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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I:  
Financing methodologies for competition law infringements**

**- Contribution from the United States -**

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The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 24-25 September 2019 in Honduras.

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## *Session I: Fining Methodologies for Competition Law Infringements*

### **– Contribution from the United States –**

#### **1. Introduction**

1. This paper responds to a request for contributions on the topic of “Fining Methodologies for Competition Law Infringements.”<sup>1</sup> It provides an overview of the methodology used to determine appropriate sanctions in criminal cartel cases. It then discusses special issues relating to fines, including: (1) fines as applied to recidivist offenders; (2) fines and leniency applicants; (3) the impact of compliance programs on fines; and (4) inability to pay claims and fine reductions.

2. Companies may be civilly fined for violating the pre-merger notification statute or violating final orders issued by the Federal Trade Commission, but they are not fined when found liable in civil antitrust cases for engaging in anticompetitive conduct. Companies also may be subject to civil or criminal contempt fines for violating antitrust decrees issued in cases brought by the U.S. Department of Justice. In addition, companies may be subject to monetary remedies, such as disgorgement or restitution. This paper will focus on fining methodologies in criminal cartel cases, and will not discuss civil penalties, monetary remedies in civil cases, and contempt fines.

3. In U.S. federal competition law enforcement, sanctions are used almost exclusively against hard-core cartel activity, which is a crime. Companies are fined when criminally convicted of price fixing, bid rigging, customer allocation, or market allocation. In the United States, participation in a cartel is viewed as a serious property crime, akin to burglary or larceny, and it is treated accordingly. Like other serious crimes, cartels are never socially desirable, and U.S. law therefore seeks to deter cartels completely rather than impose a modest tax on the conduct. Corporations that participate in cartels are subject both to criminal fines and civil actions for damages, and culpable individuals are subject to criminal prosecution and imprisonment.

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<sup>1</sup> The information for this paper is drawn from previously published papers submitted by the United States to OECD. For further reading, see *Cartels: Estimation of Harm in Public Enforcement Actions* (2017), available at [https://one.oecd.org/document/DAF/COMP/LACF\(2017\)23/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2017)23/en/pdf); *Sanctions in Cartel Cases* (2016), available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)72/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)72/en/pdf); and *Criteria for Setting Fines for Competition Law Infringements* (2013), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2013\)23&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)23&docLanguage=En).

## 2. U.S. Methodology for Determining Appropriate Sanctions in Criminal Cartel Cases

4. Since 1987 both individual and corporate sanctions for cartel activity have been governed by guidelines promulgated by the United States Sentencing Commission (Guidelines). The advisory Guidelines, available at <http://www.ussc.gov/guidelines>, detail calculations yielding a Sentencing Range for each convicted offender. Courts impose sentences after considering the prosecutor's recommendation and arguments from the offender.

5. A court's imposition of a sentence under U.S. law is governed by 18 U.S.C. § 3553, which requires it to "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes. These purposes include the need to "reflect the seriousness of the offense . . . and to provide just punishment for the offense" as well as the need to "afford adequate deterrence." A court also must consider the Sentencing Range resulting from the calculation detailed in the Guidelines.

6. Criminal sentences under U.S. law are constrained by statutory maximums. The statute that makes cartel activity a crime, 15 U.S.C. § 1, specifies maximum fines of \$100 million for corporations. In addition, the alternative fine statute, 18 U.S.C. § 3571, provides that an offender may be fined the greatest of: (1) the amount in the law setting forth the offense; (2) twice the gross gain from the offense; or (3) twice the gross loss to victims of the offense. In many significant U.S. cartel prosecutions, corporate fines have exceeded the \$100 statutory maximum. Fines as high as \$925 million have been imposed pursuant to corporate guilty pleas.<sup>2</sup>

7. In formulating the Guidelines, the United States Sentencing Commission believed that fines for economic crimes should be closely related to the resulting gain to the perpetrators or the resulting loss to the victims. However, the Commission also appreciated that determining gain or loss can be enormously difficult, and that requiring this evidence could seriously undermine the efficiency of the legal system. Requiring calculations of gain or loss may provide an opportunity for those engaging in cartel activity to escape serious sanctions simply as a consequence of difficulties in the gain/loss estimation, and the deterrent effect of sanctions could be greatly undermined as a result.

8. Calculating gain/loss often is extremely difficult because it entails the complicated exercise of determining the "but for" world—that is, what would prices have been absent the conspiracy. It is frequently possible to observe prices before and after the conspiracy, but enforcers often lack precise information about when a conspiracy began or ended. Moreover, while economists may try to control for changes in costs and demand over time, this is no easy task, and opposing experts typically end up far apart in estimating the price effects of cartels.

9. Instead of requiring complex estimations of gain/loss, corporate fines for cartel offenses are keyed to a proxy for offense severity that can be used with minimal difficulty. The proxy adopted by the U.S. Sentencing Guidelines is the volume of commerce for goods or services affected by the cartel during its period of operation. As a special instruction for corporations engaged in cartel offenses, Sentencing Guideline 2R1.1(d)(1) provides that the Base Fine to be used as the proxy for loss is "20 percent of the affected volume of commerce."

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<sup>2</sup> Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More (June 2019), available at <https://www.justice.gov/atr/page/file/991706/download>.

10. The Guidelines specify that the “volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation.” Business records obtained by the Antitrust Division from a cartel participant and its customers help to document the relevant volume of commerce.

11. The Guidelines provide that the Base Fine is converted into the Sentencing Range through the application of the Minimum and Maximum Multipliers. The Guidelines set the Multipliers on the basis of the offender’s Culpability Score, which is assigned on the basis of several factors, including the company’s size, the involvement of its high-level officials, and its cooperation and acceptance of responsibility.

## **2.1. Recidivism**

12. Under the Guidelines, recidivism increases a corporation’s Culpability Score, and the United States likely would seek a fine near the top of the Sentencing Range in a case of recidivism. But instances of cartel recidivism are rare in the United States. An examination of the issue by the Antitrust Division in 2011 found not a single instance of recidivism since the first non-U.S. citizen was sentenced to imprisonment for a cartel offense in 1999.<sup>3</sup> This study showed that while the Antitrust Division had successively prosecuted companies for multiple cartel offenses, all such instances were found to have involved cartel activity that began before the company was initially convicted for activity related to a separate cartel.

## **2.2. Leniency and Plea Agreements**

13. The Antitrust Division’s Corporate Leniency Program offers a company and its employees the opportunity to avoid criminal convictions, fines, and prison terms provided the company is the first to report a criminal antitrust violation and provided it is the first to qualify for leniency, including by providing full, continuing, and complete cooperation and meeting other conditions. A company losing the race to be the first to qualify cannot escape a fine, but it can reduce its fine by pleading guilty to criminal charges and cooperating with the Division’s investigation. The vast majority of corporate convictions for cartel offenses in the United States result from entry of guilty pleas, and many guilty pleas are accompanied by sentencing recommendations that include a fine below the Sentencing Range.

## **2.3. Compliance Programs**

14. An effective compliance program can potentially lower a corporation’s Culpability Score and ultimately the company’s criminal fine under the U.S. Sentencing Guidelines. The existence and effectiveness of a compliance program may also be relevant to determining whether a company should be sentenced to probation. The Antitrust Division evaluates the effectiveness of compliance programs on a case-by-case basis, depending on the company’s specific compliance program and its implementation and operation. Guideline 8C2.5(f)(3)(B) contains a rebuttable presumption that a corporation did not have an effective compliance program if an individual with substantial authority within the company “participated in, condoned, or was willfully ignorant of, the offense.” In addition to the Guidelines, the Antitrust Division has advocated in certain cases for a fine reduction

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<sup>3</sup> Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, Recidivism Eliminated: Cartel Enforcement in the United States Since 1999, *CPI Antitrust Chronicle*, Oct. 2011 (1).

under 18 U.S.C. § 3572(a)(8) to recognize extraordinary “forward looking” or “prospective” compliance efforts by a company to change its culture and prioritize good corporate citizenship after it learns of the investigation.

15. In past years, the Antitrust Division typically has not credited compliance efforts at the charging stage. In July 2019, the Antitrust Division announced a new policy for incentivizing antitrust compliance by considering compliance at the charging stage in criminal antitrust investigations.<sup>4</sup> The Antitrust Division now considers a number of factors when evaluating whether to credit compliance programs at the charging stage, including whether the corporation (1) implemented a robust and effective compliance program, and when wrongdoing was uncovered, (2) promptly self-reported, (3) cooperated in the Antitrust Division’s investigation, and (4) took remedial action. The Antitrust Division issued public guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations.<sup>5</sup> The Antitrust Division’s analysis is not formulaic, and it recognizes that not all factors will be relevant in every case, and that a company’s size may affect the breadth and resources allocated to its compliance program.

#### 2.4. Inability to Pay Claims

16. The Guidelines provide for the reduction of fines on the basis of inability to pay but “not more than necessary to avoid substantially jeopardizing the continued viability” of the company. When a company asserts limited ability to pay in plea discussions, it must open its financial books to the Antitrust Division. When the Division determines an appropriate fine for a company, it typically looks at what a company can pay immediately. If it cannot pay the appropriate fine immediately, then it considers an installment schedule with interest. If it determines that the company cannot pay the determined fine over time, then it considers whether the company could make the installment payments without interest. If the company is still not capable of paying the fine over the installment period, even without interest, then the Division may recommend a reduced fine to the court.

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<sup>4</sup> Makan Delrahim, Winds of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-1-0>.

<sup>5</sup> U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), *available at* <https://www.justice.gov/atr/page/file/1182001/download>.