

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

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Paper by Hwang Lee

-- Session IV --

1-2 December 2016

This paper by Hwang Lee (Professor, Korea University School of Law) was submitted as background material for Session IV at the 15th Global Forum on Competition on 1-2 December 2016.

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JT03405930

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ANTITRUST FINES IN THE ERA OF GLOBALIZATION

-- Paper by Hwang LEE * --

Summary

For antitrust fines to be effective in the era of globalization, discussions should involve factors both within and outside fining formulas. Antitrust fines need continuous justification to protect itself against anti-enforcement challenges. While antitrust fines are widely utilized against cartels, the details of the fining system are diverse. For example, violations subject to fines may include abuse of dominance and/or unfair trade practices, as well as cartels in each jurisdiction. Magnitude and assessment methods of fines are not identical across the globe. Any flaws may hamper both deterrence and efficient collaboration among competition authorities for optimal deterrence and require careful coordination. This article raises practical issues to be shared by the antitrust communities based on the difficulties identified in the Korean experience.

Detailed fining guidelines are not always beneficial for achieving deterrence in the context of antitrust fines. Economic theories provide a sound framework for evaluating proper fining methodologies but does not compel specific sets of factors that should be followed by competition authorities. Granting competition authorities a certain level of discretion is necessary, and global discussions for a common framework should focus on attaining a balanced mix of discretion and specificity while considering the diverse institutional settings faced by competition authorities.

Judicial review of discretionary actions by competition authorities plays an important role in establishing the legitimacy of antitrust fines by ensuring fines have been imposed within the legal boundaries of proportionality. Various types of sanctions including fines should be assessed as a whole. A comprehensive approach is meaningful not only for the purpose of judicial review but also for optimal deterrence because aggregate sanctions not reaching an optimal level will be ineffective.

Most jurisdictions count antitrust fines in government revenue. However, to maintain the integrity of antitrust fines, simply diverting antitrust fines to the government budget is not sufficient. Systems should be implemented to have the fines transferred to or used for the class who bear some relationship to the victims. Examples may include the consumer care fund being discussed in Korea or the Crimes Victims Fund as seen in the US. Also, antitrust fines should not undermine private recovery which play an important role in deterrence.

In designing a framework for effective antitrust fines, it is important to address the tax deductibility of antitrust sanctions and the deterrence effect by foreign competition authorities. Although these elements were previously considered an exogenous factor in national competition law enforcement, they should now be seriously considered in the context of globalization.

International coordination among competition authorities is essential not only to close loopholes in addressing international cartels but also to deal with concerns of overlapping enforcement. The issue of coordinating antitrust fines among authorities needs to be considered and active cooperation based upon positive comity is necessary.

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1. Introduction

1. Globalization has become a wide spread phenomenon not only in an economic sense but also for competition law enforcement. Today more than one hundred jurisdictions enforce competition law and most of them have provisions that allow the imposition of significant fines (especially for serious cases like cartels). This raises the issue of global coordination of antitrust fines because the effects of international violations and sanctions tend to spill over national borders. Also, as more competition authorities are willing and prepared to investigate and fine serious violations, an issue lies in the potential that the cumulative sum of fines for a single violation might exceed the optimal level of fines. This leads to other important issues such as inconsistency of methods to assess fines and different judicial review systems among jurisdictions. Conversely, as traditionally discussed, the importance to prevent any loopholes among jurisdictions (which an undertaking could take advantage of to avoid or reduce expected sanctions by way of forum shopping) cannot be overemphasized when discussing the topic of global coordination. While discussions regarding antitrust fines usually concentrate on hardcore cartels, many authorities tend to impose fines on other types of violations, *e.g.* high-profile abuse of market dominance cases or even smaller cases of unfair trade practices.

2. A constant issue regarding antitrust sanctions is how to enhance its deterrence effect. For this goal to be accomplished, the system of fines needs to gain support from the public and businesses. Since victims and other interested parties of antitrust violations are the most important group in this respect, it is critical that they benefit from competition law enforcement. However, in many jurisdictions, victims of antitrust violations are not sufficiently compensated. This calls for greater awareness of this issue from authorities and experts to think outside of the box of the antitrust fining system and fining formula.

3. Because not all the violations that affect multiple jurisdictions are properly pursued and fined, problems that arise from asymmetric competition law enforcement are not noticeable as of today. However, as more young competition authorities in Asia, Africa, East Europe, and Latin America (the “ROW”, the rest of the world as compared to the US or Western Europe) enforce competition laws more vigorously than ever, the potential for such problems continuously grow. In fact, one expert observed that competition authorities in ROW jurisdictions have been successful in enforcing competition laws and noted that this has caused rapid increase of the fines levied by them.¹

4. This article briefly addresses the issues above from the perspective of globalization.

2. Specifying Fining Guidelines and Institutional Development among Global Jurisdictions

2.1. *Rationality Hypothesis and Discretion of Competition Authorities*

5. One of the most important goals of antitrust fines is deterrence² and hence, an appropriate system to calculate the proper level of fines is necessary. Theoretically, antitrust fines deter market players from committing violations by raising the expected cost to become higher than expected gains, assuming that they are rational and their primary goal of business is making profits. From this traditional economic perspective, the optimal level of fines depends on the probabilities of detection and externalities of the

¹ See John M. Connor, *The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America*, (Jan. 6, 2016), <https://ssrn.com/abstract=2711972>.

² Deterrence does not necessarily suggest an approach inconsistent with the “internalization approach” which argues that the optimal fine should be set to match the net harm to antitrust victims. Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 *World Competition* 183, 191 (2006).

violations. As such, strategies to improve deterrence are by increasing the level of fines and/or raising the probability of detection.³

6. Despite significant contributions, several drawbacks remain in this approach resulting in under-deterrence. The exercise of discretion by the authorities is inevitable and essential to guarantee optimal deterrence. First, econometric methods used to assess the amount of fines tend to produce high figures in the real world. These figures frequently exceed the undertaking's ability to pay and may ultimately weaken competition in the relevant market. Thus, many experts suggest certain types of adjustments to reduce such amounts. The justification for and details of such reductions, however, are not easy to reconcile with the concept of deterrence. Second, difficulties in obtaining the necessary evidence for such econometric assessments (and other complexities) make the calculations extremely difficult. Third and most important, there exist the problem of irrational undertakings. As stated above, classic economic theories presuppose rationality. Increasing or decreasing antitrust fines based on the optimal deterrence theory might not work as intended if undertakings fail to act rationally according to theory. Such problems arise when agency problems between manager and stock holders are involved, or when the goals of undertakings deviate from the usual goal of making profits to goals such as maximizing revenues or the manager's reputation, pursuing long term profits by sacrificing short term profits, avoiding tax, etc.⁴ Even when such an assumption of rationality is true, a potential violator may act with various kinds of bias. One may not be free from the bias of availability (when one does not consider all information to make rational decisions) or the bias of overconfidence (that makes one underestimate the probability of detection).⁵ If one of these factors proves dominant in decision-making, an undertaking may decide to willingly violate competition regulations at the risk of potential fines.

7. The factors above imply that relying solely on pecuniary remedies may not be the right answer and that further inquiry is required to enhance deterrence. In this regard, first, we may check the facts to determine whether rationality dominates. If not, pecuniary fines will not be sufficient and a combination of various sanctions (in addition to fines) may need to be considered. Second, we need to find a balance between the specificity of detailed guidelines and the discretion of enforcers. While the former can help deterrence by providing certainty for market expectations, a certain level of discretion for enforcers is necessary since there may be factors that are not contemplated by any guideline, however detailed (even at the cost of arbitrary enforcement). Of course, any arbitrary fines should be corrected through judicial review.

2.2. *Difficulties of Conceptualizing the Proper Fining Methodologies*

8. Today fines are considered one of the most effective tools and favored by most competition authorities. As the volume of fines and their influence over businesses increase, rigorous evaluation of their effectiveness and legitimacy has become crucial. Business advocates often compare the fine system with the criminal sanction system, finding common characteristics in their harsh influence over undertakings. In the meantime, transparency and fair expectation are also considered vital. As such, most competition authorities provide fining guidelines to address such issues.

³ John M. Connor, Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 *Cardozo L. Rev.* 427, 479 (2012).

⁴ William Page, *Optimal Antitrust Remedies: A Synthesis*, in 1 *The Oxford Handbooks of International Antitrust Economics* 262-267 (Blair & Sokol eds. 2015).

⁵ Wils, *supra* note 2., at 193-195.

9. Many guidelines depend on a common fine setting process consisting of base fines, adjustments, limits, leniency, and settlements.⁶ While this common process is illustrated in the Secretariat Report across jurisdictions, the details of assessment in each stage vary for each jurisdiction.

10. One example is base fines assessment. There seem to exist three different sorts of base for fines: profits, revenue, and overcharge. Each of these suggest certain pros and cons. Also, issues of limits or maximum fines often become involved.

11. Profit-based fines have an advantage in that they have the least distortive effects and that collusive profit is a good proxy for managers' decision and motivation.⁷ Depriving profit alone, however, cannot prevent *ex post* negative impact on consumers and warrant effective deterrence because consumers might have suffered more harms than the undertaking gained. Moreover, profit is hard to determine in practice.

12. Revenue-based fines (the most common method) provides significant legal certainty and easy administration. It can serve to avert the problem of imposing insignificant fines on larger undertakings and is less likely to cause troublesome risks of insolvency. Thus, most jurisdictions seem to prefer relevant revenue as a basis for fine calculation. However, this approach may not work effective to address illegal gains which is necessary to influence management's incentive. It also might raise the issue of discrimination, especially about maximum fine cap. Diversified undertakings (multinational or multiproduct) may face larger fines than specialized firms, while vertically integrated undertakings may face larger or smaller fines depending on the parental liability rule.

13. Overcharge-based fines are well supported by scholars and can be justified by the harm caused by the violation. If overcharge is properly understood as meaning both price and output effect, it may affect an undertaking's incentive and lead to higher output than a profit-based fine.⁸ But in practice, although the average overcharge is well reported and provides a good proxy for setting a base fine level in theory,⁹ the average overcharge cannot resolve the measurement issue for individual cases.

14. Even after calculating fines according to guidelines, there are many difficulties involved in levying maximum amount of fines.

15. Some jurisdictions legally provide maximum antitrust fines.¹⁰ While the statutory cap is not in itself a fining methodology and serves a different purpose, maximum fine provisions may work to alleviate concerns of bankruptcy or draconian punishment. However, in cases where the fine cap is set below the optimal level, under-deterrence may be unavoidable. With a statutory cap, which is often based on total

⁶ Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova E., David, E. et al (2014) An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis (CLES Research paper series 3/2014, UCL Faculty of Laws: London), at 64-67. <https://ssrn.com/abstract=2542991>.

⁷ Vasiliki Bageri et al. The Distortive Effects of Antitrust Fines Based on Revenue, CEPR Discussion Paper No. DP9518 (2013), <https://ssrn.com/abstract=2284608>

⁸ Emilie Dargaud, Andrea Mantovani & Carlo Reggiani, *Cartel Punishment and The Distortive Effects of Fines*, 12 J. Competition. L. & Econ. 375 (2016).

⁹ John M. Connor, *Price-Fixing Overcharges: Revised 3rd Edition* (Feb. 24, 2014), <https://ssrn.com/abstract=2400780>.

¹⁰ The US has both a maximum antitrust fine provision and an alternative fines provision (18 U.S.C. § 3571(d)) that the US enforcers have commonly applied to obtain fines higher than provided in the antitrust fine provision.

revenue, a specialized undertaking is more likely to be fined up to the statutory limit than diversified undertakings, resulting in less than optimal fine. In fact, the suboptimal statutory cap (let's assume 20% overcharge, 10% cap) may be problematic because it affects disproportionately to the specialized and diversified firms. In the latter, the competition authority could have more discretion to overcome the limit. Without parental liabilities equivalent of the EU, firms might divest its business to limit its exposure to antitrust fines. Also, the level of the maximum fine can be suboptimal in that dissimilar conducts in terms of culpability may face liability under a similar cap, e.g. various types of violations under the umbrella of unfair trade practices.

16. In short, establishing fining guidelines is an extremely difficult job and no competition authority in the world may be able to set an ideal guideline that resolves all of the issues. Again, it calls for a certain level of discretion on the part of authorities.¹¹ Hence, I will proceed to compare the levels of discretion competition authorities in diverse jurisdictions exercise in the following section.

2.3. *How detailed are Fining Guidelines in Various Jurisdictions?*

17. Promulgating detailed fining guidelines and applying detailed fine methodology in actual cases are discrete matters. The former does not necessarily contribute to the latter, and paradoxically might hamper the latter. As such, details of fining guidelines are different across jurisdictions. Some jurisdictions (e.g. US and Canada) provide fairly general provisions that give significant discretion to authorities. The US and Canada use a 20 percent proxy on volumes of affected commerce as a basis to set fines with a presumption that expected gains from cartels would be 10 percent. While the effectiveness of this number is seriously challenged by many experts for the reasons stated earlier, it is important to note that the meaning of “affected commerce” is not fully clear and that the appropriateness of the number of 10 or 20 percent is under significant discretion of enforcers. This allows extensive room for negotiations between enforcement officials and violators,¹² often resulting in efficient enforcement.

18. In comparison, some jurisdictions (mainly in Northeast Asia) tend to announce very detailed guidelines and their rigidity does not allow much discretion to authorities. Particularly in Japan, the authority does not have any discretion at all in setting fines, while it is reported that they are considering amendments to give the JFTC discretionary power to adjust fines.¹³ Also, young competition authorities in ROW introduced or are considering introducing guidelines to provide transparency and objectivity when dealing with fine calculations.¹⁴ Probably one notable example is the case of Korea. The Fining Guidelines of the KFTC are extremely detailed and currently being pressured to become even more detailed. The KFTC Guidelines seem to equate concepts used to set base fines, e.g., “affected commerce” in US or “related goods/services” in EU, with the concept of “relevant market” in competition law market definition, and enforcers try to calculate fines based on size. Even a minor deviation from the economic

¹¹ See Lianos, et al., *supra* note 6, at 7.

¹² American Bar Association, *Joint Comments of The American Bar Association Section of Antitrust Law and Section of International Law to The Japan Fair Trade Commission on The Summary of Issues Concerning the Modality of The Administrative Surcharge System of The Study Group on the Antimonopoly Act, 2016* (Aug. 31, 2016)[ABA Comment on JFTC], at 13-14, http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_coverletter_comments_20160831_japan_fairtrade_jp_en.authcheckdam.pdf. See also ABA Section of Antitrust Law, *Comments to the United States Sentencing Commission on Proposed Priorities for Amendment Cycle Ending May 1, 2016* (July 27, 2015), at 3-6, http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_sal_20150727.authcheckdam.pdf.

¹³ ABA Comment on JFTC, *supra* note 12, at 3.

¹⁴ Secretariat Report, at 7.

criteria by the Guidelines may warrant a revocation at judicial review review that sometimes seems to try to review the appropriateness of fines instead of trying to find excessiveness beyond discretion of the KFTC.¹⁵ This is true for all the following stages in assessing fines.

19. The EU seems to take a middle ground and the 2006 EC guidelines¹⁶ set out some broad principles and methodologies for setting fines. It leaves its application at the discretion of the Commission at a certain level¹⁷ in spite of frequent criticism about transparency and predictability.¹⁸ In fact, the EC Fining Guidelines expressly reserve the right to depart from them when considered necessary for particularities of a case or deterrence reasons.¹⁹ The exercise of discretion will be upheld so long as the Commission gives good reasons that are compatible with the principle of equal treatment for departures in individual cases.²⁰ The EC Fining Guidelines also do not provide a specific range of permissible increase or decrease for certain factors. The sheer length of the fining guidelines is illustrative: only 4 pages as compared with 40 pages in Korea. And with its greater discretion, the frequency of revision was noticeably lower in the EU²¹ while the KFTC Guidelines have been amended 19 times to date since its introduction in 1999.

20. Experts observe that the cause is the different approaches to the relationship between transparency and deterrence. Some, *e.g.* the EU and the US, believe that deterrence is achieved when high sanctions are notified and warranted while others have the perspective that uncertainty or non-transparency would make risk-taking determination by potential violators less visible.²²

21. For a variety of reasons, I argue for several other contributing factors as more important: trust in authorities, seriousness of enforcement, voices of the business community, and the expected role of the judiciary. Culture and modern history also influence such matters.

22. First, high trust in authorities with significant performance allows extensive discretion. We may find this in the examples of the US, Canada, and the EU. In the US, the system of plea bargaining that allows extensive negotiations to set fines reflects the amount of discretion exercised under guidelines. While this is true for settlements by the EC, in many parts of the world and especially in civil law jurisdictions, it may not be the case.

¹⁵ This is compared to the arguments that experts make. “A generalist court should recognize the limits of its own expertise and defer to the view of the specialized tribunal (in a prosecutorial system), or that of a competition authority (in the presence of an administrative enforcement system)”. Lianos, et al., *supra* note 6, at 6.

¹⁶ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C 210, 1 September 2006 (“EC Fining Guidelines”)

¹⁷ Ian Forrester, *A Challenge for Europe’s Judges: The Review of Fines in Competition Cases*, 36 Eur. L. Rev. 185, 189 (2011).

¹⁸ Damien Geradin, *The EU Competition Law Fining System: A Reassessment*, TILEC Discussion Paper No. 2011-052 (Oct. 3, 2011), <https://ssrn.com/abstract=1937582>. The co-existence of public and private enforcement can, however, be problematic when uncoordinated.

¹⁹ EC Fining Guidelines, para. 37.

²⁰ Forrester, *supra* note 17, at 190.

²¹ Latest EC Fining Guidelines were adopted in 2006, in contrast to the situation in Korea where the KFTC Fining Guidelines have been revised almost every year after its initial adoption.

²² ICN, *Setting of Fines for Cartels in ICN Jurisdictions*, Report to the 7th ICN Annual Conference, Kyoto (2008), at 12.

23. Second, in contrast, in jurisdictions where authorities are young and under development, sufficient time and discussion to enable refined guidelines may not be possible. Or, in some cases like Japan where fines are not widely used despite a long enforcement history, guidelines may not be an issue at all. There may not exist a demand to invest resources to prepare refined guidelines. However, as seen in the current discussion for a change in Japan, calls for well-designed guidelines that give discretion and control to authorities grow as enforcement becomes more serious.

24. Third, an interesting case is detailed guidelines in young competition authorities. The great detail of the KFTC Guidelines is known to improve transparency and predictability.²³ This can be understood to be the result of systems emerging (and being demanded by the business community) to check the KFTC, as KFTC enforcement becomes more vigorous and influential. This resulted in greater detail in the guidelines. In 2004 the guidelines were amended in full with many details; this coincides with the period when the KFTC started a tough campaign against cartels. Complaints from the business community subject to such enforcement moved the political branches and tools to control the KFTC's enforcement were put in place. In the meantime, others critical of cartels were concerned about the KFTC allowing allegedly arbitrary reductions in fines. Against this background, politicians expected the judiciary to supervise enforcement with a focus on whether the KFTC abided by the Guidelines. The judiciary actually did a rigorous job and reviewed every detail for proportionality and appropriateness. While there are many criticisms regarding the complexity and inefficiency of such a system, demands from the business community seem to grow stronger and the KFTC is known to be revising the present Guidelines to become even more transparent and detailed on express request from the Board of Audit and Inspection of Korea. Many experts in Korea are concerned, arguably, if the recent development in Korea may weaken the KFTC's enforcement and undermine deterrence. The business communities require various factors to be considered with a result of limiting the KFTC's fining discretion. And some politicians or Board of Audit criticize the KFTC's discretion in fine reductions. These conflicting views seem to lead the fining guidelines to the wrong direction deviating from its original purposes.

25. All in all, to guarantee proper discretion to the competition authorities, the degree of detailedness of fining guidelines should vary to match individual jurisdiction's situation. It needs to be reminded that, while excessive transparency may not serve to enhance deterrence, albeit necessary in conception.

2.4. Pros and Cons of Detailed Guidelines and Discretion of Authorities

26. Detail in guidelines suggest many positive effects. It enhances transparency of enforcement and increases predictability for businesses, resulting in greater deterrence by facilitating rational decision making. It also enables greater control over potential abuse of power by competition authorities. As an expert recently mentioned, although in other context, "For people to have such moral commitment to the law, however, it is important that the law and its enforcement are perceived to be fair".²⁴

27. But it is also fair to say that detailed guidelines are not without flaws. It may undermine effectiveness of the fines considering the trade-off between deterrence and predictability.²⁵ First, for risk-averse undertakings or the individuals making decision on behalf of the undertakings, uncertain fine outcomes could work as a strong deterrent. Second, for risk-neutral decision-makers acting rationally, more detailed fining guidelines may lead to antitrust violations based on a cost/benefit analysis. Third, for differentiated cartel members, it would be easier to reach an agreement on what roles to play based on

²³ Lianos, et al., *supra* note 6, at 61.

²⁴ Wouter P. J. Wils, *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future*, 40 *World Competition* (Forthcoming, 2017), <https://ssrn.com/abstract=2865728>.

²⁵ Lianos, et al., *supra* note 6, at 61.

predictions of the range over which the competition authorities may treat them differently. If it is not feasible to design an *ex ante* precise fining formula that can satisfy both deterrence and proportionality concerns across the various scenarios described above, adding more detail to fining guidelines would inevitably generate enforcement gaps to the detriment of effective antitrust sanctions.

28. Being precise or transparent on the background and justification that the competition authority applies to calculate fines has implications beyond ease of administration and compliance. While highly sophisticated fining guidelines make good economic sense, some doubt may be raised as to whether particular facts in an individual case warrant such an application. This is where confidence in competition authorities, and to some degree in the judiciary, comes into play. Basic amount of fines is merely a starting point of analysis but radical departures from the basic amount sometimes raise suspicion and are considered the equivalent of forgiving a violation. Legislative attempts to limit the possible range of fine reductions from the basic amounts may emerge and add another conundrum to the call for overly detailed guidelines, as seen in the case of Korea.

29. The problem gets more complicated if settlement-style procedures in determining the amount of fines are not established in the particular jurisdiction. Competition authorities and even undertakings may prefer not to delve into every detailed factor of the guidelines. Lack of an official settlement procedure coupled with the infeasibility of other bargaining opportunities (due to distrust of an authority's proper exercise of discretion) might have perverse results.

30. Discussions above on the lack of confidence and settlement procedure imply several points. First, there is a significant challenge in finding a universal standard for an optimal level of detail. Second, the optimal level of detail may vary over time depending on the efforts of the competition authority to maintain credibility with the court and the public and its political independence. Third, notwithstanding the foregoing, a certain level of discretion of authorities is essential to mitigate the deficiencies of guidelines.

3. Developing Judicial Review over Discretion of Competition Authorities for Enhanced Deterrence

3.1. Judicial review – Proportionality and Discretion of Competition Authorities

31. Competition policy aims to protect the competitive process in the market. Fines are one of the most important tools for enforcement and their primary purpose is to deter potential violations. It is true that the issue of under-deterrence should be addressed with priority when serious antitrust violations are still widespread in the world, particularly hardcore cartels in many ROW jurisdictions including Korea despite of increasing antitrust sanctions. However, deterrence is not necessarily the sole purpose of enforcement or without limits. Legitimate interests of undertakings should be respected so that their contributions in the markets may continue uninterrupted. In short, the primary purpose of antitrust enforcement is fulfilled by, *inter alia*, both optimal fines over violations and free competition based on legitimate conduct. Consequently, as antitrust fines increase in both volume and number of levying authorities in the world, the need to respect procedural rights of defendants and prevent false positive regulations is also growing. One of the main concerns of such discussions is to enhance deterrence by increasing forcefulness.

32. While fining guidelines by competition authorities, *albeit* generally lacking binding effect, work to enable internal control of unexpected abuse of regulatory power by competition authorities, judicial review has been considered the last resort against abusive enforcement in most jurisdictions.

33. The core of judicial review is the proportionality principle that excludes excessive or wrong sanctions. This means that sanctions need to be balanced with the gravity of violations.²⁶ This is also true where deterrence is concerned. The economic assessment of fines depends upon both harm to consumers or society and probability of detection, and is not necessarily related to the level of defendant liability. Since both factors (harm to consumers and probability of detection) are beyond direct control of potential violators, the amount of fines set solely for the purpose of deterrence might exceed a maximum level of liability for them in some cases.²⁷ While this concern may not be serious about hardcore cartels, it becomes particularly true about some sorts of unilateral conducts whose liability may not be clear enough in different market background in each jurisdiction, *e.g.* margin squeeze, loyalty rebates, breach of FRAND commitment, etc. This may give rise to resistance to an antitrust fine system and require further efforts to maintain legitimacy. One critical element to address such concerns is to ensure that discretionary power of authorities is not exercised in an arbitrary manner. More importantly, values other than deterrence should be considered, including proportionality.

34. For example, the 2006 EC Fining Guidelines introduced an entry fee of significant amount regardless of the duration of infringement.²⁸ While the new entry fee of 15% to 25% of the value of annual relevant sales is typical and known to contribute to deterring violations (including cartels) by preventing opportunistic conduct known as “try and see”, from the perspective of proportionality, this punitive tool is not sufficiently persuasive as providing a good balance with the level of violator responsibility especially about marginal cases of unilateral conducts. In fact, many experts criticize the amendment because of its disadvantages for single product SMEs who are involved in short term violations.²⁹

35. In the EU, there has been long-standing debates regarding the quasi-criminal nature of fines³⁰ and more recent debates regarding its position under the European Convention on Human Rights (ECHR). In the *Menarini* decision, the European Court of Human Rights held that the cartel fine imposed by the Italian Competition Authority was of criminal nature within the meaning of the ECHR, but due to access to the court exercising full jurisdiction and complete judicial review, it did not violate article 6 of the ECHR.³¹ This view was elaborated by the AG Kokott in *Schindler* that “competition law is similar to criminal law, but is not part of the core area of criminal law” and “outside the ‘hard core’ of criminal law the criminal-head guarantees under Article 6 ECHR will not necessarily apply with their full stringency.”³² In essence, judicial review granted legitimacy to the antitrust fines imposed outside the court system. However, at the same time, it should be noted that there was a strong dissent in *Menarini* that warns of a pseudo criminal

²⁶ Wils, *supra* note 2, at 198; See *e.g.*, Opinion of Advocate General Wahl in *Intel Corporation v. Commission*, C-413/14 P, ECLI:EU:C:2016:788, para. 335 and case-law cited.

²⁷ Falling short of the liability could be possible in some cases, however, it would be less.

²⁸ See Press Release, Competition: Commission revises Guidelines for setting fines in antitrust cases. Text available at http://europa.eu/rapid/press-release_IP-06-857_en.htm.

²⁹ Jeremy Lever, *Whether, and If So How, the EC Commission's 2006 Guidelines on Setting Fines for Infringements of Articles 81 and 82 of the EC Treaty are Fairly Subject to Serious Criticism* (2007) at 15.

³⁰ Opinion of AG Vesterdorf in *Rhône-Poulenc v Commission*, T-1/89, ECLI:EU:T:1991:38.

³¹ ECtHR, Ruling of 27 September 2011, No. 43509/08—*Menarini Diagnostics*. Text available at <http://hudoc.echr.coe.int/eng?i=001-106438>.

³² Opinion of AG Kokott in *Schindler Holding and Others v Commission*, Case C-501/11, ECLI:EU:C:2013:248, paras. 25-26. *Sasol and Others v Commission*, Case T-541/08, ECLI:EU:T:2014:628, para. 207 (“in the area of competition law, unlike criminal law, both the benefits and the penalties for unlawful activities are purely pecuniary, as is the motivation of the offenders whose actions are in line with an economic logic.”)

law “imposing extremely harsh pecuniary sanctions, without the classic safeguards of criminal law and procedure being applicable”.³³

36. In short, as long as antitrust fines are not excessive, a critical component to justify the sanction concerns the issue of due process. This concern, in turn, relates to the details of fining guidelines and discretion of authorities. It does not mean that the judiciary needs to review the specific calculations of fines imposed. The case of Korea stated earlier is an example of inefficient judicial review caused by, in addition to the strictness of the judiciary, excessively complicated guidelines that generates burdensome disputes with little added social value. Frequent disputes in courts over such minor issues as mistakes in calculating small amounts in fines that lead to revocation of sanctions in full under the pretext of defending rights are hard to justify. As discussed in the previous section, proper discretion of competition authorities is necessary because assessment of fines is an extremely difficult job. In fact, in contrast to the case of Korea, EU courts are quite deferential to the Commission’s discretion, at least after the early rigorous years, and in recent years they address mainly whether the Commission has discretion about fines rather than whether the fines are appropriate or within proportionality, under the manifest error test.³⁴

37. This requirement does not endorse insufficiency of due process. Due process should be fully realized within decision making procedures at competition authorities so that it can be said that judicial review has been achieved in effect. It may not necessarily mean that procedures identical to the judiciary should be applied at the competition authorities. It should be sufficient if core values are reflected, including opportunities to defend, rights to access, review, challenge the evidence, etc. Accurate, efficient, and impartial procedures will enhance effective and legitimate enforcement and deterrence.³⁵

3.2. Proportionality and Diverse Tools for Sanctions Other than Fines

38. It is true that fines are at the core of competition policy tools of deterrence. One needs to consider circumstantial factors that give priority to the fines regime for antitrust deterrence. In the US, criminal fines are utilized only in cases of hardcore cartels due to potential competitive effects associated with most other types of antitrust violations.³⁶ One reason may be the wide availability of private litigation to challenge potential violations to significant deterrent effect. In jurisdictions other than the US where private litigation is not preferred for diverse reasons (including expensive attorney fees, unfriendly litigation systems, or community culture), antitrust deterrence depends heavily on fines for most types of violations. While criminal sanctions are still not preferred in most jurisdictions other than the US, there seems to be an increasing number of jurisdictions, such as the UK, that are criminalizing antitrust violations.

39. As such, in terms of proportionality, sanctions on violators may include not only pecuniary fines but also other kinds of sanctions and disgorgement. Most competition authorities adopt various tools like criminal sanctions to ensure effective enforcement. In terms of deterrence, imprisonment for natural persons would be far more effective because of the specificity of the harm over the person as well as the unexperienced severity. In fact, while fines work for general deterrence, imprisonment may work better for

³³ ECtHR, Ruling of 27 September 2011, No. 43509/08—Menarini Diagnostics (Dissenting Opinion of *Judge Pinto de Albuquerque*).

³⁴ Forrester, *supra* note 17, at, 191-193, 198 (2011). He observes that this practice may be due to large workloads.

³⁵ See ICN, Guidance on Investigative Process (2015), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>; ABA Comment on JFTC, *supra* note 12, at 3-4.

³⁶ ABA Comment on JFTC, *supra* note 12, at 8-9.

the purpose of specific deterrence, *e.g.* public protection or rehabilitation.³⁷ Because civil damages also work for deterrence,³⁸ they need to be a part of sanctions. This variety of sanctions may be justified to fill the gap in the level of fines because, as discussed earlier, in many cases fines are often reduced from an economically optimal level for diverse reasons.

40. This suggests that, when considering proportionality with deterrence in mind, factors to put on the scale should be more than fines. Factors to be balanced against the undertaking's particular violation should include all kinds of sanctions and disgorgement applicable, *i.e.* fines, prison, disqualification orders, publication of findings of infringement, bans on bidding for public contracts, and damages.³⁹ If one fails to consider them in totality, it may lead to excessiveness. In addition, there could be various types of fines, *e.g.* administrative, civil, and criminal.

41. Because the variety of sanctions available depends on each jurisdiction, one needs to take the difference into account when assessing optimal volume of fines. For example, in jurisdictions like the US where private damages actions are active, assuming that the optimal sum of fines and damages applies the same, theoretically fines may need to be set less than other jurisdictions like the EU or Korea where damages suits are infrequent for many reasons.⁴⁰ If a potential violator is subject to severe imprisonment, it also needs to be considered in association with other punitive measures. Awareness of differences of sanction tools across jurisdictions is important and might make concerns about over-deterrence insignificant because many jurisdictions tend to depend on a single type of enforcement system and/or fines, either administrative or criminal. It means that the sum of various sanctions in a jurisdiction may remain constant without excessiveness.

42. However, theoretical reminder of the comprehensive approach is meaningful not only for the purpose of judicial review but also for optimal deterrence because excessive sanctions may not dissuade rational potential violators more effectively while generating unexpected side effects. Conversely and more important, aggregate sanctions not reaching an optimal level will be ineffective. In fact, generalist judges with little expertise in complex economics issues might be reluctant to uphold a large amount of fines or damages considering the fact that in most jurisdictions outside the US, those amounts are often unprecedented in terms of the civil damages or in administrative or criminal fines awarded.⁴¹ Since this is one of the reasons why many authorities depend on fines for deterrence, the need for judicial education is critical.⁴² Furthermore, in harmonizing and coordinating a global level of antitrust fines, judicial training encompassing judges from various jurisdictions might be very helpful.⁴³

³⁷ See Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 *Am. Crim. L. Rev.* 513, 567 (1989).

³⁸ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *Journal of Political Economy* 167, 169 (1968).

³⁹ See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6(2) *Competition Pol'y Int'l* 3, 5 (2010).

⁴⁰ Even in the EU, experts argue for a coordination between public and private enforcement to avoid potential inefficient over-deterrence. Geradin, *supra* note 18, at 17.

⁴¹ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 *Fordham Int'l L.J.* 788 (2013).

⁴² Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 *J. L. Econ.* 1 (2011)

⁴³ In the EU, DG Competition and European University Institute organized training for national judges in competition law and economics (ENTraNCE for Judges). And in Nov. 2016, the ICR Law Center of Korea University together with the Global Antitrust Institute of Antonin Scalia Law School, George Mason University, organized an "Economics Institute for Competition Judges and Enforcement Officials".

In any event, it should be noted that excessive or wrong fines may generate various problems.⁴⁴ This may become noticeable with regard to over-deterrence about unilateral conducts in cutting-edge industries by discouraging enterprises from undertaking potentially efficient or innovative practices, or by causing insolvency of violators leading to less competition in market, or higher financial costs for stockholders and employees, etc.

3.3. *Judicial Review and Deterrence*

43. For effective deterrence, fining guidelines need to be sufficiently detailed and the judiciary should review whether it is properly established and observed in practice. However, the down side of detail may be the curtailment of authorities' discretion that is crucial to cure flaws in the economic assessment of fines. Therefore, an appropriate balance between the two conflicting principles needs to be sought.

44. It is also important to enhance effective enforcement of a fines regime by aligning fines to the potential harm or competitive effects of characteristic types of conducts.⁴⁵ Proper levels of judicial review would contribute to this goal by securing appropriate deterrent effect.⁴⁶ Reasonable fines would dissuade rational undertakings from committing violations and prevent litigation to revoke actions by authorities.

45. One caveat is the potential of under-enforcement through domination of resources by large undertakings. Major voices asking for active judicial review may come from big undertakings or deep pockets. In some ROW jurisdictions where social resources to influence the judicial review process may not be evenly distributed among different classes, more judicial review might mean more influence from big undertakings rather than more justice, leading to undesirable outcomes. Asymmetry in available resources between big undertakings and the competition authority may be another comparable example, as commonly pointed out in Korea.

4. **The Rightful Beneficiary of Collected Fines: Government or Victims?**

4.1. *Beneficiaries of Antitrust Fines and the Legitimacy of Antitrust Fines System*

46. As the Secretariat Report notes, antitrust fines pursue one or more policy goals among deterrence, punishment, disgorgement, or compensation.⁴⁷ Competition authorities, however, do not put identical weight on each of them. They usually grant lower priority to compensation or do not explicitly pursue compensation as a remedial objective in the context of public enforcement for certain reasons. It is appropriate for competition authorities to focus on conduct harming public interest rather than on private harms suffered by individual victims. Empowering private enforcement may be a discrete matter and should be carefully enabled not to decrease the effectiveness of public enforcement.

47. However, rationales that give priority to antitrust fines do not necessarily justify fines proceeds being paid into the public treasury or a fund that serves public causes. Fines do not, even remotely, benefit the victims usually. In fact, most jurisdictions count antitrust fines in government revenue.

⁴⁴ See OFT, *An Assessment of Discretionary Penalties Regimes: Final Report* 20-21 (Oct. 2009).

⁴⁵ ABA recommends that fines should be imposed with extreme caution for violations other than hardcore cartels. ABA Comment on JFTC, *supra* note 12, at 9.

⁴⁶ Of course, intensive judicial scrutiny may also discourage deterrence by way of preventing authorities from taking actions for fear of being overturned by the courts. See Lianos, et al., *supra* note 6, at 6. It suggests that the key is to find the proper level.

⁴⁷ Secretariat Report, at 9.

48. The distribution of proceeds from fines *ex post* has been underappreciated for practical or political reasons. However, such indifference can undermine the very *raison d'être* of antitrust fines in the long term. It would become increasingly the case as the amount of fines collected increases significantly and at a disproportionate rate to the damages recovered by injured parties. The situation is not expected to improve in the near future despite significant efforts devoted to promoting private enforcement, mostly outside of the US. In fact, the US seems to be an outlier in that courts must consider restitution to victims of the violation when determining fines.⁴⁸ Antitrust fines are deposited into the Crimes Victims Fund, whose main beneficiaries are not cartel victims.

49. The optimal antitrust fine theory does not answer who is the rightful beneficiary of the fines and even provides potential for overlap depending on the institutional design. The rationale for regulating anticompetitive conducts such as cartels or abuses of dominance is to prevent appropriation of benefits that are supposed to belong to consumers. In fact, the social cost is not considered in assessing fines according to the economic approach because it does not affect the potential violator's decision making. However, while divesting illegal gains or holding a perpetrator liable for the harm is consistent with optimal antitrust fines, it would be unfair if that very mechanism denies victims the right to be compensated based on concerns of duplicative payment or disproportionality.

50. Furthermore, treating antitrust fines as a source of revenue may work to discredit the motives of competition authorities. In Korea, antitrust fines are deposited into the general account of the budget revenue, and worth about USD 289 million in 2015.⁴⁹ The EU takes a similar approach and the fines made final in 2014 accounted for 3.2% of the EU Budget in 2014, worth EUR 4.5 billion.⁵⁰ Within administrative fine systems, competition authorities already serve the dual role of prosecutor and judge. The addition of the role of budget revenue collection by way of fines (a role of the treasury) may harm the integrity of the antitrust fines system. If a government budget office estimates revenues in advance, sets certain goals for expected antitrust fines, while the amount charged and/or collected in each fiscal year is taken into account in closing government books, and the budget office closely monitors and manages revenues every year, it would not be entirely unreasonable to have concerns that the antitrust fines system may be abused to collect non-tax revenue, or even worse, to finance the regulator itself. Such suspicion is not unprecedented. A textbook example is found when a local government issues speeding tickets to support its budget as it suffers from financial shortfalls.

4.2. Interaction between antitrust fines and private damages

51. So far, the area of conflict between antitrust fines and private damages has been limited to a small number of cases. First, in the UK, when a punitive damages claim was filed in a follow-on private action, the UK court held that a punitive portion could not be claimed.⁵¹ In Germany, GWB 34(2) regarding disgorgement of profit provides for reimbursement of fines if the firm later pays compensation to the injured parties. But GWB 34(2) is rarely used in practice.

52. The avoidance of double payment may be addressed differently between antitrust fines and private damages. In setting antitrust fines, damages payments might be a mitigating factor. But the payment of antitrust fines cannot justify a reduction in the amount of damages, especially without punitive

⁴⁸ ICN, *supra* note 22, at 7..

⁴⁹ National Assembly Budget Office, FY 2015 Final Accounts Analysis by Committee [National Policy Committee] (Jul. 2016), at 62.

⁵⁰ European Union, Budget Financial Report 2014. Text available at http://ec.europa.eu/budget/financialreport/2014/revenue/index_en.html.

⁵¹ Devenish Nutrition Ltd v Sanofi-Aventis SA [2007] EWHC 2394 (Ch).

damages. Courts have rejected reducing damages to account for fines paid based on the different goals pursued by fines and damages.

53. In theory, however, the principle of proportionality may lower the amount of damages awarded as courts take into account the overall effects of sanctions. This may exacerbate without a remedy the lack of transfer of fines to consumers.⁵²

4.3. *Ensuring Antitrust Fines Contribute to Mitigating Consumer Harm*

54. To ensure the legitimacy of antitrust fines, efforts should be continued to distribute monies collected as antitrust sanctions to the victims of antitrust violations. While it should not be underestimated that antitrust fines are collected by the government because it is often economically infeasible or administratively impractical for individual victims to claim their share, this administrative challenge should not impede depriving perpetrators of their illegal gains. For the antitrust fine system to be sustainable, directing the collected funds to the treasury is not enough, and other systems should be implemented to have the fines transferred to or used for the class who bear some relationship (direct or otherwise) to the victims.

55. Of course, this does not mean that competition authorities should not devise measures to fill the gap between private enforcement and public enforcement. Assisting private claimants in lawsuits or filing *amicus curiae* briefs in court can be recommended on a selective basis as long as it does not drain too many enforcement resources. *Parens patriae* suits,⁵³ in which a public agency files a lawsuit on behalf of injured citizens, when individual filings are infeasible or unlikely, can be a good model for reference.

56. Even after a competition authority makes reasonable efforts to distribute the proceeds to harmed consumers, or when distributing the remaining proceeds is not economically feasible, the issue of whether the government is an appropriate recipient of the remaining funds is not resolved. In those cases, *cy pres* remedies may have some relevance.

57. *Cy pres* remedies to put the unclaimed money to the next best use are often ordered by US courts in antitrust class actions.⁵⁴ Examples of the next best uses can be education projects focused largely on demonstrating the value of the antitrust laws for consumers and businesses, or a grant to a foundation or center for research on complex antitrust litigation.⁵⁵ *Cy pres remedies* are far superior to various alternatives: superior to not imposing fine or damages when the harm is measurable but the injured parties are not identifiable; superior to returning unclaimed fines to an undertaking as a windfall; better than reverting the money to the government budget or some fund unrelated to the injured class of consumers. Less desirable alternatives may distort incentives or raise conflict of interest issues.

58. Here I am not suggesting that *cy pres* remedies should be introduced. *Cy pres* remedies has its own weaknesses, and recently in Australia such a legislative proposal had not been accepted for the fear that the court might be led into inappropriate involvement in matters of policy in an area with no guidance.⁵⁶ However, *cy pres* remedies offer important lessons for policy makers in designing a

⁵² It does not necessarily mean that there should be a procedure to reimburse fines to firms if the firm later pays compensation to consumers.

⁵³ 15 U.S.C. §15d.

⁵⁴ Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy*, 24 ANTITRUST 86 (Spring 2010).

⁵⁵ *Id.*, at 87-88 (summarizing case laws).

⁵⁶ Ian Harper, *Competition Policy Review: Final Report* 415-416 (Mar 2015).

distribution mechanism for fine proceeds. Proceeds should be used “for a purpose as near as possible to the legitimate objectives underlying the lawsuit”⁵⁷

5. Preserving Effectiveness of Antitrust Fines by Addressing the Tax-deductibility Problem

59. In designing antitrust sanctions with optimal deterrence, competition authorities and scholars have often overlooked the tax consequences of the sanctions. Tax and competition law serve different purposes and it does not follow that antitrust remedies are against public policy and should be non-deductible business expenses even without explicit legal provisions. However, if pecuniary remedies become tax-deductible as an unintended consequence and without legislator awareness (or not reasonably foreseen at the time of introducing the sanctions), the intended deterrence effect is reduced by the corporate tax rate, which is 40% in the US and 22% in Korea. In many jurisdictions, corporate tax laws prohibit business expense deduction of fines or penalties. But this simple rule becomes complicated as new antitrust sanctions emerge such as punitive damages, public collection of damages on behalf of victims, or consumer redress as a condition of consent order or commitment, etc.

60. The rule of thumb is the dichotomy of punitive and compensatory damages. The punitive portion of remedies should not be tax-deductible as a matter of policy. In the US, two-thirds of the treble damages or settlements paid under Section 4 of the Clayton Act are not tax-deductible only if the tax payer is criminally convicted.⁵⁸ But outside this narrow prescription remains a grey area.⁵⁹ Compensation to victims or reimbursement of legal fees (unlike bribery) are not against public policy, so that allowing tax deductibility may be justifiable. Recently in Korea, a punitive damages system has been introduced but the issue of tax-deductibility still remains unaddressed.

61. If a jurisdiction adopts pecuniary sanctions or disgorgement intended to be distributed to victims, it can be argued that it is by nature compensatory and thus should be tax-deductible. Let’s suppose the overall amount paid by an undertaking taxpayer is the same. But if the expenses are tax-deductible, the deterrent effect will be reduced by the corporate tax rate. Here, I am not suggesting an increase in initial amount to make up for this consequence. Rather, I am suggesting that competition authorities should take into account the tax impact in designing the sanctions system and assessing the volume of fines.

62. Another important issue is the tax-deductibility of fines or punitive damages paid to foreign competition authorities or foreign plaintiffs. Recently in 2016, the Korean National Tax Services announced that settlement of treble damages claims in the US should not be allowed to be deducted. As a policy matter, such deduction hampers the effectiveness of enforcement against international cartels, regardless of whether the conduct was prosecuted domestically or not. It also amounts to a repayment of a penalty by the state and ultimately taxpayers. While the Korean Corporate Tax Law did not seem to consider such situations, the Ministry of Strategy and Finance issued an authoritative interpretation that civil antitrust settlements paid to foreign consumers are tax-deductible regardless of whether the KFTC found a domestic violation by the same cartel. In *Tessenderlo Chemie vs Belgische Staat*, the Belgian constitutional court faced the issue of whether fines imposed by the European Commission can be tax-deductible under Belgian law. The European Commission filed an amicus brief opposing tax-deductibility

⁵⁷ In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002).

⁵⁸ 26 U.S.C. § 162(g).

⁵⁹ Surprisingly, outside the antitrust area punitive damages are tax-deductible in the United States. Dep’t of Treasury, General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals 116 (2015). And 26 U.S.C. § 162(g) does not cover indirect purchaser antitrust actions under state laws, antitrust actions with no criminal conviction, or settlements prior to any plaintiff filing a lawsuit.

because it would undermine the effectiveness and consistent application of EU Law.⁶⁰ The Belgian constitutional court adopted and based its decision on such reasoning.⁶¹

6. The Problem of Double Punishment in an Era of Globalization

63. It is a global phenomenon that competition authorities of ROW jurisdictions impose fines in many international cartel cases (beyond the US or EC), and that their fines are rising⁶² as discussed earlier. In addition, the global share of the fines ROW jurisdictions impose over identical violations is also increasing.⁶³ Thus, we need to consider the deterrent effects of fines related to cross-border violations from the perspective of potential violators who are global undertakings. This raises the issue of global coordination of fines among authorities.⁶⁴

64. The problem of over-deterrence by overlapping fines in multi-jurisdictions is still a matter of theoretical possibility and not empirically tested. In fact, not all of the jurisdictions seriously enforce competition laws and even many of hardcore cartels are fairly detected and sanctioned, leaving the issue of under-deterrence significant. Increasing antitrust fines worldwide does not in itself mean over-deterrence, because it may represent a portion of anticompetitive activities not enforced against before active enforcement is established in a jurisdiction. In many cases, a mere “too multinational to fine” defense should be dismissed. Recently, however, antitrust sanctions related to indirect sales (literally or constructively) attracted renewed attention to the overlapping potential of fines based on global turnover. Conceptual problems of double fines among jurisdictions can also become a serious issue at any time.

6.1. Issue of Indirect Sales

65. Concerns over double counting is most likely to arise in the context of calculating fines based on the sales which took place outside a jurisdiction but indirectly affects the jurisdiction. The trend toward parallel (concurrent or subsequent) multi-jurisdictional antitrust enforcement with a real chance of fines casts doubt on the sustainability of the status quo or its desirability as a global best practice to follow. Unfortunately, the leading competition authorities have taken ambiguous approaches. For example, the US DOJ does not consider indirect US sales as an affected volume of commerce in calculating fines, while reserving judgment on whether it could include foreign commerce, and takes indirect sales as an aggravating factor.⁶⁵ The DOJ expresses a willingness to take foreign penalties into consideration as a mitigating factor in plea-bargaining negotiations. However, it does not remove the uncertainty surrounding double counting issues. Recently, the EU had a good opportunity to further clarify this important but under-addressed the issue in a judicial review, which drew much attention in hopes of providing a better

⁶⁰ European Commission, *Written Observations in case No 5285 Tesserlo Chemie NV v the Belgian State* (Mar. 8, 2012), http://ec.europa.eu/competition/court/amicus_curiae_2012_tesserlo_en.pdf

⁶¹ Belgian Constitutional Court, Case 161/2012, *Tesserlo Chemie vs Belgische Staat* (Dec. 20, 2012).

⁶² Connor, *supra* note 1, at 3-6.

⁶³ *Id.*, at 6-7.

⁶⁴ Brent Snyder, *Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing? Remarks as Prepared for Delivery at the Sixth Annual Chicago Forum on International Antitrust* (Jun. 8, 2015), at 5 (“greater discussion among enforcers about our fine methodologies in specific investigations will help us minimize the risk of inconsistent approaches and overlapping fines”). Text available at <https://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf>.

⁶⁵ Transcript, *United States v. Furukawa Elec. Co. Ltd.*, No. 11-cr-20612 (E.D. Mich. Nov. 14, 2011), ECF No. 12. at 20:16-18, 21:2-3; Scott D. Hammond, Remarks at the ABA/IBA International Cartel Workshop, GCR Cartel Roundtable, 15(4) *Global Competition Review* 18 (Feb. 2012).

approach for converging global antitrust sanctions. Despite a well-reasoned dissent from the Advocate General on the risk of double counting, arguing that “a broad interpretation of the territorial scope of EU competition law would entail the risk of conflicts of jurisdiction with foreign competition authorities and of ‘double penalties’ for undertakings”,⁶⁶ the ECJ upheld the fining methodology adopted by the EC which can be extended to indirect sales, for the reason that excluding sales generated outside the EEA would artificially lower the significance of the violation.⁶⁷

66. The judiciary may well have good reason to defer to a leading competition authority with high reputation, especially with regard to the murky area involving component cartels. However, this missed opportunity warrants more effort among competition authorities to cooperate in a manner that leads to not only a consistent (in the meaning of converging upon the US or EU approaches) but also a more explicit best practice to deal with the risk of double counting. In fact, it is argued that the ECJ’s *InnoLux* decision increased the risk of being fined twice for the same wrongdoing for multinational companies.⁶⁸

6.2. *Issue of Double Fines: Local Turnover or Global Turnover*

67. The problem of double punishment becomes clear when considering issues of maximum fine limits. It is known that many authorities cite global turnover as one of the main criteria in assessing fines in cartel cases. However, there is no convergence in the actual approach to global turnover in the process.⁶⁹ This section concentrates on the use of fines caps to avoid complexity. While it is true that most jurisdictions set a certain portion of global turnover as a maximum limit to fines,⁷⁰ this broad limitation (seemingly focused solely on the issue of insolvency or financial ability to pay) may result in excessive fines when multiple authorities try to sanction undertakings at the same time. A good example is the case of the EC. The EC guidelines set a ceiling of fines at 10% of the undertaking’s global turnover in the preceding business year⁷¹ and it does not explicitly consider any foreign enforcement conducted in a parallel manner.

68. This approach seems to fill the gap for jurisdictions in which competition laws have not been introduced and to prevent any evasive conduct by assigning turnover to those jurisdictions. This approach seemed reasonable before and worked to fill the gap for jurisdictions in which competition laws have not been introduced and to prevent any evasive conduct by assigning turnover to those jurisdictions. However, today as most jurisdictions enforce competition laws, this justification may not work perfectly. In fact, the 10% ceiling rule by the EC and many of the EU member states may generate excessively harsh fines because cumulative fines for a single violation by multiple authorities may easily go beyond the undertaking’s net global turnover in the particular year. This could also be true for international cartels and violations by global firms and may be criticized for being a violation of proportionality.⁷² The problem of

⁶⁶ Opinion of Advocate General Wathelet in *InnoLux v Commission*, Case C-231/14 P, ECLI:EU:C:2015:292 (2015), para. 42. Recently, in *Intel v. Commission*, AG Wahl took more a nuanced approach against expansive extraterritorial jurisdiction, Opinion of Advocate General Wahl, *Intel Corporation v Commission*, Case C-413/14 P, ECLI:EU:C:2016:788 (2016), paras. 295-296.

⁶⁷ *InnoLux v Commission*, Case C-231/14 P, ECLI:EU:C:2015:451 (2015).

⁶⁸ Lukas Ritzenhoff, *Indirect Effect: Fine Calculation, Territorial Jurisdiction, and Double Jeopardy*, 6(10) *Journal of European Competition Law & Practice* 691, 695 (2015).

⁶⁹ ICN, *supra* note 22, at 15.

⁷⁰ See Secretariat Report, para. 50.

⁷¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 32.

⁷² Geradin, *supra* note 18, at 39.

double fining as implied by the *InnoLux* Decision by the ECJ raised a similar issue.⁷³ The problem can further extend to include the issue of infringement on sovereignty. Assuming a difficult case of abuse of dominance by a global undertaking on which authorities can reach conflicting decisions regarding liability, fines with a cap of global turnover by an authority may constitute a *de facto* sanction over conduct in other jurisdictions that do not endorse the decision.

69. Recently a US court observed, “both the Justice Department and the Federal Trade Commission now work with their foreign counterparts in major antitrust cases. No longer is the United States ‘the world’s competition policeman,’ as it used to be called, because other nations have stricter antitrust laws”.⁷⁴

70. One good solution would be limiting the cap of fines, with some explicit reference to geographic scope of turnover, to turnover within the boundary of a jurisdiction or commerce affected within the jurisdiction.⁷⁵ Korea has adopted even stricter limits; a fine basis is the turnover within a “relevant market” in both product/service and geographic sense. There could be a concern for global undertakings to slip through regulatory net leading to decreased deterrence. However, in present days when competition authorities in ROW strengthen enforcements, such concerns would be better addressed by empowering them.

71. Amending current legislation, however, may not be feasible within the foreseeable future and this problem needs to be addressed by active coordination among competition authorities. Many of the current bilateral or multilateral agreements include provisions about co-operation for competition policy enforcement, but most of them only concern procedural issues.⁷⁶ Now far more active cooperation is necessary to solve such problems based upon the spirit of positive comity.

6.3 *How to Coordinate Antitrust Fines*

72. A more difficult topic is how to cooperate with other competition authorities in making fining decisions in parallel proceedings, apart from a consistent fining methodology. A good news is that comity-based cooperation in a remedial matter is not unprecedented. One good example is the concurrent jail terms discussed in the *Marine Horse* case.⁷⁷ And it is not uncommon for a competition authority to decide not to find infringement or not to impose a cease-and-desist order when remedies imposed by foreign competition authorities sufficiently address the competition concern.⁷⁸ The antitrust fines in such contexts involve, at least, one more complication regarding ex post distributional consequences of the proceeds, along the same lines of the discussion in Chapter 5 and requires further consideration. Of course, such a coordination among authorities is not an easy job and we have seen many cases of conflicts or tension over a big international case. Even given such a background, more active efforts for coordination and/or collaboration should be pursued.

⁷³ See Secretariat Report, paras. 65-66.

⁷⁴ *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 826 (7th Cir. 2015).

⁷⁵ This is subject to the caveat that the statutory maximum of fines has its own distortive effect as mentioned in section 2.2 above.

⁷⁶ See ABA Section of Antitrust, *Presidential [Transitional] Report: The State of Antitrust 2012* (Feb. 2013), p. 52.

⁷⁷ *Id.*

⁷⁸ For such practices, see US DOJ & FTC, Proposed Update to Antitrust Guidelines for International Enforcement and Cooperation (Nov. 1, 2016), § 5.1.5, pp. 38-39.

7. Conclusion

73. Today, given that enhancing market functions is considered a core element to stimulate efficiency and innovation and develop economies, guaranteeing optimal deterrence through a proper fining system should be given top priority. Although most competition authorities enforce competition laws more seriously than ever, we still live in the world where hardcore cartels are widespread. Moreover, as more jurisdictions worldwide actively enforce competition laws as a strategy to develop the economy, the success of enforcement heavily depends on deterrence. Due to its ease of enforcement and deterrent effect, the fines regime stands as a most prominent sanction tool.

74. The current design of fining guidelines adopts the rationality hypothesis but this approach does not work perfectly in reality. While we need to remove economic incentive to commit antitrust violations (apart from punishment), some experts maintain that higher fines may not deter antitrust violations more effectively.⁷⁹ All the complexities of the issue call for a good balance between competition authorities' discretion to create and enforce effective fining regimes and judicial review to ensure proportionality and enhanced deterrence. Fundamentally, the most desirable solution would be enhancing enforcement capabilities of competition authorities so that findings of liability would increase coupled with imposing an optimal level of sanctions across all global authorities.

75. In addition to difficulties in assessing a proper level of fines, globalization raises the new and complicated issue of coordination among jurisdictions. It extends to identifying beneficiaries of fines and addressing the complexities of taxation. As much as preventing double jeopardy is necessary, addressing similar problems with regard to indirect sales or global turnover is also important. These factors have previously been considered exogenous factors in national competition law enforcements, but have recently become relevant. In an age of globalization, no authority can operate independently. Active cooperation over substantive measures should be actively promoted because it would benefit not only the global community but also individual regulators.

⁷⁹ Ginsburg & Wright, *supra* note 39, at 12.

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