

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Fining Methodologies for Competition Law Infringements - Call for contributions

24-25 September 2019, San Pedro Sula, Honduras

This document is circulated in preparation of the discussion under Session I of the Latin American and Caribbean Forum that will take place on 24-25 September 2019 in San Pedro Sula, Honduras. Delegates are requested to submit their written contributions to the Secretariat by 2 September 2019 at the latest. Advance notice of your intention to submit contributions before or by 16 August 2019 would be useful.

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*Session I: Fining Methodologies for Competition Law
Infringements
Call for contributions*

Introduction

1. This request for contributions is circulated in preparation for the discussion to be held at the 2019 Latin American and Caribbean competition Forum (LACCF) during Session I, which deals with the topic “Fining Methodologies for Competition Law Infringements”.
2. You are invited to prepare and submit a written contribution for the session. In this call for contributions, we aim to identify some topics that you may wish to address in your written and oral contributions. Please note that this is neither prescriptive nor exhaustive, and you are free to raise other relevant issues that reflect your experiences.
3. To assist the OECD Secretariat in planning the session, please inform us by **Friday 16 August 2019** you intend to submit a contribution.
4. The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin [angelique.servin@oecd.org] and copied to Lynn Robertson [lynn.robertson@oecd.org] by **Monday 2 September 2019** at the latest. Country contributions will be circulated to participants through the LACCF website oe.cd/lacfcf and on the LACCF ONE Community <https://community.oecd.org/community/lacfcf/overview>. Furthermore, if you would like to circulate other relevant material please submit a copy to the Secretariat before **Monday 2 September 2019**.
5. This session is scheduled to last three hours. The background note by the Secretariat accompanies this Call and will be used as a starting point for discussions in the session. The Annex identifies a number of relevant topics for discussion and suggested reading material. The list can inform the preparation of contributions, but should not limit the debate nor the contributions of the issues discussed in this letter.

Annex

1. Background

6. Across Latin America and the Caribbean, competition law offenders are often subject to fines. These fines can play a critical role in deterring anti-competitive conduct such as collusion and abuse of dominance by making unlawful conduct less profitable. From the perspective of a pure profit-maximising company, it will not violate the law if the expected monetary sanctions are greater than the expected illegal gain. Even when other penalties are present, fines are an important element of the competition authority's toolkit. For example, the existence of substantial fines can, in the case of cartels, contribute to the instability of the cartel conduct by increasing the likelihood of leniency applications.

7. Over the last few decades, competition authorities worldwide have continued to aggressively investigate and prosecute anticompetitive conduct. The size of fines for competition law infringements has substantially increased in recent years. Regarding Latin America specifically, a trend towards increased cartel enforcement has also taken hold where, for example, fines for antitrust violations in Colombia have jumped 7,000 % since the enactment of new competition laws in 2009. Chile's Parliament and Senate have approved legislation criminalising cartels and removing the USD 22.5 million cap on fines imposed on companies for cartel participation. The bill remains subject to approval by Chile's President and constitutional court, but is expected to pass. In 2016, Brazil's Conselho Administrativo de Defesa Econômica (CADE) levied fines of USD 89 million against six orange juice producers and their trade association. In Mexico, the Comisión Federal de Competencia Económica (COFECE), increased cartel enforcement activity in 2017, imposing USD 90 million in fines compared to just USD 10.6 million in 2016.¹

8. Overall, total cartel fines moved from EUR 166 million in 2015 to EUR 205 million in 2017 (Chile, Colombia, Mexico, Peru).²

9. Identifying appropriate sanctions for competition law infringements is a challenge. There is an ongoing debate about appropriate level of fines necessary in order to achieve objectives such as deterrence. Although the design of optimal penalties regimes depends on the economic and political circumstances in a jurisdiction and the institutional capabilities of the authorities in charge of enforcing competition law, the overview and comparison of the fining methodologies in different jurisdictions may provide useful insights in setting antitrust fines to us.

10. Fining regimes in most jurisdictions are relatively transparent and predictable, yielding fines that are in some sense proportionate to the gravity of the infringement. Most jurisdictions have made efforts to reduce the extent of discretion given to the competition law enforcers in determining fines.

¹ <https://www.arnoldporter.com/en/perspectives/publications/2017/12/cartel-regulation-2018-introduction>

² OECD Compstats internal database.

11. Behind these efforts, a number of competition authorities have endeavoured to adopt or revise their methods of setting fines such as legislation and guidelines. It is widely accepted that adoption and publication of a method of setting fines such as guidelines in antitrust cases brings positive effects in several ways. The guidelines deter undertakings from anticompetitive conduct if they realise that the expected costs of engaging in the conduct exceed the potential gains. Guidelines on fines enable competition authorities to implement a consistent fining policy thereby avoiding pressure for unfair special treatment in certain individual cases. They make it easier for the addressees of fines to understand why the fine was set at the level it was, thus possibly reducing the number of appeals and promoting compliance with competition law.

12. Finally, while fines can be an effective deterrent mechanism, disproportionate fines may lead to over or under enforcement of competition law. Excessively high fines may affect shareholders, bondholders and other creditors of the infringing undertaking and put the firm in financial difficulties beyond or even out of the market. Excessively low fines will not sufficiently deter future anticompetitive behaviour and will affect compliance with competition law. Furthermore, consumers may be harmed if the amount of the fine is passed on to them in the form of higher prices

13. Since 2013, when the LACCF last examined the issue of fining methodologies regarding corporate fines, much has changed, not only in the region but also internationally, in fining methodologies, guidelines and legislation. This session will include discussion on 1) current fining methodologies in a variety of jurisdictions, and note both similarities and differences in the way fines are calculated and applied; and 2) will explore challenges faced by authorities regarding fines and if fines are an effective mechanism to prevent and deter anti-competitive conducts.

14. The quality and utility of this session will be strengthened by written contributions from participants. To this purpose, we suggest a number of questions and topics below. There is no need to answer each question in your contribution. We encourage you to focus on the topics and questions in your contribution that represent in particular the challenges that you are facing, whether you have been able to address them and consider if fines have been effective in your jurisdictions. Lessons learned to support the peer learning are an important characteristic of the LACCF. It will be especially helpful if you include a discussion of relevant enforcement and advocacy cases from your jurisdictions. Your written contributions complements the background note prepared by the Secretariat.

2. Some Suggested Issues and Questions for Consideration in Contributions

2.1. *Establishing the Fining Methodology*

- What kinds of laws or regulations provide criteria for determining fines? Who (e.g. the competition agency or congress) has the authority to make or amend those laws or regulations?
- If you have guideline(s) on calculation of fines or detailed rules for calculating fines, when have you introduced the guidelines (or rules) and what aspects do the guidelines (or rules) include? (e.g. how to set the base fine, mitigating and aggravating circumstances)
- Have you changed your fining methodologies recently? If yes, what was the purposes of the change and what changes have been made for those purposes? Have those changes been effective?

2.2. Objectives of Fines

- How do different objectives of fines (deterrence, punishment, disgorgement) influence the amount of the fine? Does the appropriate level change depending upon the goal of the fine?
- Have fines been effective in achieving their objectives, for example a decline in cartel activity or a decrease in recidivism? Do you undertake any specific actions on a regular basis to monitor the effectiveness of fines? How do you ensure that the fines are effective?
- Do you think the intensity of enforcement of the competition authority is linked to the level of fines?

2.3. Calculation of Base Fine

- What factors do you consider when you set the base fine? For the determination of the initial measure, what do you use as the proxies for the illegal gains of a competition law infringement? (e.g. relevant turnover or total/global turnover) How do you take the duration of the infringement into account?
- How do you take the size of the addressee of fines into account when you determine the base fine? In other words, do you give special consideration for relatively small companies in determining the base fine?
- Once the initial measure of fine is determined, as you may know well, base fine is calculated as a certain percentage of the initial measure. What is the maximum percentage rate applicable to the initial measure in your jurisdiction? Is the proportionality principle explicitly provided under laws, regulations or guidelines for determining fines? How do you respect the proportionality principle when calculation the amount of the fine?

2.4. Adjustment of Base Fine

- What kind of mitigating and aggravating circumstances are in laws, regulations or the guidelines in your jurisdictions? Which circumstances have you most frequently applied in actual cases?
- If you consider recidivism for imposing fines as one of the aggravating circumstances, have you noticed whether repeated offenders have become more or less frequent over time? What are the reasons in your view for any increase or decrease?
- There is an argument that compliance programmes (CPs) are not “effective” if a company then participated in an illegal conduct, and thus any mitigation should not be granted. If you consider CPs for imposing fines (e.g. a mitigating circumstance for calculating fines), what are the grounds for adopting CPs as a circumstance? How do you distinguish genuine programmes from sham ones which are only seeking reduction of fines?

2.5. Additional Adjustments

- If you set statutory maximum limit (ceiling) on the amount of fines for competition law infringements, what is the practical methodologies to set the maximum limit? Does the ceiling impose constraints on the fining policy?
- Has the ceiling in your country been modified recently and if so what were the arguments to do so? Has this change affected the effectiveness of the fines?

- Do you consider a firm's 'inability to pay' when imposing or collecting the fine? If so, please specify the exact circumstances under which this criterion could be applied and the method of application.
- In your jurisdiction, is there a leniency programme? If so, how does a leniency programme interact with fines? Have you observed heavier sanction such as higher fines compared to illegal gains encourage more applications for leniency?
- What are the pros and cons of automatic fines, or minimum levels that do not take into consideration circumstances that may augment or reduce the fine?
- How do you balance the dual constraints of effective fines and proportional fines? What considerations enter into the analysis?

2.6. Practical Issues

- In your jurisdiction, may parent companies be held jointly liable for antitrust violations committed by their subsidiaries (i.e. parental liability) in certain circumstances? If so, how does parental liability have a significant impact on the way fines are calculated?
- Does your law provide for an appeal against a decision that levies fines on competition law infringers? How often does judicial scrutiny modify the amount of fines? What kind of reasons does judicial scrutiny provide to alter the amount of fines imposed by competition authorities?
- In your jurisdictions, who is in charge of collecting fines imposed on competition law infringers? (e.g. competition authority or finance ministry) Is there any special tool to collect the fine effectively? How do you encourage or force the companies to comply with payment orders?
- Do you have settlement or plea agreement procedures? How do you design settlement procedures to enhance procedural efficiencies without weakening the deterrence effect of the fines?
- In order to achieve an "optimal" level of corporate fines, in your jurisdiction, what aspects of criteria for determining fines need to be changed?
- If possible, can you provide a comparison/analysis of competition fines relative to fines by other administrative bodies, for example, amount of fines, procedures.
- What issues do you face in the collection of fines? Do these issues undermine the effectiveness of fines and their use?

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