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DAF/COMP/GF(2016)2

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

11-Jul-2016

English - Or. English

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

Cancels & replaces the same document of 05 July 2016

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

-- Session IV --

Call for country contributions

This document is a call for country contributions for Session IV of the Global Forum on Competition to be held on 1-2 December 2016. GFC participants are invited to submit their contributions by 3 October 2016 at the latest.

JT03399222

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TO ALL GLOBAL FORUM PARTICIPANTS

RE: Sanctions in Antitrust Cases

15th Global Forum on Competition (1st and 2nd December 2016)

Dear GFC participant,

The OECD Global Forum on Competition which takes place on 1-2 December 2016 will hold a Roundtable on Sanctions in Antitrust Cases on the second day of the meeting, Friday 2 December 2016. The Secretariat would like to invite you to make a written contribution to this session. Please submit your contribution by **Monday 3 October 2016** at the latest.

Competition law offenders are often subject to fines (civil, administrative or criminal). Fines impose a cost on those companies or individuals undertaking illegal anticompetitive conduct. Breaking competition laws is profitable if it goes undetected. Fines play a role in deterrence by making unlawful conduct less profitable. From the perspective of the company, it will not violate the law if the expected monetary sanctions are greater than the expected illegal gain. It may have a financial incentive to violate the law if the expected illegal gain is greater than the expected monetary sanctions. Also, fines can contribute to the goal of compensation of broad victim classes indirectly by reducing tax. In terms of fines, this goal is achieved even though indirectly at best because the proceeds from them usually go into a public treasury.

Competition authorities worldwide have continued to aggressively investigate and prosecute anticompetitive conduct over the last few decades. As a result, the amount of fines imposed on anticompetitive conduct has dramatically increased in recent years. The level of fines imposed on international cartels over the period 1990-2013 amounts to at least USD 53 billion. Some young competition authorities have made rapid progress in detecting and imposing sanctions on anticompetitive behaviour. In 2012, the Competition Commission of India (CCI) has fined 11 cement manufacturers and the cement manufacturers association approximately USD 1.1 billion, which marks the largest fine ever imposed on cartels by the CCI. In 2014, Brazilian antitrust agency, Brazil's Administrative Council of Economic Defense (CADE) imposed a fine of approximately USD 1.4 billion against the members of a long-running cement and concrete cartel.

Behind this trend, a number of competition authorities have put forth a great deal of effort to adopt or revise their legislation or guidelines on fines. A method of setting fines such as guidelines in antitrust cases brings positive effects in several ways. The principle of "*nullum crimen et nulla poena sine lege*" tells us there must be a legal provision establishing and imposing a specific punishment on the offenders of such conduct if the conduct is decided as a crime or offence. In antitrust cases, if undertakings could predict in advance the amount of the fine which would be imposed on it for any particular antitrust conduct, it could take a calculated financial decision about whether or not to join or form a cartel. Therefore, undertakings would be deterred from committing anticompetitive conduct if they realise that the expected costs of engaging the conduct exceed the potential gain. In addition, the guidelines on fines enable competition authorities to implement a consistent fining policy thereby avoiding pressure for unfair special treatment in certain individual cases. Further, 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.

Although competition authorities imposed substantial fines for competition law violations based on guidelines on fines, some commentators still argue that higher fines are necessary to pursue deterrence even in the jurisdictions that have already had years of rapidly increasing fines. For example, Connor (2013) found that the severity of the fines relating to affected sales under the 2006 EU guidelines is about double that of the fines decided under the previous 1998 Guidelines. However he still emphasised that the new fine guidelines are no more severe than contemporaneous U.S. DOJ criminal fines. There is another advantage for imposing higher fines. There appears to be widespread agreement that high fines compared to illegal gains are one of essential prerequisites to adopting an effective leniency program. Without high fines and vigorous enforcement by competition authorities, there is little incentive for cartelists to report their breach of competition laws.

There are other commentators who contend that in spite of the large fines, cartels remain a substantial problem and recidivism among cartelists is still frequent. In addition, there are limits to what a corporation can pay. Thus, imposition and collection of a very heavy fine might lead the company into bankruptcy. This could eliminate or weaken competition in markets. Consequently consumers might pay higher prices, buy goods of poorer quality, or benefit from less innovation. Moreover, it is argued that extremely heavy fines combined with a low probability of detection could raise questions about the proportionality of the fines as punishment relative to the harm caused by the violation or the behaviour. Despite mathematically optimal level of fines, if they become so high that the public including perpetrators consider them as vindictive, they may undermine respect for antitrust law and thus do more harm than good.

Several competition authorities consider that fines on corporations may be insufficient to deter infringement and therefore impose other forms of sanction. These may take different forms: disqualification orders on directors of undertakings, personal fines, bans on bidding for public contracts and imprisonment. For example, individuals that have participated in bid rigging in Germany can be sent to prison, while they may be subject to fines up to EUR 1 million for other anticompetitive conduct. In the UK, individuals who have been involved in price fixing face disqualification, five years imprisonment and fines. However, some can raise questions for effectiveness of these other sanctions. Fines on individuals, for instance, are not effective because it is hard for competition authorities to prohibit corporations from reimbursing the individuals for fines on individuals.

Private damages recovered through private suits play a role of monetary sanctions against competition law offenders. It is because private actions seeking damages lead to deterrence of anticompetitive conducts by levying monetary sanctions in the form of damages. Private enforcement has increased in many jurisdictions because they recognise private enforcement as an important axis of competition law regime. Private enforcement has long been a central part of US antitrust law experience, while it has played minor roles or none at all in other jurisdictions. However, private enforcement is becoming increasingly commonplace across Europe and is growing rapidly in Asia.

Against this backdrop, there is indeed an increasing need around the world to discuss antitrust sanctions adopted by different jurisdictions in order to consider the deterrent power of current penalties regimes. Participating jurisdictions are therefore invited to consider the questions below, taking account of the issues that are outlined, and bearing in mind that both the issues and the questions are intended to be illustrative rather than exhaustive. You should feel free to discuss other topics that are not mentioned here. Wherever possible, please present the points you make by referring to specific cases.

The first part of the discussion will be dedicated to a plenary session on how sanctions including fines are applied in various jurisdictions. In the latter half, delegates will discuss in smaller break-out sessions their enforcement experiences. The Secretariat will allocate delegations in the break-out sessions according to the topics discussed in their contribution. The roundtable will terminate with a wrap-up plenary session, in which the outcome of the parallel sessions will be summarised and discussed.

Please advise the Secretariat by **25 July 2016** if you will be making a written contribution. As noted above, **written contributions are due by 3 October 2016**. This deadline applies to both members and non-members. It is important to meet the deadline in order to allow the Secretariat enough time to best organise the session. Contributions received after this deadline may not be taken into account in the preparation of the roundtable discussion. In addition, late contributions may not be uploaded to the website www.oecd.org/competition/globalforum in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Ms. Angelique Servin (Email: Angelique.Servin@oecd.org). All substantive queries relating to this roundtable should be sent to Mr. Semin Park (Email: Semin.Park@oecd.org) and Ms. Lynn Robertson (Email: Lynn.Robertson@oecd.org).

We would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. We invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce one, but given the time constraints you will not be in a position to check it before distribution on OLIS.

SUGGESTED QUESTIONS AND POINTS FOR CONSIDERATION

1. Determination of the basic fine

- If you have imposed fines in antitrust cases, please describe type and nature of financial sanctions in antitrust cases (civil, administrative, criminal, combined): On whom (e.g. companies, individuals) can sanctions be imposed?
- What kinds of laws or regulations provide criteria for determining fines? 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)
- 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. Adjustment of the basic fine

- If you have mitigating and aggravating circumstances in laws, regulations or the guidelines, which circumstances are frequently applied in antitrust cases?
- If you consider recidivism for imposing fines (e.g. an aggravating circumstance for calculating fines), 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?
- Should competition authorities treat the fact that competition law offenders have antitrust compliance programmes (CPs) as an aggravating or mitigating circumstance? 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?
- In your jurisdiction, may a parent company be held jointly and severally liable for antitrust violations committed by its subsidiary (i.e. parental liability) in certain circumstances? If so, how does parental liability have a significant impact on the way fines are calculated?
- Do you consider ‘inability to pay’ in imposing or collecting the fine? If so, please specify the exact circumstances under which this criterion could be applied and the method of application.

3. Practical issues in determining the amount of fines

- Does your law provide for an appeal against a decision that levies fines on competition law infringers? Does an appeal to a decision imposing a sanction / fine bring an automatic suspensory effect on the sanction / fine? If it is necessary to apply for suspension, what are the criteria?
- 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 cases, have you faced situation where you imposed fines on companies but failed to collect the fines? If so, what are the reasons? How do you encourage or force the companies to comply with payment orders?
- Do you have any evidence on whether fine levels are sufficient to deter illegal activities?
- In order to achieve an "optimal" level of corporate fines, in your jurisdiction, what aspects of criteria for determining fines need to be changed?
- 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?

4. Alternatives to fines

- What sanctions in addition to those fines mentioned above can be imposed on individuals who are involved in anticompetitive conduct?
- If your jurisdictions provide criminal sanctions against individuals including imprisonment, how many cases did you handle for last few years?
- Has private enforcement, especially private damages, increased in your jurisdiction? If so, how do private damages interact with sanctions?
- Do you use or plan to use disqualification orders on individuals for sanctions? If so, what are the strengths and weaknesses for the disqualification orders?
- How effective are fines imposed on individuals if there is no prohibition against reimbursing individuals? On the other hand, can prohibitions against reimbursement be effective?
- If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions (e.g. bans on bidding for public contracts), what are the result for those differences? Have you found the differences effective?
- What other sanctions have been used and found successful in your jurisdiction?
- What are the experiences concerning the effectiveness of various sanctions in order to achieve deterrence and punishment? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? Do you have any suggestions on ways to improve the effectiveness of combinations of sanctions?

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