2012 amendments to its competition law, Portugal has a definition of the undertaking similar to that of the European Commission and ECJ decisions in Law No 19/2012, Article 3.

Notion of undertaking

1 – The term undertaking, for the purposes of this law, shall be deemed to be any entity that has an economic activity comprising the supply of goods or services in a specific market, irrespective of its legal status or means of financing.

2 – A group of undertakings is deemed to be a single undertaking, even if the undertakings themselves are legally separate entities, where such undertakings make up an economic unit or maintain interdependence ties deriving specifically from the following: 2

- a) The undertaking so defined has a majority of the share capital;
- b) It has more than half of the voting rights conferred by the share capital;
- c) It has the power to appoint more than half of the members of the board of directors or the supervisory board;
- d) It has the necessary powers to manage the businesses of the group and of each of its undertaking

Brazil

Under the previous law in Brazil, sanctions could only be calculated based on the turnover of the actual defendants included in the proceedings. However, after the recent revisions to the law of November 30, 2011, with amending the competition law (law no.12,529/2011), Brazil could consider parent companies' turnover when determining the amount of the fine with an expanded the fine range between 0.1 and 20 percent of the company's or group of companies' pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation.⁶⁶

8.2 Treatment of trade / business associations

85. Trade and other business associations at times play a role in competition law infringements. The determination of fines applied to business associations raises particular challenges.

86. The first challenge concerns the relevant turnover when calculating the amount of the fine. If the turnover is calculated based on the turnover of the association, the fine is likely to be so small as to have a very limited deterrent effect. The fine would be small because associations are generally not directly active as sellers. Competition authorities will at times pierce the veil and take turnover of members as a reference for the fine.⁶⁷

87. The second challenge is how to enforce payment of monetary penalties against associations, as their assets are often limited and they can easily be dissolved and then reformed as a different legal entity. For this reason, some jurisdictions have introduced provisions in which, if the association is not solvent, it is obliged to call for contributions from its members.⁶⁸

⁶⁶ Shaping the future of Brazil's Anti-cartel Program: Relevant changes Introduced by law no. 12,529/2011, Ana paula Martinez & Mariana Tavares de Araujo, Competition Policy International 2012.

⁶⁷ Such an approach was supported by the European courts which in the past held that "the correctness of this view is borne out by the fact that the influence which an association of undertakings has been able to exert on the market does not depend on its own 'turnover, which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power.'" (Case C-298/98 P, Metsä-Serla Sales Oy v. Commission, [2000] ECR I-10157, para 12 and para 62-74).

⁶⁸ See Regulation 1/2003 (OJ 2003 L1/1), Article 23. "When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine."

8.3 *Appellate review*

88. Largely because of the significant size of many fines, appeal of decisions is frequent except in those jurisdictions in which settlements predominate. The experience of fining decisions with subsequent review on appeal has been highly varied. Appellate review of cartel decisions can be wide ranging. Topics subject to review can include matters of fact and law, depending on the jurisdiction. The findings of the court can lead to a direct reduction of the fine by a court, the remanding of a decision to a lower-level decision authority for reconsideration, or nullification of a decision and accompanying fine with prejudice, i.e., preventing the issuance of a revised decision.

89. The ultimate impact of appeals is generally to reduce the amount of the fine. For example, between 1990 and 2013, the European Commission levied fines of EUR 19.2 b for cartel violations. Court judgments reduced this amount by 8.2%, resulting in a fining level of EUR 17.6 b. At times, the reduction in the amount of fine can be much larger. Cassels (2011) calculates that European Commission fine decisions were upheld by the General Court 50% of the time, were annulled and cancelled 17% of the time and were subject to partial annulment s or reductions 33% of the time.⁶⁹

- In Spain’s Sherry wine cartel case, the National Appeals Court adopted four decisions in March of 2013. One estimate of the impact of these and earlier court decisions is a reduction in the fine level about 80%.⁷⁰
- In Chile’s 2008 liquid oxygen case, the fines requested by the FNE amounted to USD 11.182m, the TDLC determined fines of USD 3.007 m and after the Supreme Court decision that no wrongdoing was proved, there were no fines.

90. On average in Chile between 2008 and 2013, fines fell be 11% between the TDLC decisions and the Supreme Court decisions.

91. While fine reductions under appeal can, at times, appear dramatic, competition law fines overall have held up well in many jurisdictions, particularly once the legal framework and precedents for levying fines and standards of proof are well established. In fact, at times, fines have been raised on appeal.

- For example, in the CFI’s 2007 review of the BASF fine in the choline chloride case, the BASF fine was actually increased by a small percentage.⁷¹
- In 2008, in the Chilean case concerning public transport and buses in Olorno, the TDLC determined a fine of USD 79,300 which was almost tripled by the Supreme Court to USD 232,863.
- On 15 April 2013, the Higher Regional Court of Dusseldorf increased the cartel fines on liquefied gas suppliers to EUR 244m, up to 85% higher than that in the Bundeskartellamt’s administrative decisions.

92. Appeal courts have granted reductions in fines for various reasons. These include: failure to prove the existence of a legal violation, incorrect calculation of the fine due to incorrect duration or unwarranted application of aggravating circumstances or insufficient consideration of mitigating circumstances, incorrect attribution of liability to a parent and procedural errors.

⁶⁹ Cassels, John (2011) “Appealing EU cartel decisions: prospects for success.” <http://www.ffw.com/publications/all/articles/appealing-eu-cartel-decisions.aspx>.

⁷⁰ See Eversheds “Investigations: sherry wine cartel – court substantially reduces fines.” 22-04-2013.

⁷¹ See T-101/05 and T-111/05, BASF and UCB.European Commission and ECR 2007, II-4949 of 12 December 2007.

8.4 *Collection of fines*

93. Decisions to impose a fine will not have a deterrent effect unless the fines are actually collected. As collection is often not performed by the competition authority, success in collection can be outside the control of the competition law enforcers. In some countries, collection of fines has been a major problem, notably in the past in Colombia and Mexico, among others. In 2008, for example, the Colombian competition law imposed fines amounting to USD 2.1 m, but only 18% of this amount had been collected as of 2013. More recently, about 50% of fines were successfully collected in Colombia in 2011 and 2012, suggesting that collection rates are going up but remain an ongoing issue.

9. **Conclusion**

94. In Latin America, fines are increasingly applied for serious violations of the national competition laws. Imposing dissuasive fines that are proportionate to the competition law offence is one of the main objectives of fining regimes for competition law violations. To successfully deter illegal activities, the level of fines is determined by considering both expected gains from the illegal activity and probability of detection. However, it is difficult to analyse exactly the average cartel overcharges and probability of detection in each case. Some research⁷² asserts that fining offenders based on 10% of revenue in the affected products and a limited duration may be inadequate to deter cartel conduct. Other research suggests that fines in the range of 10% of revenue are adequately dissuasive.⁷³

95. The differences between fining activity in Latin America are still significant. Particularly for companies involved in international breaches of the law, some countries have high fines proportionate to local sales and others having none at all. Future convergence will be aided by identifying common and different criteria for setting fines of each jurisdiction and sharing the methodologies of fining regimes for competition law infringements.

96. In this paper, fining regimes around the world share a number of common features:

- Many jurisdictions use four steps when setting fines for competition law infringement: 1) set the base fine; 2) adjust the base fine in light of aggravating or mitigating circumstance; 3) apply a cap to the resulting overall fine; and 4) reduce or eliminate the fine to account for a leniency application.
- Many jurisdictions set the base fine for infringement as a function of the relevant turnover, the value of sales in the relevant market of relevant goods or service affected from the infringement during a period of violation.
- Many jurisdictions consider the duration of the infringement, and also take a proportion of the relevant turnover, when determining the base fine.
- Many jurisdictions increase or decrease the base fine in light of aggravating or mitigating circumstances. Common circumstances include recidivism, actual effect of the infringement, distinction of intentional breach and negligent breach, role of offender in the collective infringement, co-operation or obstruction with investigation of competition authority.
- Many jurisdictions impose high fines on the hard-core cartels compared to other violations of the law. Considering the low probability of detection and high expected gains for cartel conspirators,

⁷² This assertion is based on Connor and Lande (2006), Combe and Monnier (2011) and Smuda (forthcoming).

⁷³ See Allain et al (2011) and Heimler and Mehta (2012).

hard-core cartel are classified as very serious infringement (Korea, Spain), with a sum of between 15% and 25% of the value of sales being added in the base amount considering the impact entry fee (EU), or high multiplier and culpability scores for hard-core cartel (US).

- Many, if not all, jurisdictions have a cap on fines in their law or guidelines as a legal maximum, so that the competition authority applies the statutory limit on the fine level when the final amount of fines calculated in previous step exceeds the maximum cap.

97. When comparing the structure of fining regimes substantial worldwide differences still exist. These include:

- Some jurisdictions do not impose fines for abuses of dominant position even if they impose fines for cartel offences.
- Some jurisdictions have no policy to impose individual fines but do have one for corporate fines.
- Some jurisdictions (including Germany, Korea, The Netherlands and the US) fully consider the length of the period of infringement in calculating the base fine because the affected commerce is taken as the turnover of the company over the period of the infringement. Meanwhile, other jurisdictions (such as the UK and EU) apply the length of the period of infringement to the base fine in approximated way, with the values of sales multiplied by the number of years of infringement.
- Some jurisdictions have an upper limit on the base fine as a proportion of relevant turnover without a detailed classification of infringements according to their gravity and types, such as up to 10% (UK), up to 30% (EU, Denmark, The Netherlands), at least 15% (US) so that the competition authority has considerable discretion to apply a proportion of relevant turnover on a case-by-case basis. Other jurisdictions such as Spain and Korea classify offences in three categories (minor, serious, or very serious). Japan determines a fine percentage according to the size of the enterprise and the type of business.
- Some jurisdictions have a detailed standard on how rates of addition or reduction will apply to each aggravating or mitigating factor and also, on how long time lapses between the previous infringement and the infringement in question will apply to reflect the frequency of violation (recidivism). Other jurisdictions have no maximum rate of addition or reduction on each aggravating or mitigating circumstance but simply list all factors to be considered as aggravating or mitigating circumstances.
- Some jurisdictions take into account the ability to pay of an implicated undertaking in the last step of setting fines to ensure continued financial viability of the undertaking.

98. This paper has shown how criteria differ between jurisdictions over setting fines for competition law offences. Fining regimes in most jurisdictions are relatively transparent and predictable, yielding fines that are in some sense proportionate to the gravity of the infringement. The extent of discretion given to the competition law enforcers in determining final fines varies. Increasingly, fines are viewed through a lens of deterrence, which has resulted in a realisation that cartel fining levels of 25 years ago were insufficient to achieve the objective of deterrence. This focus on deterrence should not hide the fact that another goal of fining regimes is frequently punishment. There is a broad agreement that for cartel offences, due to their egregious nature, penalties should generally exceed expected gains, though there are still varying approaches to determining the appropriate penalty. There is not complete agreement about the appropriate nature of fines in abuse of dominance cases. In the future, it would be valuable to compare impacts of various differences between fining regimes on company behaviour and deterrence of competition law violations.

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